

Introduction

Brown & Marriott's ADR Principles and Practice, 4th Ed.

Mainwork

Chapter 1 - Analysing ADR

Introduction

- 1-001 The resolution of disputes has varied widely across families, communities, nations, and internationally, since time immemorial. Mechanisms have included procedural means (such as the rolling of dice); the battle of the fittest (for example, pistols at dawn or war between nations); negotiation; mediation; and adjudication by a third-party (such as a tribal leader or a court judge). For some time state-administered court-adjudication¹ has been the prime means of dispute resolution across nations that adhere to rule of law principles. However, over the last 40 years or so,² there has been a fresh impetus to make use of alternative procedures as a counter to problems within legal systems (such as delay and expense), and in their own right, as a means to provide individuals and corporations with choice, flexibility, confidentiality, and autonomy in the resolution of their disputes.³ Hence, in many jurisdictions, courts and government agencies have supported and promoted the use of alternative dispute resolution; mediation and conflict resolution organisations have been established; Bar Associations and Law Societies have embraced Alternative Dispute Resolution (ADR) principles; practitioners from a wide range of professional disciplines, including law, mental health and many others have trained in its use; and there is a flourishing body of academic and practitioner literature debating its theory, practice and principles.
- 1-002 The term ADR encompasses a wide range of processes broadly falling within two categories, determined by the way in which the dispute is resolved: *adjudicative* and *agreement-based* or *consensual*. In adjudicative procedures, such as arbitration, a third-party independent reaches a decision (which may be binding (e.g. arbitration) or may be a recommendation (e.g. Ombudsman)) whereas, in agreement-based processes, the parties have the opportunity to reach an agreed outcome assisted by an impartial third party.
- 1-003 The range of ADR procedures may be viewed as a spectrum of processes, set apart from court proceedings, each of which may be utilised to bring resolution to parties engaged in a dispute, where arbitration sits at one end of the spectrum and mediation at the other.⁴ Moreover, ADR procedures may be blended in different permutations into hybrid processes tailored to meet the needs of each individual dispute and situation, such as Med-Arb and Arb-Med, where parties agree to use an adjudicatory method if agreement is not reached through an agreement-based process, or they may opt to use an agreement-based process for some aspects and reserve others for adjudication. Mediation⁵ has over recent years become the most widely used non-adjudicatory process whilst arbitration clauses are frequently found in commercial and construction contracts. It should be noted, however, that since a significant aim of the processes is to ensure greater party control of the type of process, rules for resolution, third-party intervention in their dispute, and so on, individual processes may vary considerably.
- 1-004 However, ADR has not been universally adopted for varying reasons. Individuals may lack sufficient knowledge about the range of possible approaches to dispute resolution⁶; legal advisors and courts may promote ADR but individuals may be committed to court-based resolution to vindicate their rights, to seek greater recompense or to gain publicity⁷; and, additionally, a case may be considered unsuitable for mediation (e.g. where a legal precedent is required or where an individual has been bullied or abused by another party).⁸ However, even in such cases, the use of ADR may be advocated.⁹
- 1-005 In order to understand the complexities of ADR processes, it is instructive to analyse each of the three elements of ADR: "alternative", "dispute" and "resolution". In doing so, it is important to bear in mind that ADR is a generic and broad concept,

covering a wide range of activities and embracing significant differences of philosophy, practice and approach in the dispute resolution field.

Footnotes

- ¹ Albeit that a significant majority of cases settle before they reach the courts.
- ² It is widely considered that the address of Professor Frank Sander at the Pound Conference 1976 led to the mainstreaming of ADR into the dispute resolution landscape in democratic nations.
- ³ Prior to this, the ADR idea was “viewed as nothing more than a hobbyhorse for a few offbeat scholars”: Harry Davies, “*Alternative Dispute Resolution: Panacea or Anathema*” (1985–1986) 99 *Harvard Law Review* 668.
- ⁴ Dispute resolution procedures may be formulated to include litigation, where court-based adjudication sits at one end of the spectrum and mediation at the other. Susskind prefers to categorise dispute resolution into two groups: those which are attached to the court or engage the supervision of the court and those which are not. In this formulation mediation may be sited on both sides of the formulation: L.E. Susskind, “Consensus Building and ADR: Why They are Not the Same Thing” in M.L. Moffatt & R.C. Bordone, *The Handbook of Dispute Resolution* (San Francisco: Jossey Bass, 2005) pp.358, 359–360.
- ⁵ In certain jurisdictions, mediation may be termed as “conciliation” whereas in other contexts conciliation has a different meaning. See Ch.2, para.2-036 and fn.22 and Ch.8, paras 8-012 to 8-019, and in the employment context, Ch.13, paras 13-008 to 13-013.
- ⁶ I. Pereira, C. Perry, H. Greevy and H. Shrimpton, “The Varying Paths to Justice” (Ipsos Mori Research Institute, Ministry of Justice Analytical Research Series 2015).
- ⁷ See e.g. S. Shipman, “Court Approaches to ADR” (2006) *C.J.Q.* 181, 192; and see J. Wade, “Don’t Waste My Time on Negotiation and Mediation: This Dispute Needs a Judge”, *Conflict Resolution Quarterly*, Vol.18, Issue 3, 259–280, Spring, 2001; and Ch.5 ADR & the Courts.
- ⁸ See Ch.16, para.16-118 for a list of some circumstances where mediation would be inappropriate.
- ⁹ For example, National Human Rights Institutions may make use of ADR, such as mediation or conciliation, to resolve individual complaints of human rights violations: Paris Principles adopted by the United Nations General Council Resolution 48/134 1993. See F.E.A. Sander and S.B. Goldberg, “Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure” (1994) 10 *Neg. J.* 49, 66; or (2005–2006) 7 *Cardozo J. Conflict Resol.* 83.

“Alternative”

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“Alternative”

- 1-006 There is no universally accepted phraseology for dispute resolution procedures.
- 1-007 The term “alternative” has attracted criticism. One concern is that it may have negative social capital since its use in other contexts denotes separation from mainstream, accepted social activities and norms (such as alternative medicine, alternative lifestyle, and so on). Indeed, in recognition of this, and in view of changing public perceptions, “alternative” medical treatments may now be referred to as “complementary”.
- 1-008 A linked concern is that the use of “alternative” in relation to mediation and other ADR processes, may suggest that these are subservient to litigation. This view pertains to the idea that ADR provides “second class justice”, which notion may be predicated on the notion that ADR has been viewed as a way of dealing with cases that are less deserving of court resources and, hence, public money.¹⁰ Thus the use of the term “alternative” dispute resolution is not unproblematic.
- 1-009 Following this line of thought, commentators and dispute resolution organisations have adopted other terminology and acronyms. Internationally, one of the most popular appears to be “appropriate dispute resolution”.¹¹ Commentators appear to agree that the use of the word “appropriate” represents accurately the dispute resolution landscape since it encompasses a full range of possible DR options, including mediation, ombudspersons and litigation.¹²
- 1-010 Others, such as CEDR,¹³ prefer to use the term “effective”. This has the merit of providing positive imagery but does not have widespread recognition. Outside of CEDR, its use may be confusing since the acronym EDR may be used to refer variously to “effective”, “employment”, “environmental”, “extra-judicial” and “electronic” dispute resolution.
- 1-011 Since the turn of the century the civil justice system has encouraged “proportionate” dispute resolution (PDR)¹⁴ and this terminology is increasingly used.¹⁵ Again, this conveys valid imagery in terms of reflecting that processes can be designed and used that are balanced, fair and in proportion to the nature of the dispute.
- 1-012 However, these terms are each sufficiently broad to encompass court litigation within the range of possible procedures. Hence, in the context of this work, the term “alternative” is adopted to differentiate between judicial decision-making in formal court proceedings and other forms of dispute resolution conducted and/or facilitated by independent third parties (irrespective of whether such processes are conducted pursuant to a court order or other form of court encouragement). “Alternative” also distinguishes these processes from conventional bilateral negotiation.¹⁶

Footnotes

- 10 For example *S.B. Goldberg, E.D. Green and F.E.A. Sander* "ADR Problems and Prospects: Looking to the Future" (1986) 69 *Judicature* 291, 293.
- 11 Examples include: CADRE (Center for Appropriate Dispute Resolution) which, in the context of special education in the US, encourages the use of mediation and other facilitative processes in disputes between parents and schools; and the Appropriate Dispute Resolution Centre in Pretoria, South Africa.
- 12 See C. Menkel-Meadow, "The History and Development of 'A'DR" (Volkerrechtsblog 20 July 2016), at: <http://voelkerrechtsblog.org/the-history-and-development-of-a-dr-alternativeappropriatedispute-resolution/> [accessed March 2018].
- 13 Centre for Effective Dispute Resolution, London, UK, which describes itself as the "largest conflict management and resolution consultancy in the world", at: https://www.cedr.com/about_us/ [accessed April 2018].
- 14 Civil Procedure Rules 1998 r.1.2(c); Practice Direction Pre-Action Conduct and Protocols paras 4, 8-10.
- 15 Ministry of Justice references include: "Housing: Proportionate Dispute Resolution" Cm.7377 Law Commission No.309 May 2008.
- 16 Negotiation is fundamental to virtually all forms of agreement-based or consensual ADR processes, so an understanding of it and its theories and principles is essential to undertaking and managing these processes effectively. See Ch.4 Negotiation.

“Dispute”

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“Dispute”

- 1-013 By definition, ADR deals with disputes. However, whilst the term generally denotes disagreement, it can be used in a variety of contexts. It may be used to describe debate or academic argument, for example: “this point has been much disputed”. It can be used to represent challenge: “I dispute that”. In the context of ADR, it may reflect a legal disagreement, such as neighbours who are “in dispute” about the boundary of their properties.
- 1-014 The English courts have, on a number of occasions, considered the ambit and meaning of the word in the context of contractual arbitration clauses. Successive Arbitrations Acts have obliged courts to stay proceedings where contracting parties have agreed to refer disputes to arbitration. Hence, in these cases, the exercise of the court’s power to stay proceedings has turned on whether there is a dispute. The court decisions have been significant since, if it is decided that no dispute exists, the party who wishes to enforce any aspect of the contract may do so through the courts; but if the court finds that a dispute exists then the specified ADR process must be followed.
- 1-015 Under the [Arbitration Act 1975](#),¹⁷ the courts had resisted attempts to narrow the meaning of the word to apply only where a claim could be resisted on either the facts or the law. In *Hayter v Nelson*,¹⁸ the parties had contracted to refer any differences that arose under the agreement to arbitration. The court considered that the word “differences” was sufficiently broad to encompass “disputes” and, therefore, had jurisdiction to exercise its power to stay proceedings under the Act. In doing so, it expressed the view that the ordinary meaning of “disputes” and “differences” should be given to these words in arbitration clauses. Hence it must stay proceedings even in situations where the court would otherwise have granted summary judgment.
- 1-016 In keeping with a wide definition, the courts have held that “dispute” encompasses silence in response to a request for action required under the contract. Hence, in *Ellerine Bros Pty Ltd v Klinger*,¹⁹ there was a provision for disputes to be referred to arbitration. The defendant failed to account as required under the agreement but did not assert that a dispute existed until after a writ had been issued seeking an accounting and payment. The Court of Appeal held that “silence does not mean consent” and that:
- “the fact that the plaintiffs make certain claims which, if disputed, would be referable to arbitration and the fact that the defendant then does nothing—he does not admit the claim, he merely continues a policy of masterly inactivity—does not mean that there is no dispute. There is a dispute until the defendant admits that a sum is due and payable.”²⁰
- 1-017 These decisions give rise to a potential problem. It was relatively easy, quick and inexpensive to issue proceedings in the court for a debt or to obtain summary judgment. Having to go to arbitration, appoint an arbitrator or arbitrators and get an award is likely to be both time-consuming and expensive.
- 1-018 In *Halki Shipping Corp v Sopex Oils Ltd*,²¹ the Court of Appeal again considered the ambit of the term “dispute”, this time under the [Arbitration Act 1996](#) provision which concerns when the court must stay proceedings in the context of arbitration clauses.²² Under the [Arbitration Act 1975](#) courts could refuse to grant a stay of proceedings where there was “not in fact any dispute between the parties”. However, [s.1\(b\) of the Arbitration Act 1996](#) sets out a core principle: that “parties should be free

to agree how their disputes are resolved". Hence, if a dispute exists the courts must grant a stay of proceedings unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.²³ In this case, which has been extensively followed, the Court of Appeal held that, in essence, if a valid arbitration clause exists, the court has very restricted and limited scope to consider the nature or effect of any dispute, and should stay any proceedings brought in the courts so that the matter can be dealt with in the agreed forum.

- 1-019 This principle was applied subsequently in a case in which it was argued that there was no "dispute" between the parties since the defendant admitted liability, agreed the amount of the claim, and acknowledged that payment had not been made. The question was whether failure to make payment admittedly due constituted a "dispute". The judge, Langley J, held that such refusal was a "dispute" on the basis that if one party required payment and the other refused to pay, they were in dispute: there was no difference between a refusal to admit a claim and a refusal to pay it.²⁴

- 1-020 The courts have interpreted "dispute" in a similar way in the context of decisions relating to other forms of ADR. In *Thames Valley Power Ltd v Total Gas & Power Ltd*,²⁵ the contract provided for expert determination of any dispute or disagreement. The judge had to decide whether there was a "dispute or disagreement" between the parties, who could not agree as to whether a force majeure notice could be served, a matter which the judge considered was ill-founded. Hence, having regard to this view and to other factors that militated against a stay, he declined to grant a stay. Whilst he considered that the words "dispute or disagreement" should be accorded their ordinary meaning (in line with the arbitration cases), the court's power to order a stay of proceedings in this case was discretionary.

- 1-021 These cases suggest that the courts afford a generous interpretation of the word where parties have agreed to refer their disputes to ADR, even when this may lead to greater expense and delay for the parties. This accords with the principle, adopted by the *Arbitration Act 1996*, that parties should be free to choose their preferred method of dispute resolution. However, this approach may be limited where a court has discretion to refuse to grant a stay of proceedings.²⁶

Distinguishing dispute and conflict: the paradox²⁷

- 1-022 Whilst the courts have adopted a broad interpretation of "dispute" to include any difference between parties, whether or not articulated, it is important in the context of ADR to distinguish between disputes and conflict. Generally, "conflict" is used to denote a serious dispute or protracted and complex disagreement whereas disputes are disagreements which are amenable to resolution through third-party decision or party agreement (which may be facilitated). However, this distinction is not straightforward since the terms may be used interchangeably and, additionally, may be paradoxical: on the one hand, "conflict" may be viewed as a generic term, with "dispute" as a class or kind of conflict which manifests itself in distinct, justiciable issues. On the other hand, disputes are likely to involve some element of conflict within them, for example, where parties are in high conflict about the subject-matter of a dispute. Hence disputes may be found within conflicts, and conflicts may be found within disputes.

- 1-023 The essence of conflict is often associated with something negative and destructive.²⁸ It is defined as "a state of opposition or hostilities", "a fight or struggle" or "the clashing of opposed principles".²⁹ It has also been variously described as "a manifestation of differences working against one another"³⁰; "disagreements between two or more parties which cause tension for the individuals concerned"³¹; or "a disagreement through which the parties involved perceive a threat to their needs, interests or concerns".³²

- 1-024

Uncontained conflict may manifest itself in verbal and behavioural disagreements and ultimately in some cases in violence; and in the case of international conflict, war. However, conflict is an integral part of human behaviour, and may be utilised positively to bring about change.³³ Decision-making frequently involves an element of conflict; exchanges of ideas involve conflict; the democratic process is built on the basis of the normalcy of a conflict of ideas and interests.

Various management writers point out that conflict is a fact of life in organisations, though destructive handling of it does not need to be.³⁴ Other writers make similar points on a more general basis.³⁵

- 1-025 Hence, conflict may have a healthy and positive function. It is when it becomes dysfunctional that problems arise. When parties or groups become irreconcilable and the natural mechanisms for managing and resolving conflict, for example by discussion and negotiation, are inadequate or go awry, then the conflict may become potentially damaging and other processes may be needed.
- 1-026 If conflict is more generalised as a clash of opposed principles or a manifestation of differences and may include differing viewpoints and attitudes, disputes—as will be seen from the above outline of case law—are much more specific and involve disagreement over issues capable of resolution by negotiation, mediation or third-party adjudication.³⁶
- 1-027 On this definition, the nature of a practitioner's approach is likely to be different for a dispute that can be resolved than for an inter-personal or organisational conflict or an enduring conflict (one that is deep and long-standing and not amenable to immediate resolution) that may require different kinds of intervention.³⁷

Submerged issues in disputes

- 1-028 There is not uncommonly an "iceberg" factor in disputes, in which only part is initially apparent, but where much lurks below the surface. This may for example be the case with regard to disagreements involving parties who have or had some form of relationship with one another, which may have degenerated over a period of time. So, for example, in a partnership dispute the issue that has surfaced may not necessarily be the whole or the real problem, which may be more complex, involving underlying differences. There may be hidden agendas in other business or personal relationships, of which the parties themselves may not necessarily be fully conscious. However, this is by no means limited to personal or relationship disputes. Hidden agendas, emotional factors, personality differences, issues of principle, perceptions of fairness and justice, strategic considerations and symbolic significance can be—and commonly are—underlying factors in all kinds of disagreements that may affect the level of conflict and disguise the actual issues in dispute. These issues may make dispute resolution a more complex task than may initially be apparent.
- 1-029 The existence of submerged issues further blurs the distinction between conflict and dispute, since the underlying issues may well aggravate the conflict between the parties but may not be directly relevant to the actual dispute. By way of example, brothers may be in dispute about their respective rights to the allocation of new shares in a family business, and they may enter mediation to try to resolve this. There may however be deep underlying issues and resentments going back to childhood about how the one has always treated the other, feelings about how their parents may have differentiated between them, and how one is perceived as having taken advantage of family members' goodwill and many other personal issues and antagonisms. The main issue of the shares is the presenting dispute, but it is just one manifestation of underlying conflict between them. It is important for the ADR facilitator to be clear whether his role is to help them resolve the dispute about the shares or to help them resolve the deeper underlying conflict between them. The issue is whether the facilitator's role in this matter is one of dispute resolution, or of conflict resolution. This is not a rhetorical question: it addresses the facilitator's fundamental role and function and has to be agreed between the parties at the outset.

1-030

The intensity of the conflict level in a dispute can range between very low (as for example where there are no personality, emotional or other submerged issues, and the parties have a simple, basic disagreement which they want to resolve) and very high (as where there are serious personality problems coupled with intense emotional factors and other submerged issues, and the dispute carries significant outcome implications for the parties).

Why only disputes anyway?

1-031

Although the primary use of ADR is in relation to disputes, and perhaps conflict, the process of engaging a third-party neutral to facilitate or arbitrate an agreed outcome does not have to be limited only to addressing issues where parties are in dispute. Concepts such as "deal mediation", for example, are very properly part of the ADR umbrella. This is a form of mediation in which, rather than working with a dispute, a mediator assists parties who are setting up a deal to do so, particularly in relation to complex negotiations, and to overcome blockages.³⁸ Similarly, project mediation is a process that helps construction industry teams to communicate more effectively, work more collaboratively and avoid issues turning into conflictual disputes by addressing them at an early stage. The machinery for project mediation is generally built into the contract, and indeed it may be included in any procurement documents.³⁹

Footnotes

- 17 The [Arbitration Act 1975 s.1](#) provides that the court "shall make an order staying the proceedings" unless it is "satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is in fact *not any dispute* between the parties in regard to the matter agreed to be referred".
- 18 [1990] 2 Lloyd's Rep. 265; [The Times](#), 29 March 1990 QBD.
- 19 [1982] 1 W.L.R. 1375 CA (Civ Div).
- 20 Ellerine Bros Pty Ltd v Klinger [1982] 1 W.L.R. 1375 CA (Civ Div), per Templeman LJ at 1383.
- 21 [1998] 1 W.L.R. 726; [1998] 1 Lloyd's Rep 465 CA (Civ Div).
- 22 Arbitration Act 1996 s.9.
- 23 Arbitration Act 1996 s.9.
- 24 [Exfin Shipping \(India\) Ltd Mumbai v Tolani Shipping Co Ltd Mumbai](#) [2006] EWHC 1090 (Comm).
- 25 [2005] EWHC 2208; [2006] 1 Lloyd's Rep. 441.
- 26 The issue of what amounts to a dispute also attracted a high incidence of litigation in the context of adjudication under the [Housing Grants, Construction and Regeneration Act 1996](#). Under that Act disputes are referred to an adjudicator for interim decision pending final resolution of disputes through agreement or arbitration. See: *I. Ndekugri and V. Russell "Disputing the existence of a dispute as a strategy for avoiding construction adjudication"* (2006) 13(4) *Engineering, Construction and Architectural Management* 380; *A. Reid & R.C.T. Ellis "Common sense applied to the definition of a dispute"* (2007) 25(3/4) *Structural Survey* 239. In the context of housing disputes, subsequent recommendations arising from a Law Commission consultation suggest that in the context of housing disputes greater use should be made of dispute resolution procedures such as mediation and ombudspersons: "Housing: Proportionate Dispute Resolution" Cm.7377 Law Commission No.309 May 2008.
- 27 Such disputes may revolve around intensely emotional issues, such as child custody, employment disputes, where parties have strong emotional attachment to the outcome. See, for example: *C.A. Coates et al "Parenting Coordination for High Conflict Families"* (2003) 41 *Family Court Review* 1.
- 28 See Bernard Mayer, *The Dynamics of Conflict: A Guide to Engagement and Intervention*, 2nd edn (San Francisco: Jossey-Bass, 2012), pp.1–33, for his views on the sources of conflict.
- 29 Oxford English Dictionary Online (at: <https://en.oxforddictionaries.com/definition/conflict> [accessed 10 May 2018]).
- 30 John Crawley, *Constructive Conflict Management: Managing to Make a Difference* (London: Nicholas Brealey Publishing, 1992/1995), pp.10/11.
- 31 Vibeke Vindeløv, *Mediation: a non-model* (Copenhagen: DJØF Publishing, 2007), p.42.

- 32 See Harry Webne-Behrman, *The Practice of Facilitation: Managing Group Process and Solving Problems* (New York: Quorum Books, 1998).
- 33 Andrew Floyer Acland, *A Sudden Outbreak of Common Sense: Managing Conflict Through Mediation* (London: Random House Business Books, 1990), p.69 suggests that “the purpose of conflict is related to change...all conflict is about the attempt to achieve or resist change”. In Thomas F. Crum and John Denver, *The Magic of Conflict: Turning a life of Work into a Work of Art* (Touchstone, New York 1987), Thomas F. Crum says that conflict is “the interference patterns of energies caused by differences, that provides the motivation and opportunity for change”. Conflict, he says, is not a contest, and resolving conflict is rarely about who is right, but about the acknowledgment and appreciation of differences.
- 34 For example, David Lax and James Sebenius, *The Manager as Negotiator: Bargaining for Co-operation and Competitive Gain* (New York: The Free Press, 1986); and D. M. Kolb and J. M. Bartunek, *Hidden Conflict in Organisations* (USA: Sage Publications, 1992). D. Whetten, K. Cameron and M. Woods in *Effective Conflict Management*, (Pearson Education, 1996) say that “conflict is the life-blood of vibrant, progressive, stimulating organisations. It sparks creativity, stimulates innovation and encourages personal improvement.”
- 35 Susan Stewart says that “the evidence of history suggests that conflict is more characteristic of human behaviour than is harmony.” *Conflict Resolution: A Foundation Guide* (Hampshire: Waterside Press, 1998), p.9. In *Mediating Dangerously: The Frontiers of Conflict Resolution* (San Francisco: Jossey-Bass, 2001), Kenneth Cloke says that conflicts contain information “essential for our growth, learning, intimacy and change.”
- 36 In a family context—but the principle may be extended to other fields—Marian Roberts describes disputes as “specific, identifiable issues which divide parties”, distinguishable from the “wider conflict” associated with family breakdown: see *Mediation in Family Disputes*, 3rd edn (Hampshire: Ashgate Publishing, 2008).
- 37 See the next section under “Resolution” for the different approaches to conflict and dispute and for addressing enduring conflicts.
- 38 See *L. Michael Hager and Robert Pritchard “Deal Mediation: How ADR Techniques Can Help Achieve Durable Agreements in the Global Markets”* (1999) *ICSID Foreign Investment Law Journal* 1 and Scott R. Peppet, “*Contract Formation in Imperfect Markets: Should We Use Mediators in Deals?*” (2004) 19 *Ohio S.L.J.*
- 39 See for example Danny McFadden “Big Projects, Big Disputes—Bring in the Mediators” at <https://www.cedr.com/blog/big-projects-big-disputes-bring-in-the-mediators/>.

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“Resolution”

- 1-032 ADR by definition refers to the “resolution” of disputes, which in the context of agreement-based forms of ADR may be understood to equate with settlement and, for adjudicative forms, relates to third-party decision-making to resolve the dispute. However, since ADR may be used at varying stages of a dispute, at times, dispute management may be appropriate rather than resolution. Additionally, the parties and/or the facilitator may have broader aspirations for the ADR process and may, for example, adopt a “transformative” approach to dealing with disputes.⁴⁰ Hence the concept of resolution needs to be further considered.
- 1-033 If there is a distinction between conflict and dispute, however interrelated these concepts may be, then there are surely differences in the way conflicts and disputes can be addressed. Additionally since the term ADR encompasses a broad range of processes, options include third-party decision-making, settlement, prevention, management, transformation, analysis and intervention.

Dispute resolution or settlement?

- 1-034 In the context of agreement-based ADR, successful “resolution” of the dispute is likely to result in an agreement between the parties to settle the issues under consideration and will, therefore, comprise processes that facilitate settlement.
- 1-035 However, settlement of the issues in the presenting dispute may leave underlying conflict unresolved. Hence a broader understanding of the term “resolution” may suggest that it should be used only when all issues, presenting and underlying, have been resolved, and that the term “settlement” is more appropriate to where parties have reached agreement on the issues of the presenting dispute.
- 1-036 This goes to the essence of the distinction between conflict and dispute. If a practitioner is required to help parties reach agreement to settle a dispute that has no other or underlying conflict, then “settlement” and “resolution” would have the same meaning. If however the practitioner is required to help parties resolve a state of conflict that exists between them, and the dispute is merely one of the ways that the conflict manifests itself, then settlement of the dispute does not of itself necessarily resolve the wider conflict: here “settlement” may not be the same as “resolution” at all. On this principle, if any dispute has underlying conflict that is not resolved by a settlement, then even if the practitioner is only required to deal with the presenting dispute, the term “resolution” would arguably be inappropriate.
- 1-037 This raises the question as to what the ADR practitioner’s proper role is: settlement of the presenting dispute or resolution of the underlying conflict, or both, or something else? The answer lies in the contract that the parties and the practitioner enter into with one another, and the informed decision that parties make as to their requirements. It is obvious that if parties choose mediation, it would not be right to provide psychotherapy, arbitration or any other process that is not mediation. Similarly, if parties seek help in resolving (and the word is used advisedly here) a particular dispute or issue, and they contract for that, then if the dispute is settled, the practitioner’s contract is fulfilled even if an underlying conflict remains. If the parties wish the practitioner to help them with their underlying conflict, that would be a different contract—a proper one to address if so required.

- 1-038 However, in fact, working towards the settlement of a dispute may well provide the opportunity for addressing underlying conflict, and it is not uncommon that reconciliation may take place as the process unfolds. Practitioners would generally regard this as positive and desirable; but the explicit (and necessarily implicit) terms of the contract would have to decide whether this was the primary objective of the process, or an added bonus to an otherwise fulfilled contract.⁴¹

Dispute management or other intervention

- 1-039 Not all dispute intervention necessarily requires an ADR practitioner to help parties to resolve a dispute. Indeed, Mayer regards the terminology of "dispute resolution" as limiting, since it implies that resolution is necessarily the practitioner's objective, whereas there are times and situations where resolution is neither possible nor appropriate, yet where the neutral's role may be relevant and helpful.⁴² Certainly, there are other roles that may assist parties which do not involve the practitioner in achievement of actual resolution or settlement.
- 1-040 Parties may, for example, wish to have a neutral person facilitate certain aspects of a dispute, leaving resolution to be dealt with in a different way or forum or at a different time; or they may want the neutral to help manage aspects of an ongoing process. One form of Early Neutral Evaluation (ENE) is an example of such a role, where the evaluator works alongside the parties and their lawyers in guiding them through various stages of litigation, expressing informal and non-binding views on process and/or the merits and being available as needed to smooth the path of the litigation and help create conditions in which settlement can be effectively considered.⁴³
- 1-041 Hence the word "resolution" in ADR should not be viewed in too rigid or limiting a way, as an ADR practitioner's role may quite properly comprise something that enhances the resolution process but does not itself engage with the actual resolution as such of the dispute.

Dispute resolution: transformation

- 1-042 In the context of agreement-based processes, there are primarily two ways of viewing transformation in dispute resolution. The first is the transformation of a dispute from an adversarial process into a problem-solving exercise and from a rights-based approach into one that includes an interest-based approach, and the reframing of issues so that they can be effectively addressed and resolved. This transformation of the dispute is what agreement-based ADR may aspire to achieve; but the usage of the term "transformation" is not usual in this context.
- 1-043 More commonly, however, the term refers to the ideological concept of transformative mediation.⁴⁴ Underpinning this approach are the twin concepts of "empowerment" and "recognition" (rather than problem-solving): the aspiration is that the mediation process has the potential not only to settle disputes but to transform people's lives by increasing their efficacy within conflict and helping them to gain greater acceptance of the person with whom they are in dispute. Hence, it is not the dispute that is transformed but the person.

1-044

For a mediator who adheres to a transformative approach, even if the matter is not settled and even if the parties remain unreconciled with one another, mediation is successful if it brings about party recognition and empowerment: settlement is a bonus if it occurs.⁴⁵

- 1-045 While transformative mediation has its supporters, especially but not only in inter-personal issues, the process and matters for resolution are set by the contract agreed between the parties and the third-party facilitator. If the parties make an informed decision at the outset of the process that they seek empowerment and recognition irrespective as to whether or not the dispute is settled, then transformative mediation would be the right approach. If however their primary aspiration is to settle their dispute as far as possible, and if they are not seeking transformation (albeit that they might, if asked, be willing to accept it as a bonus), then the facilitator's task is to help them settle the dispute.
- 1-046 It is arguable that parties may not necessarily appreciate the transformative possibilities of the mediation process and may, therefore, agree to an issues-based approach. Conversely, parties choosing the transformative approach need to appreciate that settlement of the dispute is not the primary objective. The particular ideology or approach of the facilitator, and/or professional advice offered to the parties, is likely to be influential in determining the parameters of the process and its resolution. It is important that, in any case, the particular process, its objectives and possibilities, are fully explained in order in order to ensure that parties make informed choices.

Conflict resolution and other interventions

- 1-047 As indicated previously, conflict resolution is not necessarily the same as dispute resolution. A wide range of practitioners from all walks of life may specialise in conflict resolution. This may include, for example, family therapists and/or counsellors in relation to family conflict, or management consultants in relation to organisational conflict. These would not ordinarily be the professionals one might engage—in those capacities in any event—to help with specific dispute resolution.
- 1-048 As the name indicates, conflict resolution involves attempts to move people away from their conflict into positive outcomes. This may be achieved through the use of a variety of strategies and processes including, for example, mediation, facilitated dialogue, third-party consultation, collaborative problem-solving or consensus-building.⁴⁶
- 1-049 There are further roles for neutral practitioners who choose to work in the field of conflict. One possibility is *conflict prevention*,⁴⁷ a process that is particularly relevant in the international field to prevent disagreements from escalating into violence and war. This is applicable, also, to conflict in the community, workplace, families and many other situations. Conflict prevention may involve a range of strategies such as changing one's communication style, responses and behaviour; developing systems and rules for anticipating and de-escalating conflict; and establishing consensus-building approaches. This is not the same as *conflict avoidance*, which espouses strategies, consciously or unconsciously, to sidestep having to address the conflict.⁴⁸
- 1-050 Conflict prevention may be different, also, from *conflict transformation*, in which the aim is to transform conflict into a peaceful outcome, particularly but not necessarily at the societal, national and international level.⁴⁹ This approach focuses on the context and relationship between the actors and looks for ways to bring about collective healing, reconciliation, restoration and building of long term goals.⁵⁰
- 1-051 Another way of addressing conflict is through *conflict management*, which is relevant where it is not practicable to seek to resolve conflict immediately, but where management of it over time may be appropriate. This may apply, for example, to

intractable or enduring conflict,⁵¹ which is deadlocked and not amenable to resolution. Such conflicts may, for example, embody profound differences of values that may not be able to be reconciled, such as the conflict between the pro-abortion and the pro-life lobbies, who may not be able to resolve their differences, but who may need to be able to live together in a common society; or the conflict between parents who have fundamentally different views about bringing up their children but who need to find a way to co-exist and to function effectively.⁵²

Footnotes

- 40 See "Dispute resolution: transformation" below and Chs 3 and 9.
- 41 The issue of reconciliation and healing as part of an ADR process is addressed in Ch.3, paras 3-025 to 3-029. See also "transformation" below.
- 42 Bernard Mayer, Staying with Conflict—A Strategic Approach to Ongoing Disputes (San Francisco: Jossey-Bass, 2009).
- 43 As to Early Neutral Evaluation, see Ch.19. Evaluation as a form of dispute management, which takes different shapes, clearly has potential to be further developed; and the neutral's role could in some circumstances be converted to that of mediator at some stage if required.
- 44 For the origins and discussion of this ideology see: R.A. Baruch Bush and J.P. Folger, The Promise of Mediation: the Transformative Approach to Conflict (Jossey-Bass San Francisco 1994). See Chs 3 and 9 for further discussion about transformative mediation.
- 45 Foreword to Baruch Bush and Folger, The Promise of Mediation: The Transformative Approach to Conflict (1994), by the consulting editor, Jeffrey Z. Rubin.
- 46 For detailed discussion about the theories and practice of conflict resolution and prevention see: O. Ramsbotham, T. Woodhouse and H. Miall, Contemporary Conflict Resolution, 4th edn (Polity Press, 2016); P.T. Coleman, M. Deutsch and E.C. Marcus, The Handbook of Conflict Resolution: Theory and Practice, 3rd edn (San Francisco: Jossey Bass, 2014); J. Berkovitch, V. Kremenyuk and I.W. Zartman Sage Handbook of Conflict Resolution (Sage Publications Ltd, 2008).
- 47 This term was adopted by UN Secretary-General Dag Hammarskjold in the 1950s and has gained political currency due to the humanitarian and other costs involved in international conflict. See, for example the United Nations Development Programme on Democratic Governance and Peacebuilding: <http://www.undp.org/content/undp/en/home/democratic-governance-and-peacebuilding.html>.
- 48 A number of professional bodies (including the International Chamber of Commerce, the Royal Institute of Chartered Surveyors and the Royal Institute of British Architects), in the construction and engineering industries have joined together to introduce measures designed to avoid conflict in an effort to combat the financial costs of disputes. In one example, they have introduced a Conflict Avoidance Pledge to encourage and equip signatories to work towards the avoidance of conflict.
- 49 For example, the organisation Search for Common Ground describes itself as working "to transform the way the world deals with conflict—away from adversarial approaches and towards collaborative problem solving (working through local partners to find culturally appropriate means to strengthen societies" capacity to deal with conflicts constructively: to understand the differences and act on the commonalities."
- 50 John Paul Lederach has written extensively on this subject, for example Preparing for Peace: Conflict Transformation Across Cultures (New York: Syracuse University Press, 1996); and The Moral Imagination: The Art and Soul of Building Peace (USA: Oxford University Press, 2005).
- 51 Mayer prefers to focus on such conflicts as being "enduring", "ongoing" or "long-term" rather than "intractable" because the latter term, in his view, suggests that there is no hope of working effectively to deal with the conflict. Bernard Mayer, Staying with Conflict—A Strategic Approach to Ongoing Disputes, see fn.42.
- 52 A useful overview of "intractable" conflicts, their characteristics and approaches to addressing is provided at: P.T. Coleman, "Intractable Conflict" in P.T. Coleman, M. Deutsch and E.C. Marcus, The Handbook of Conflict Resolution: Theory and Practice p.708—see fn.46.

ADR Reconstituted

Brown & Marriott's ADR Principles and Practice, 4th Ed.

Mainwork

Chapter 1 - Analysing ADR

ADR Reconstituted

- 1-052 The message from an analysis of the three component parts of ADR is that a strict and comprehensive definition for the processes encompassed within the term ADR is elusive. The processes may be adjudicative or agreement-based, and though they may be prescribed to an extent by legislation (as under the Arbitration Acts), they are shaped by the requirements and wishes of the parties, and may be influenced by the ideologies and approaches of the third-party facilitator. Hence, rather than restrict the scope of ADR processes, we may be flexible and creative and adopt a wide range of possibilities under its umbrella.

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Introduction

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Chapter 2 - An Overview of the ADR Landscape

Introduction

- 2-001 Third-party facilitation of disputes has gone on since people first established communities, in the earliest societies around the world.¹
- 2-002 In its present manifestation, ADR has assumed a range of forms and processes. Over the last two or three decades, there have been a number of developments:
- Mediation has become the predominant non-adjudicatory process in England and Wales and has to a greater or lesser extent been integrated into the dispute resolution mainstream.² In the early days of ADR, there was a sense that dispute resolution could be creative and flexible, combining different elements in various permutations to create a wide range of hybrid, bespoke processes to be adapted to the needs of each individual situation and dispute.
 - Whereas arbitration is regulated by statute in the UK and elsewhere, mediation does not have statutory authority; but various forms of regulation are in place or being developed.³ Standard-setting bodies have been established that provide directly or indirectly for mediator accreditation and practice in the civil-commercial, family and other fields.
 - Mediation organisations and groups have been established internationally, nationally and regionally, dealing with civil, commercial, workplace, family, community and a wide range of other issues. Many also offer training and accreditation of mediators. These stand alongside arbitration institutions, many of which also offer mediation and other processes. Many law firms and barristers' chambers have also established specialist dispute resolution groups.
 - ADR processes have been incorporated into judicial procedures, court rules and protocols and are now expected to be considered and wherever practicable used before or alongside litigation. Court judgments and rulings periodically refer to or promote ADR processes.⁴
 - Many institutions, organisations, commercial bodies and businesses now offer some form of facilitated dispute resolution process to address complaints, claims and disagreements.
 - The teaching of ADR processes has become widespread in universities and law schools⁵ and research and specialist writing have analysed, informed and supported practice.⁶
 - Among the many other contexts for impartial third-party facilitation, the role of mediation in helping to resolve international conflict, for example in Northern Ireland, should not be overlooked.
- 2-003 The value of having a skilled impartial facilitator to assist parties in dispute to reach a resolution as an alternative to litigation has been widely recognised; and although mediation is the primary vehicle through which this is done, there are other various ways to do so. See Goldberg and Sander for their views on dispute resolution process choice.⁷
- 2-004 For example, a Claims Handling Agreement to administratively coordinate a significant number of coal miners' claims for damages arising from their respiratory illnesses was created as a form of ADR measure. When reviewed by the court, the judge considered it to be "a fair and workable scheme for disposing of many thousands of cases by administrative means". The judge expressed the view that:

“consistent with the duty of the Court to deal with cases brought before it in ways which are just and proportionate it should do what it can to encourage parties only to litigate what cannot be reasonably disposed of by other means, whether those be by way of arbitration, mediation, administrative scheme or howsoever”.⁸

- 2-005 In another example, a council had closed down a residential care home for the elderly and a number of residents sought a judicial review of the council’s decision-making procedures. In appeal proceedings, Lord Woolf took the view that the applicants should have taken up the council’s offer to set up a complaints review panel, which was perceived as a form of ADR—“steps to resolve the dispute without the involvement of the court.” Lord Woolf stated:

“Particularly in the case of such disputes, both sides must by now be acutely conscious of the contribution alternative dispute resolution could make to resolving disputes in a manner that both met the needs of the parties and the public, and saved time, expense and stress. Today, sufficient should be known about Alternative Dispute Resolution to make the failure to adopt it, in particular when public money was involved, indefensible.”⁹

- 2-006 In another public law case involving a damages claim under the [Human Rights Act](#), the court decided that the Parliamentary Commissioner and the Local Government Ombudsman were included within the ambit of ADR for the purposes of public law proceedings.¹⁰ The judge expressed the view that:

“if there is a legitimate claim for other relief, permission should if appropriate be limited to that relief and consideration given to deferring permission for the damages claim, adjourning or staying that claim until use has been made of ADR, whether by a reference to a mediator or an ombudsman or otherwise”

- 2-007 The construction industry has also found creative ways to avoid court litigation, where the practice of incorporating dispute resolution machinery into contracts for major projects is well established. Its use of adjudication is now underpinned by statute in the UK¹¹ and the creation of Dispute Boards is increasingly common even beyond the construction industry. In these processes, an adjudicator or a Dispute Board is established with the power to adjudicate (or, in the case of a Board, alternatively to make non-binding recommendations), which in either event become binding if neither party challenges them within a prescribed period, commonly 30 days, by referring them for further determination, usually by arbitration. These forms of ADR allow parties to continue work on the project notwithstanding the existence of the dispute, and provide for interim resolution by a person or group with knowledge, skill and understanding of the project.¹²

- 2-008 Although mediation has taken centre stage, the concept of creating hybrid ADR processes remains as relevant as ever and should be an essential part of every dispute practitioner’s repertoire. This may involve combining different non-adjudicative processes with one another, or perhaps even just different models of the same process.¹³ Alternatively, it may involve combining a consensual process such as mediation with an adjudicatory one, such as arbitration: hence the processes of med-arb and arb-med, or adjourning a mediation so that parties can jointly obtain a non-binding opinion on a sticking issue from an agreed expert and bring it back to the adjourned session for consideration.

- 2-009 These ADR processes will be more fully examined in this book, but meanwhile, it may be helpful to have an overview of dispute resolution processes.

Footnotes

¹ S. Roberts in Order and Dispute: An Introduction to Legal Anthropology (Harmondsworth: Penguin Books, 1979) traces the way that simpler, non-State societies organised their systems for maintaining order and resolving disputes using a

range of strategies including informal mediation and the use of neutral umpires. And Derek Roebuck has challenged “the assumption that mediation—even as we now know it and even as court-ordered—is a modern invention of lawyers when it is the most natural form of dispute resolution in the world”. See Derek Roebuck’s chapter: “The myth of modern mediation” in *Disputes and Differences: Comparisons in Law, Language and History* (Oxford: Holo Books, The Arbitration Press, 2010)—originally appearing in (2007) 73 *Arbitration* 105.

2 This is certainly the case with family mediation where there is now a requirement under the provisions of the [Children and Families Act 2014, s.10](#) of which requires a person to attend a family mediation information and assessment meeting before making a relevant family application. Whilst there is no equivalent statutory provision for general civil matters, threaded through the [CPR](#) are examples of efforts to encourage litigants to pursue [ADR](#) and more often than not when pursued, the process choice is mediation.

3 By way of example the USA have adopted the Uniform Mediation Act 2001, modified and updated in 2003.

4 See [Ch.5](#).

5 Particularly in the USA and Canada and to an extent university law schools in the UK as well.

6 This is the case in the USA, but not nearly to the same extent in the UK.

7 Frank E. A. Sander and Stephen B. Goldberg, “Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure” (1994) 10.1 *Negotiation Journal* 49–68.

8 Per Sir Michael Turner in *AB v British Coal Corp* [2004] EWHC 1372 at [52] and [109].

9 [R. \(on the application of Cowl\) v Plymouth City Council](#) [2001] EWCA Civ 1935; [2002] 1 W.L.R. 803 at [1] and [25].

10 Per Lord Woolf CJ, in *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406 at [81]. The role of the Ombudsman in the resolution of disputes is considered in further detail in [Ch.18](#).

11 In the UK, the [Housing Grants, Construction and Regeneration Act 1996](#) provided for mandatory adjudication in the construction and engineering industry.

12 For further detailed discussion on the process of Dispute Boards in the construction industry, see Cyril Chern, Chern on Dispute Boards (CRC Press, 2015).

13 For example, family mediators in the UK—and elsewhere—have tended to follow a mediation model in which, among other things, parties meet jointly with the mediator throughout the process and the mediator does not maintain any confidences; whereas in a commercial model, separate confidential meetings are standard. These models have been in a process of careful and appropriate integration in family mediation practice.

Litigation and Negotiation: the ADR Symbiosis

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Chapter 2 - An Overview of the ADR Landscape

Litigation and Negotiation: the ADR Symbiosis

- 2-010 ADR refers to the alternatives to litigation, so it may be helpful, in order to place ADR processes in context, to outline briefly the key elements of the litigation process.

Litigation refers, of course, to a civil court action brought by a claimant against a defendant based on legal principles, asserting some right or legal entitlement. Formal procedures for the conduct of litigation may involve a number of stages including setting out the details of the dispute (in “pleadings” or “statements of case”), disclosure of relevant documents (“discovery”), pre-trial hearings before judicial officers dealing with any preliminary issues and preparing for the eventual trial, perhaps the preliminary exchange of evidence (“witness statements”) and in some cases the joining of other parties to the action. If the case does not settle, the litigation process is concluded by a trial and a substantive judgment (“the court order”).¹⁴

- 2-011 Litigation is State provided and supported: the courts are maintained for anyone to use, judges and court officials are paid by the State,¹⁵ court orders can generally be appealed to a State-provided higher court, and once final, can be enforced by following procedural rules. In the ADR context, if one sees all dispute resolution processes as comprising a continuum, with the most rigid, adjudicatory processes at one end and the most flexible, consensual processes at the other, litigation would comprise the rigid, adjudicatory marker at one end of the line.

- 2-012 If litigation is at one end of the dispute resolution spectrum, bilateral negotiation (by parties personally) is at the other end, being the most flexible and consensual way of resolving disputes.¹⁶ Negotiation is fundamental to all consensual ADR processes, and forms an inherent part of them, but on its own it is not generally regarded as an ADR process: the general view is that consensual ADR provides some additional process that enhances or supports negotiation, most usually some form of impartial third-party facilitation.¹⁷

- 2-013 ADR has a symbiotic relationship with litigation and negotiation, in that it depends on both for its vital functions, certainly as far as any consensual processes are concerned. Self-evidently the facilitated negotiation processes that comprise ADR could not exist in the absence of negotiation. ADR’s synergic relationship with litigation is, however, sometimes less acknowledged, as some proponents of consensual procedures promote these over litigation: the stark fact is that mediation would not be effective in most cases without the backstop of litigation or some form of adjudication. Mediation and other ADR processes take place “in the shadow of the law”¹⁸: if parties cannot resolve their dispute in a consensual ADR process, they are free to have it adjudicated, by a court if no other adjudicatory procedure is agreed or prescribed. Without some such machinery, any processes that relied purely on parties reaching agreement would be hopelessly deficient in the face of parties declining to agree, for good reason or not.

Footnotes

14 In England and Wales the Civil Procedure Rules which came into force on 26 April 1999, replaced the Rules of the Supreme Court, and provide procedural guidance for conducting litigation in the Court of Appeal, High Court and County Court for all civil claims.

- 15 Though parties may be required to pay court fees for various procedures.
- 16 Negotiation is further dealt with at Ch.4.
- 17 A view is occasionally heard that bilateral negotiation without any supplementary facilitation is itself a form of ADR. Given the general and flexible nature of ADR, there is no definitive or purist view on this, nor indeed is there any need for one. Because of its inherent role in consensual dispute resolution, this work gives attention to negotiation as a separate process and it really does not matter whether or not it is defined formally as ADR.
- 18 See R. H. Mnookin and L. Kornhauser "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 Yale L.J. 950.

The Spectrum of Processes from Consensual to Adjudicatory

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Chapter 2 - An Overview of the ADR Landscape

The Spectrum of Processes from Consensual to Adjudicatory

- 2-014 The spectrum of processes with litigation at the one end—adjudication with rigid procedures and minimal party control—and negotiation at the other end—consensual with flexible procedures and maximum party decision-making control—is sometimes referred to as the dispute resolution continuum. Between the adjudicatory and the negotiation ends of this continuum, hybrid ADR processes incorporate elements of negotiation, facilitation and adjudication, binding or non-binding, in different permutations. The greater the individual party's control, power and authority and the more flexible the process, the more consensual they may be regarded; the less their control, power and authority, and the greater the third-party decision-maker's power and the more rigid the procedures, the more adjudicatory they may be viewed.
- 2-015 Of course, individual power, control and authority are not necessarily objectives that disputants seek, but simply comprise one way of comparing processes. For many people, retaining power, control and authority are important and indeed provide a strong rationale for using ADR. For others, they are of little consequence: they seek an effective resolution of their dispute, through the assertion of their rights, by seeing “justice done” accordingly to the law, rather than a desire that their dispute be merely resolved efficiently and/or effectively.

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Outline of the Processes

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Chapter 2 - An Overview of the ADR Landscape

Outline of the Processes

- 2-016 It should be noted that these processes will be considered in more detail elsewhere in this book. But by way of brief overview, the following summarises each process, with particular reference to the issue of third-party authority and control versus party control and the rigidity or flexibility of process.¹⁹ The role of the law in all of these processes is important as it is in itself an arbiter between the parties and acts as a constraint on the third-party neutral.

Adjudicatory: third-party responsibility

Litigation

Private judging

Administrative or statutory tribunals

Arbitration

Expert determination

Adjudication

Dispute Board

Court-annexed arbitration

Ombudsman

Arb-med; med-arb

Evaluation (early neutral evaluation)

Neutral fact-finding expert

Mini-trial (Executive Tribunal)

Negotiation (through representatives)

Collaborative practice

Mediation (involving evaluative element)

Mediation (purely facilitative)

Negotiation (by parties personally)

Consensual: parties' own responsibility

Litigation

2-017 The neutral is a judge, master or other official appointed by the Court to make a binding determination, and in some jurisdictions, also a jury.

Parties have least control. Third-party neutral has most power and makes binding determinations on procedure and substance. Procedural rules are strictly prescribed. The parties do however retain the choice to commence litigation or respond to it.

Private judging

2-018 Where this procedure has been adopted, the Court refers the case to a referee privately chosen by the parties to decide some or all of the issues, or to establish any facts.

Similar to litigation, but parties can choose (and must pay for) the neutral and can agree to simplify and speed up procedures.

Administrative or statutory tribunals

2-019 Binding adjudication based on statutory requirements, such as establishing rent levels, compensation awards or social security benefits through tribunals and appeal tribunals.

Procedures tend to be more informal.

Arbitration

2-020 A process, in England and Wales and elsewhere regulated by statute,²⁰ in which a neutral, privately chosen by the disputants or by a body agreed by them, makes a binding determination. Procedural rules may be ad hoc or set by arbitral organisation. Various sub-categories of arbitration have been developed.

Similar to litigation, but parties can agree choice of arbitrator, choice of legal rules and/or norms which should form the basis for the judgment and the procedure can be tailored to meet their needs. The arbitrator makes a binding, enforceable award.

Court-annexed arbitration

2-021 Available in some jurisdictions: the arbitration is initially non-binding, but may become binding if neither party appeals. In other jurisdictions, arbitration through the court is immediately binding. Where the award is not initially binding but may become so, this is similar to the principles of adjudication. Where it is binding right away, it is the same as arbitration.

Expert determination

2-022 Parties appoint an expert, who is not an arbitrator and is not subject to the [1996 Arbitration Act](#), to consider issues and make a binding decision or appraisal (which is not an arbitral award) without necessarily having to conduct an enquiry following adjudicatory rules.

Procedures accord with contractual instructions given by parties to the third-party expert.

Adjudication

2-023 Mainly used in construction and engineering industry: an informal process in which an adjudicator is appointed to deal with disputes as they arise.

The adjudicator has authority to make decisions using informal procedures, which are binding unless and until either party challenges them by going to arbitration or litigation.

Dispute Board

2-024 Set up at the start of a contract, in the construction industry and increasingly other industries,²¹ to deal with disputes as they arise, either by making recommendations or decisions. Very similar to adjudication, but commonly three neutrals on Board rather than just one.

Ombudsman

2-025 An independent and impartial neutral third-party who deals with public complaints against maladministration. Also used in certain sectors such as legal services and insurance. Can investigate, criticise and publicise, and sometimes can award compensation.

Degree of party control depends on terms of reference of individual ombudsman. Usually power is in the hands of the neutral third-party. Sometimes a compensation award allows one party freedom to choose acceptance or not.

Arb-Med

2-026 Parties have an arbitration and the arbitrator seals the award, then they mediate the dispute, aiming to avoid unsealing the award. Another usage is to enter into and immediately adjourn arbitration, then mediate with a view to having agreement made a consent award.

Unlike med-arb, the arbitration procedure is held first—and the sealed award is used as a prompt to settlement. The other usage is mediation in all respects, but with an ability to turn the settlement into an award; and if not settled, the arbitration leg revives and takes effect.

Med-Arb

2-027

The impartial third-party neutral acts as mediator, and if the parties cannot agree, becomes an arbitrator to make a binding determination. There are variations giving parties rights to opt out of this process in some versions.

As for mediation during the first stage; but if parties are bound to the arbitration phase then the next stage may be viewed as for arbitration. In some versions different people may act in each capacity.

Evaluation/Early neutral evaluation (ENE)

- 2-028 An independent and impartial third-party neutral chosen by the parties makes an evaluation of the case based on legal norms, usually its merits or some aspect, which is not binding on the parties but helps them in their decision-making. An evaluator may also help parties narrow and define issues and promote efforts to settle.

This falls into the category of non-binding evaluative processes. Power remains with the parties, but the third-party neutral can influence them by evaluating.

Neutral fact-finding expert

- 2-029 A neutral expert is appointed by the parties to investigate issues of fact, technicality or law, who produces a report, helps towards settlement, and if agreed, a report may be used in court or arbitration. The third-party neutral may also be given a mediation role.

If the third-party neutral's role is to produce a report that all parties agree in advance to accept, this gives the neutral great power. If, more commonly, the report is non-binding, then it still has authority.

Mini-trial (Executive Tribunal)

- 2-030 Lawyers for the parties present their cases to a panel comprising the parties and an impartial third-party neutral. The neutral helps clarify the issues and evaluate the merits, and may also mediate after presentations and evaluation. No binding determination is made, but the process helps the parties evaluate realistically.

In the US, the presentation may be to a mock jury, which makes a mock, non-binding determination: the Summary Jury Trial.

Negotiation (through representatives)

- 2-031 No third-party neutral is involved. Representatives of each party negotiate with one another. Parties retain power to agree terms. Parties retain control over outcome but little control over process and content, which is in hands of representatives.

Collaborative practice

- 2-032 Parties each appoint lawyer under contract to deal with issues by negotiation without contested proceedings and to stand down from further acting if contested action becomes necessary. Structured framework for process that includes parties in direct negotiations supported by lawyers. This is most commonly used for divorce and relationship breakdown disputes.

Parties retain control over outcome, supported by lawyers who are also active in negotiations in structured meetings.

Mediation (involving evaluative element)

- 2-033 An impartial third-party neutral who has no authority to make any decisions, uses skills to assist parties to negotiate settlement terms and arrive at their own resolution. The neutral may express some view on merits of issues (how and to what extent this is done may vary widely).

The parties have some influence over process and full control over decision-making. The evaluative aspect is non-binding and may help parties reassess their positions.

Mediation (purely facilitative)

- 2-034 As for evaluative mediation save that the impartial third-party neutral does not express a view in any way or challenge parties' perceptions.

Parties have influence over process, retain decision-making power, and are not directly influenced by the third-party neutral.

Conciliation

- 2-035 This is broadly the same as mediation, but there is some variation of understanding as to how it differs or indeed whether or not it is different. Some regard it as more proactive and evaluative than mediation, others take an opposite view and see it as very informal and exploratory with no evaluation possible. There is no consistency of usage. In this book no distinction is made between mediation and conciliation.²²

Negotiation (by parties personally)

- 2-036 No impartial third-party neutral is involved. Parties negotiate directly with one another.

Parties have total control over process, content and outcome. Maximum power.

Footnotes

- 19 See L. Steffek and H. Unberath, *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroad* (Oxford: Hart 2014), for more detailed accounts of these processes.
- 20 The [Arbitration Act 1996](#).
- 21 Notably the financial services industry, shipping, engineering and the oil and gas industries. For further details see The Dispute Board Federation at <http://www.dbfederation.org/> [accessed 10 May 2018].
- 22 It should be noted however that some international instruments (e.g. the United Nations where National Human Rights Institutions and their complaint handling roles are concerned) distinguish between conciliation and mediation where the third-party neutral ensures that settlements are in accordance with some external factor (such as the legal merits and/or the public interest).

Standard or Bespoke Processes

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Chapter 2 - An Overview of the ADR Landscape

Standard or Bespoke Processes

- 2-037 It is an interesting phenomenon that innovative processes that challenge established procedures resist further innovation once they become the norm. Perhaps this is the systemic equivalent of homeostasis, the principle whereby living beings and organisms regulate their internal environment so as to function at a stable, constant level, despite changes in the environment. This can be a healthy force, preventing inappropriate changes from taking place. It can also be a reflection of stubborn resistance to change.
- 2-038 As mediation has become entrenched, so have some of the attitudes towards maintaining standard models of working. In the UK for example there are fixed expectations that the parties will exchange case summaries and documents and will then meet on an assigned “mediation day” when a broadly standard procedure will be followed. In family cases, the anticipation has been that couples will meet jointly with mediators without lawyers present and will have periodical joint sessions over a period of weeks or months, again following a standard format (though this has changed to some extent with the introduction of a “hybrid” model combining elements of the commercial model).
- 2-039 This preference for consistency is not surprising, given especially that when mediation was in its early stages, it was necessary to show that the process was a solid and viable alternative to litigation with procedural certainty and consistency. And in many ways these expectations are positive: there are advantages in having an established and known format and procedure.
- 2-040 But the disadvantage is that “one size fits all” is not always the best course for some individual cases, which may benefit from a more personalised and bespoke process. Indeed, some will be found to be quite inappropriate for the standard models, and sometimes practitioners may ironically be faced with resistance to considering other ways of working.
- 2-041 It may be helpful to consider the ways in which the standard models can be used to embody a creative approach, and the ways in which bespoke hybrid processes can be created.

Using the standard models and designing bespoke processes

- 2-042 Both arbitration and mediation have inherent scope within their frameworks for variation, flexibility and creativity: procedures can be adapted to suit the needs of each case. There is generally a wide discretion as to the conduct of each process.²³
- 2-043 In mediation, a preliminary meeting at which the parties or their lawyers meet the mediator to identify the issues on an initial basis and discuss process is generally beneficial, where this is logically and practically possible, and economically viable. It enables the mediator to assess whether a standard or bespoke process is needed. Where a bespoke process is required, it can be designed with the parties or lawyers. Where the standard procedure is required—as may be likely in most cases—the preliminary meeting can serve the purpose of planning for the substantive meeting, arranging practicalities and enhancing the prospect of a successful outcome.²⁴

2-044 Where a preliminary meeting is impracticable to arrange, the neutral may deal with matters on the phone. Further options are available and are likely to be increasingly used as communication resources and technology develop: for example virtual meetings, telepresence video-telephony and teleconferencing, secure email and encrypted document transactions all facilitate communication.

2-045 Procedures can be entirely novel and specific to the needs of the situation, as for example was established with the Claims Handling Agreement outlined above. What is needed is an understanding of available processes and a creative willingness on the part of all concerned to design a specific procedure that meets the needs of the situation. This is in the best traditions of ADR.....

Footnotes

- 23 This assumes that the mediator is using a model that gives him or her management responsibility, perhaps subject to consultation.
- 24 This is dealt with in Chs 8 and 9.

Some Further Considerations for the Development of ADR

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Mainwork

Chapter 2 - An Overview of the ADR Landscape

Some Further Considerations for the Development of ADR

- 2-046 In January 2016 a decision was taken by the Civil Justice Council (CJC) to establish a Working Party “to review the ways in which ADR is at present encouraged and positioned within the civil justice system in England and Wales.” That group produced its Interim Report on the future role of ADR in civil justice in October 2017, inviting submissions for its final report.²⁵
- 2-047 That report reviewed the landscape of ADR provision in England and Wales and current measures for the encouragement of ADR and considered whether there was a need for measures stronger than pure persuasion to promote the use of ADR. It considered three different forms of possible compulsion. These were:
- a requirement that the parties in all cases (or in all cases of a particular type or subject-matter) engage in or attempt ADR as pre-condition of access to the court, with the claimant unable to issue proceedings until evidence of the appropriate efforts is produced;
 - a requirement that the parties have in all cases (or all cases of a particular type or subject-matter) engaged in or attempted ADR at some later stage such as the Case Management hearing;
 - a power in the court to require unwilling parties in a particular case to engage in ADR on an ad hoc basis in the course of case management.²⁶
- 2-048 The working group expressed the interim view that the Court should promote the use of ADR “more actively at and around the allocation and directions stage”. A minority of the group would go further and introduce ADR either as a condition of access to the Court or later as a condition of progress beyond the Court’s case management conference.
- 2-049 The working group also gave positive consideration to the opportunities that digital access to the courts might give for online dispute resolution (ODR) resources to be used. In this regard, and generally, it referred to Lord Justice Briggs’ Final Report on the Civil Courts Structure Review which he presented in July 2016.²⁷ In that Report Lord Briggs referred to ADR generally, and mediation and conciliation in particular.²⁸ He favoured the development of an Online Court and concluded that “The materials accessible to court users by engaging with the Online Court should emphasise that litigation should be regarded as a last resort, after using all available means of pre-issue ADR”.²⁹

Footnotes

25 See: <https://www.judiciary.gov.uk/publications/cjc-invite-submissions-on-the-future-role-of-adr-in-civil-justice/> [accessed 10 May 2018]. At the time of publication of this work, the Final Report is still awaited.

26 See para.8.3 of the Interim Report.

27 See <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf> [accessed 10 May 2018].

28 For example, in the section “Civil/ADR” at paras 2.16-2.28 and at 6.71-6.74 and 11.22-11.28.

- 29 See his specific recommendations at para.12.15, sub-para.11, also at sub-para.2 with reference to mediation and sub-paras 5-26 with reference to the Online Court.
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A Broad Church

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Mainwork

Chapter 3 - ADR Philosophies and Motivation: Common Values and Differences

A Broad Church

- 3-001 Unlike litigation, which has the single object of providing procedures to decide disputes based on the principles of law and rights, and in some very limited circumstances equity, there is no single philosophy underpinning or motivating ADR.¹ Rather, a number of different ideas, rationales and considerations have influenced its development, some overlapping and some inimical to the others.
- 3-002 Particular beliefs can share fundamental principles and convictions and yet can have internal divisions, where aspects of those philosophies conflict. Differing religious beliefs exist within the various branches of Christianity, Islam and Judaism. The political spectrum comprises diverse sub-groups, which despite a common underlying belief, have fundamentally different views on some detailed issue of principle.
- 3-003 In some ways, and not entirely without irony as introduced in Ch.2, ADR replicates some of these systems, in that although fundamental principles are shared by all the models and groups of practice, there are also some differences of Weltanschauung, or world view, within its proponents and practitioners. This “broad church” of models and beliefs enriches the whole and brings variety, vibrancy and a range of choices to the practice of ADR. This appreciation is relevant to understanding the variations of philosophy, attitudes and practice within the various ADR practices.

Footnotes

¹ Note, however, the development of motivating influences in England and Wales such as the Mediation Information and Assessment Meeting requirement for private family matters and the encouragement of parties to use the services of ACAS, judicial or other mediation, or other means of resolving their employment related disputes by agreement, both underpinned by statutory provision and considered in more detail elsewhere in this book.

Shared Values and Motivation

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Mainwork

Chapter 3 - ADR Philosophies and Motivation: Common Values and Differences

Shared Values and Motivation

- 3-004 Within adjudicatory forms of ADR the shared motivation is to provide processes that are fair and effective and which provide a considered and just outcome more speedily and at a lower cost than litigating through the courts. All involve a privately appointed impartial person considering the relevant facts and making a decision as to which party is right and how that finding is to be incorporated into an award or judgment. Expertise, authority and good judgment coupled with the ability to engender trust would no doubt be regarded as necessary for any such person.
- 3-005 Similarly, within consensual ADR processes, the principles that are shared are more significant and fundamental than any differences of view and practice. The shared values and motivation in this context include the following:

The principle of negotiated agreement

- 3-006 A fundamental principle shared by all proponents of consensual ADR is the proposition that, with limited and specific exceptions, for example where matters of public policy need to be publicly heard and decided or where urgent injunctive relief is needed and is unlikely to be obtained by agreement, the parties have much more control over the outcome and can reduce cost, delay and risk if they choose to resolve their differences by a negotiated agreement that is acceptable to them, rather than through contentious proceedings. Invariably there is likely to be an element of compromise, but there is also scope for more creative and mutually beneficial provisions in an agreed outcome.
- 3-007 Negotiation underpins the mediation process and as pointed out by Roebuck, who has traced the use of settlement facilitation historically, even adjudicative processes have historically been incorporated into negotiated mediation agreements:

“Everywhere in the Ancient Greek world, including Ptolemaic Egypt, arbitration was normal and in arbitration the mediation element was primary. However formal the procedure, mediation was attempted first and a mediated settlement was preferred, so that even an adjudication might, where possible, be incorporated in an agreement.”²

- 3-008 There is a clearly established public policy in England and Wales “that parties should be encouraged so far as possible to settle their disputes without resort to litigation”.³ This approach has been incorporated into civil procedure of England and Wales and is an underpinning principle of the Civil Procedure Rules (CPR).⁴ As processes that assist parties with their negotiations towards dispute settlement, non-adjudicatory ADR including in particular mediation fully supports this public policy.
- 3-009 It should be said that there is a view among some academics that a mediated compromise solution to a dispute may be undesirable. One of the primary concerns is that mediation places compromise ahead of legal justice. Fiss for instance takes the view that:

“a capitulation to the conditions of mass society and should be neither encouraged nor praised parties might settle while leaving justice undone.”⁵

- 3-010 These views have engendered considerable debate, both for and against, and are to some extent mirrored in the views of Genn, who in 2008 claimed that “mediation is not about just settlement, it is just about settlement”.⁶
- 3-011 There is however a substantial consensus among dispute resolution practitioners that an agreement between parties resolving their issues in a way that both find acceptable is preferable to continued conflict culminating in judicial determination. Many such agreements are achieved by direct negotiation between the parties or more usually their representatives. Where that cannot be achieved, consensual ADR processes provide mechanisms for parties in dispute to work towards reaching a negotiated agreement. This view is widely shared by academics and writers on this subject.⁸

Facilitating resolution

- 3-012 If disputing parties cannot resolve their differences through bilateral negotiation, either by themselves or through legal representation, they may require a third-party intervener to facilitate their negotiations. This principle applies equally to a wide range of disputes and conflict situations, from neighbours who cannot agree about their boundary fence, to corporations with major transnational disputes who are locked into seemingly intractable litigation.

The facilitator’s role is then to help achieve whatever change is appropriate in the circumstances, according to the needs and wishes of the parties and to help break the impasse.

- 3-013 De Bono, who coined the term “lateral thinking”⁹ is clear that a third-party role is critical because parties in conflict are: “bogged down in the argument mode of thinking the third party is not an addition or an aid but an integral part of the process”¹⁰

- 3-014 As will be extensively explored in this work, the impartial role of the ADR practitioner, and particularly the mediator, covers a range of skills and activities that parties and, where represented their legal advisors, find difficult or impossible to achieve on their own.

Personal empowerment and self-determination

- 3-015 One of the common motivations of ADR practitioners who favour nonadjudicatory models is to remove decision-making from a third-party neutral, such as a judge or arbitrator, and to place it firmly in the hands of the disputants themselves.¹¹
- 3-016 In mediation and other non-adjudicatory ADR processes, the parties generally have a central role with lawyers sometimes having a supporting function. In corporate disputes, executives responsible for business decisions re-take responsibility for making

decisions about resolving the dispute. In disputes of a more personal nature, including for example separation and divorce matters, the aim of the process is to involve the parties themselves in dealing directly with the issues and take responsibility for working through them.

- 3-017 At one level, therefore, the process empowers both or all the parties. At another level, it can also empower individual parties. Power may come in complex and often unclear packages¹² and processes and the way they are managed may help to redress power imbalances between the parties. For example, where one party controls relevant information that the other does not have, this may be shared¹³; or if one person's negotiating style is more powerful than the other, process rules and management may rebalance this.¹⁴
- 3-018 However, there are obviously limits to this: some imbalances may well remain as they would in the litigation system. There is also the question as to how far it is the ADR practitioner's role to seek to vary the power dynamic between the parties. Certainly, this may be desirable insofar as it may be necessary to ensure that the process is fairly conducted; but there is a view that some relationships that have to be continued after the end of the ADR process, such as those between employers and employees, should leave their power dynamic undisturbed by the process and that it is not the neutral's function to empower either party at the expense of the other. The question for the neutral is how to prevent the dispute resolution process from being corrupted by an abuse of power.¹⁵
- 3-019 Although empowerment may well be one of the motivations for the development of ADR, many parties may choose to participate in an ADR process in order to settle a dispute, without necessarily seeking personal empowerment. In that event, they may well be more than willing for their lawyers to take a leading role, but with the parties having the ultimate decision-making power regarding settlement.

Creative and flexible decision-making

- 3-020 Litigation is limited both in the kind of factors that the court can take into account in arriving at its determination and in the range of decisions that it can make.
- 3-021 Litigation is rights-based, in that the function of the courts is to establish factually where rights lie, to identify and interpret precisely what those rights are, and to resolve any conflicts of fact, technicality and law. Judgments are then based on those interpretations and findings. In England and Wales, the Courts of Equity (the Chancery Division) can have some regard to certain principles of equity and fairness in a limited range of circumstances, for example in trust law. However, legal and sometimes equitable principles underlie all disputes in litigation.
- 3-022 Arbitration, too, is rights-based though in some circumstances the arbitrator may be given discretion to have regard to principles of equity and fairness in reaching a decision.¹⁶ The parties can however determine which law or set of norms governs the arbitration procedure (albeit often at the contracting stage).
- 3-023 A particular advantage of mediation and some other non-adjudicatory ADR processes is that they are not limited to consideration of parties' rights and the applicable law. Parties can have regard to a wide range of considerations¹⁷ when reaching a consensual agreement. These may, for example, include:
- legal rights and principles (whether they refer to these and which ones);

- principles of fairness and equity (whether they refer to these and which ones);
- mutual interests and needs;
- commercial considerations, such as the preservation or enhancement of a working relationship, or personal considerations, such as the preservation of personal or family relationships, and in either case allowing for better understanding, forgiveness, dignity, mutuality of respect and privacy;
- risk assessment, having regard to the uncertainties of litigation as well as the personal circumstances of the parties in relation to their willingness to run such risks;
- the cost factor inherent in legal action and the ability and willingness of parties to incur such costs¹⁸;
- a wide range of other considerations which may for example include timing needs, avoidance of the stress of litigation for themselves and/or families, employees, colleagues and others or possible damage to reputation, credibility or authority if unsuccessful.

An ADR practitioner may help the parties, individually or jointly as appropriate, to take these considerations into account and to find an acceptable balance. Lawyers too should be considering these factors.

3-024 Terms of settlement may reflect this range of considerations, and may allow for more flexible and creative outcomes. Factors that can be provided for which are simply not available to a court may for example include:

- provision for any agreed payment to be made over time or providing value in some alternative way;
- agreeing conditional terms that depend on future events;
- rewriting a contract to amend terms found to be unacceptable;
- providing an acknowledgment, apology, explanation, public statement or credit;
- providing personal undertakings, individual or mutual, to do things or to refrain from doing things;
- arranging for third parties, for example trustees or others not party to the dispute, to provide payments, guarantees, indemnities or other support;
- making arrangements to a degree of detail and with a level of sensitivity to each person concerned that no court would be able to order.

3-025 De Bono has created the concept of a “design idiom”—a designed and creative outcome to a conflict situation.¹⁹ This requires a third-party intervenor, who uses expertise to help the parties to achieve this designed outcome as part of a “design team”.

Potential for healing and relationship preservation

3-026 Although ADR is widely used for issues where there is no relationship between parties, the common experience is that where personal and business relationships exist between disputing parties, ADR processes preserve or enhance them, where they might otherwise be damaged by the adversarial process.²⁰

3-027 Disputes between siblings, parents and children, friends who are also business or professional partners, couples who have become alienated but who have to continue co-parenting—these are just a few examples of conflict within relationships that have broken down, that litigation does nothing to heal. Other kinds of relationship breakdown can also cause rifts in circumstances where people may need or want to continue together: business or professional partners who fall out, shareholders or co-directors

of companies who have fundamental disagreements, employers and employees, co-workers, neighbours: disputes between all of these can only be exacerbated by pursuing litigation.

And then there are other working relationships that have become contentious: negligence allegations between doctors who were once perceived as caring and patients who trusted them or between lawyers and their clients.

3-028 When parties are helped to understand one another's positions and encouraged to respond appropriately and when they communicate respectfully and thoughtfully, conditions exist for a shift in disputants' attitudes towards one another which can preserve or restore good relationships. When adversarial roles are assumed, which includes claiming that the other is wrong and blameworthy, or when the relationship breakdown is exacerbated, it can be very hard for relationships to survive.

3-029 Although relationship preservation may be a common goal, ADR practitioners can have differing emphases. For some, it may be a primary aspiration and in the absence of reaching a settlement on all issues may be regarded as incompletely successful. For others, settlement of the dispute is the primary goal and relationship preservation would be a bonus if achieved. In many cases, these concepts are entwined: resolving the dispute may be the first step towards relationship restoration, which may take place over time.

Maintaining ethical values

3-030 Whereas litigation commonly takes place within the full glare of public gaze, mediation and other non-adjudicatory ADR processes are ordinarily conducted in private. In some models, widely used, the mediator has confidential separate meetings with each party without the other party knowing what was discussed.

3-031 This makes it very difficult for any outside agency to assess whether the process was fairly conducted. Parties may have been placed under undue pressure to agree to proposed terms, or something irregular might have been said or done that could have had an adverse effect on the outcome. Because of the confidential nature of many of these processes, ADR practitioners are very properly unwilling to discuss with the courts or any other outside agency what took place within the process.²¹

3-032 ADR practitioners and organisations are aware of these constraints, which they safeguard in the interests of maintaining the integrity of the process which may depend largely on confidentiality and trust. In these circumstances, they should be conscious of the need to conduct themselves and the process in a fair and ethically proper manner, albeit that different ADR systems, bodies and individuals may vary on the views that they take as to what is ethically proper.

3-033 The way in which ethical conduct is manifested in mediation and other ADR processes is a product of a number of different and interlocking factors, which may include:

- a written Code of Practice or other guiding document specifying the ethical and practical conduct expected of third-party facilitators;
- a written Agreement to Mediate or to conduct any other process, which a third-party neutral will enter into with the parties, regulating practicalities and behaviour;
- overarching professional rules or guidelines that may apply to the conduct of mediation in any country, territory or field of activity, as specified by regional authorities such as the EU, regulatory bodies or funding bodies such as the Legal Aid Agency in England and Wales²²;

- professional rules for the practice of ADR, as specified by any other professional body to which the facilitator may belong, for example the Law Society or Bar and in the US the American Bar Association's Model Standards of Conduct for Mediators;
- ethical guidelines provided by any training bodies;
- ethical discussions on a continuing basis in professional journals, at conferences and seminars;
- cultural expectations, constraints and guidelines which may arise from religion; community; family; trade, business or professional practice and organisations; or other relevant source;
- individual ethical codes and belief systems.

Providing a confidential and secure environment

- 3-034 All ADR process models will generally regard confidentiality as critical—unless the parties do not want it, for example where they are conducting a facilitated public enquiry or consultation.²³ This retains privacy for the parties about matters which may be personal to them and which do not need to be matters of public knowledge. It also allows greater freedom to consider ways of resolving issues without publicity.
- 3-035 All ADR process models also generally agree that the process environment should be secure, both in terms of physical and evidential security. Physical security is perhaps obvious: if parties are very hostile, there should be separate reception facilities for them and special care should be taken in managing the process and the way in which they leave it. Support should be available if needed. Evidential security is provided by agreeing rules that preclude settlement discussions from being brought before the court, in particular the “without prejudice” rule, which applies in common law jurisdictions.²⁴ The existence of an overriding privilege, which varies from one country to another, is more fully addressed in Ch.15.

Attributes, skills and sensitivity

- 3-036 The attributes and skills that ADR practitioners are likely to need to perform their functions effectively are addressed in Ch.14 and broadly speaking include personal and professional attributes that enhance the process, and a range of communication and other skills that facilitate dialogue and process momentum.
- 3-037 While some people may naturally have some of these skills, most can be learned; and ADR practitioners will ordinarily have undertaken professional training to learn and practise these skills and how to use them appropriately.²⁵ There are now bodies in many countries that prescribe training, skills and practice criteria for practitioners: the public may have some assurances as to levels of competence where practitioners belong to such bodies and have met the qualification criteria.
- 3-038 Most ADR practitioners will also agree that a further common requirement for facilitative practice is sensitivity to the needs of parties and an ability to gain their confidence and to work effectively with them. This has little to do with models of practice, but is rather a reflection of the personality and individual qualities of the neutral.

Seeking a beneficial outcome

- 3-039 All practitioners want a good outcome for the parties and virtually all would agree that this would include resolution of the dispute and agreement on mutually acceptable settlement terms. For many practitioners, if this was the contract with the parties—whether explicit or implicit—that would be a completely successful outcome. For others, it would only be successful if other requirements were also met: for example, resolution of underlying issues, healing or closure, in some cases personal transformation.
- 3-040 A good outcome where litigation is pending might also include costs savings, avoidance of delay, absence of publicity, elimination of the risks, stresses and anxieties inherent in litigation and the relief of finality. Terms that meet mutual needs and interests, that enhance or preserve personal or working relationships, that allow people to close a chapter and move on with their lives—these may all be classified as good outcomes.

Overcoming the cost and delays of litigation

- 3-041 ADR is also widely motivated by the fact that it is said to reduce the costs and delays of litigation. Litigation tends to be expensive and generally also involves delays of varying degrees. There has been an increasing consumer resistance to the costs, delays and risk of litigation which has contributed to the search for alternatives.²⁶
- 3-042 The cost-savings element of ADR is based on the assumption that it will be effective. The costs of running a mediation will invariably be much lower than a full-scale trial; and the costs savings can be considerable. If, however, the ADR process does not resolve the issues and the parties have to proceed to adjudication, then the cost of the ADR will have to be aggregated with the costs of trial.²⁷ Nevertheless, there is often some value added by virtue of the ADR process, such as helping to gather information and clarify or narrow issues; and ADR discussions that do not produce an immediate resolution sometimes provide the basis for a later settlement.

Footnotes

- 2 Derek Roebuck, “The myth of modern mediation” (2007) 73(1) *Arbitration: the Journal of the Chartered Institute of Arbitrators* 1.
- 3 Per Oliver LJ in *Cutts v Head* [1984] Ch. 290; [1984] 2 W.L.R. 349.
- 4 See Civil Procedure Act 1997 which introduced the CPR, which in turn place an emphasis on litigation avoidance and the promotion and use of ADR where possible.
- 5 O. Fiss, “Against Settlement” (1984) 93 *Yale L.J.* 1073, 1075, 1085.
- 6 Hazel Genn, “What is Civil Justice For? Reform, ADR, and Access to Justice” (2013) 24(1) *Yale Journal of Law and the Humanities* 397, 411; See also M. Galanter, “Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law” (1981) 19 *Journal of Legal Pluralism* 1, 17; Symposium Issue “Against Settlement: Twenty-Five Years Later” (2009) 78 *Fordham Law Review* 1117, 1117–1280; S. Shipman, “Compulsory Mediation: the Elephant in the Room” (2011) 30 *C.J.Q.* 163, 180–184.
- 7 Resolution of disputes may be achieved, but resolving underlying conflict may not always be possible. Bernard Mayer writes that in certain kinds of enduring conflict, immediate resolution may not be practicable or even desirable, and

- the practitioner may need to help them live with the continuing conflict: B. Mayer, *Staying with Conflict: A Strategic Approach to Ongoing Disputes* (San Francisco: Jossey-Bass, 2009).
- ⁸ Examples from the array of works supporting this view include the classic R. Fisher and W. Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (New York: Penguin, 1981); H. Raiffa, *The Art & Science of Negotiation* (Massachusetts: Harvard University Press, 1982); E. De Bono, *Conflicts: A Better Way to Resolve Them* (London: Penguin Books, 1986); and R. Mnookin, *Bargaining with the devil: When to negotiate and when to fight* (New York: Simon & Schuster, 2011).
- ⁹ See E. De Bono, *The Use of Lateral Thinking*, (London: Jonathan Cape, 1967).
- ¹⁰ De Bono, *Conflicts: A Better Way to Resolve Them*, pp.124–125 at fn.8.
- ¹¹ Self-determination suggests ownership. Self-determination and ownership may lead to empowerment but not necessarily. A person may decide to give all power away to resolve a dispute—either through dispute weariness, through reflection on the impact of the decision on third parties (e.g. children in a divorce—see *T. Grillo, "The Mediation Alternative: Process Dangers for Women"* (1991) 100(6) *Yale L.J.* 1545, 1563 (fn.73)). Empowerment includes awareness that one has choices and the will and emotional readiness to exercise these.
- ¹² Power issues are more fully dealt with in [Ch.16](#).
- ¹³ It should be noted that there are disclosure rules in litigation which force parties to disclose evidence which is available to one and not the other. While similar rules apply in relation to financial issues in family mediation in the UK, this is not the case in civil-commercial mediation, where such disclosure is voluntary. In this regard, see [Ch.9 at paras 9-070 and 9-071](#) under the sub-heading “How much information is enough?”
- ¹⁴ There are also process rules in litigation that seek to redress an inequality of power between parties, which can be helpful, though they cannot necessarily address fundamental aspects such as inequality of ability to fund the litigation, individual vulnerabilities or limitations or helping parties with a better understanding of their options. In consensual ADR processes, codes of conduct generally place the onus on the facilitator to manage power inequality (or suggest that the facilitator should be excused from involvement in the proceedings if the inequality is such that the process cannot be conducted fairly or the neutrality of the facilitator is likely to be compromised in attempting to redress this). See [Ch.4 Negotiation](#) for further discussion on negotiating power.
- ¹⁵ For further discussion of this see the commentary on power elsewhere in this book, notably in [Ch.4 Negotiation](#) and [Chs 8–17](#) dealing with mediation.
- ¹⁶ See Amiable Composition in [Ch.6](#). That, however, is a civil law concept, rarely used in common law systems, though common law arbitrators, while relying on the law, may in practice take principles of equity and fairness into account when making their awards.
- ¹⁷ See J. R. Sternlight, C. J. Menkel-Meadow, L. Porter Love and A. Kupfer Schneider, *Dispute Resolution: Beyond the Adversarial Model*, (New York: Aspen Press 2010), pp.266–390, for some other views on the considerations which may indicate that mediation and/or some other non-adjudicatory ADR processes may be desirable for a particular dispute.
- ¹⁸ It should be noted that in some circumstances mediation may be more costly, for example if it does not resolve the issues and the parties have to bear their own costs of the process and still have to proceed to litigation.
- ¹⁹ See [fn.10](#).
- ²⁰ See generally [Ch.10](#) in R. H. Mnookin, S. R. Peppett and A. S. Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (Boston: Harvard University Press, 2004); and [Ch.10](#) by B. Patten, in M. L. Moffitt and R. C. Bordone, *The Handbook of Dispute Resolution* (San Francisco: Jossey-Bass 2005).
- ²¹ Confidentiality and evidential privilege are touched on below, and are more fully addressed in [Ch.15](#). The courts are not without power to intervene where there are allegations of any irregularity that might warrant such intervention.
- ²² The USA for instance has the Uniform Mediation Act 2003 (UMA) which seems to be one of the primary pieces of consolidating legislation present in westernised jurisdictions concerning mediation regulation.
- ²³ In certain situations there may be a public interest dimension to the subject-matter and outcomes of agreement-based processes. In such situations confidentiality may be maintained by the aggregation and/or anonymising of mediation stories. This may enable public education, action to be taken to ensure public bodies change behaviour and processes, or may provide examples of the types of outcomes possible. An example is the Conciliation Register maintained by the Australian Human Rights Commission: at <https://www.humanrights.gov.au/complaints/conciliation-register> [accessed 10 May 2018].
- ²⁴ This is addressed in [Ch.15](#).
- ²⁵ Training requirements vary widely across jurisdictions and institutions. The desirable attributes may vary, also, according to the ideology of the facilitator. These aspects will be discussed in [Ch.14](#).
- ²⁶ See R. Jackson, “Review of civil litigation costs: final report.” Office of the Judiciary of England and Wales (2009), available at: <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf> [accessed 10 May 2018].

- 27 This may be particularly relevant in the case of small claims, where costs of an ADR process or of litigation may be disproportionate and/or where mediation settlements are low and where parties have to pay their own costs.
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Differences of Practice and Philosophy

Brown & Marriott's ADR Principles and Practice, 4th Ed.

Mainwork

Chapter 3 - ADR Philosophies and Motivation: Common Values and Differences

Differences of Practice and Philosophy²⁸

- 3-043 Differences of philosophy and approach are difficult to identify because models of practice and individual beliefs and approaches are very diverse. An attempt will nevertheless be made to indicate some broad differences of approach to ADR philosophy and practice:

Different fields of activity

- 3-044 ADR takes place in different fields of activity, each of which tends to have its own practice and culture. The fields include couples and family; civil and commercial; neighbourhood and community; employment and workplace; consumer claims; restorative justice; and environmental issues.²⁹ In each field, certain ways of working and certain cultural assumptions are fairly entrenched, and the overlap of processes between fields may therefore not be as great as might be expected.

Different models of practice

- 3-045 Writers, academics and some ADR practitioners distinguish between different models of practice, and while some of these distinctions are valid, others are questionable, especially as models and philosophical approaches do not always follow predictable patterns. The distinctions have become blurred, as models have learned and borrowed from one another.
- 3-046 However, while there has been some cross-over of elements from one process model into another, there has also been an overriding tendency to keep process models substantially separate. Practitioners tend to favour particular process models, based no doubt on which one they trained in and are familiar with, which in turn may be a reflection of the field of activity and culture within which they primarily work.
- 3-047 Some attempts have been made in England and Wales to integrate aspects of the civil-commercial and the family process models to enhance both fields. This has been well if tentatively received.

Some specific differences of model and philosophy will be separately addressed below.

Evaluative or facilitative mediation

- 3-048

It is a seductive proposition to distinguish between a “facilitative” approach, which suggests that the mediator merely facilitates and does not express a view in any way and an “evaluative” approach, which suggests that the mediator’s main thrust is to make an evaluation of the merits.

- 3-049 The term “evaluative mediation” is really a misnomer and its juxtaposition with “facilitative mediation” creates what in most cases is a false dichotomy. In fact all mediation is facilitative and there is a wide spectrum of evaluation, starting at one end with little or no evaluation, through at the other end to a mediator being willing to express a view on the merits. In between there are varying levels of evaluation, different shades of grey: selective questioning, “reality testing” and raised eyebrows are classic examples. It seems that most mediators fall somewhere between these two ends of the spectrum, and that “evaluative mediation”, which has become pejorative in some eyes, is not a helpful term, unless qualified by an explanation as to where in the evaluative continuum a mediator is placed.

Settlement-geared or problem-solving mediation

- 3-050 One aspirational approach to mediation and ADR practice is to be settlementgeared and cost-saving which may go hand in hand with a negotiating bargaining style, seeking to trade issues in a search of “a deal”. For some ADR practitioners, this does not reflect the spirit of ADR and the problem-solving approach that often seeks a “win-win” outcome, with the impartial exploration and understanding of underlying issues.
- 3-051 This distinction may have some validity, but is also questionable. Undoubtedly, some disputes require a bargaining approach and some require a problem-solving approach. Mediators with sensitivity will deal with each according to its needs. And many may involve a mixture of both approaches. Lax and Sebenius point out that although negotiation can be conducted in such a way as to create joint gains for both parties, “an essential tension in negotiation exists between co-operative moves to create value and competitive moves to claim it”.³⁰

Transformative and related approaches

- 3-052 There is a view that considers the problem-solving approach to be inadequate, in that it neglects a critical element of the process, namely the transformative potential of the process. This aspires to facilitate party transformation through the adoption by the mediator of an approach that helps to empower the parties and give them a greater sense of their own efficacy. Based on the work of Folger and Bush,³¹ the transformative model of mediation, having as its key aspirations empowerment and recognition, has acquired a committed following, though there are also those who believe that seeking transformation is only appropriate if the parties have knowingly elected for this.
- 3-053 Cloke promotes another approach that aims for “personal and organisational transformation” and talks of “the quality of energy that is released in resolution, transformation and forgiveness”.³²

Other models and schools of thought

- 3-054

Other models of mediation reflect different schools of thought about the process, its aims and practice approach. While they are practised in some places, they are not widely known or used in the UK. They include:

- The narrative model is based on a story-telling metaphor, working with people in better understanding and reconstructing their “stories” rather than simply adopting an interest-based problem-solving approach.³³
- Another school of thought sees mediation and other ADR processes through the lens of a communications perspective. They see conflict as a “socially created and communicatively managed reality occurring within a socio-historical context that both affects meaning and behaviour and is affected by it”.³⁴
- The therapeutic model of mediation, often undertaken by mediators with a background profession in counselling or therapy, is based on the assumption that parties cannot engage in effective communication and problem-solving until unresolved emotional and relational issues are addressed.³⁵

Intervention and directiveness

- 3-055** In adjudicatory processes such as arbitration, the impartial third party necessarily has an interventionist role; but in England and Wales mediation training aims to establish minimal intervention and directiveness. This supports individual empowerment and self-determination.
- 3-056** Most mediators, irrespective of process model or approach, are likely to support the proposition that they should not be unduly directive or interventionist. However, there are different views about what level of directiveness and intervention is appropriate. Indeed, like evaluation, there is a continuum in this regard.
- 3-057** The injunction against excessive intervention and directiveness is entirely justified; but this should not be confused with effective management of the process, where the mediator may need to give directions and to intervene as necessary (though in some models, such as the transformative one, the mediator’s management role is rather more minimal). There may be circumstances demanding intervention or directiveness, for example to ensure that the process is conducted fairly, effectively and non-abusively.³⁶ A blanket and undiscriminating injunction against directiveness and intervention is unhelpful.³⁷

Footnotes

²⁸ The issues in this section are presented in brief outline and are further elaborated elsewhere in the book.

²⁹ Several of these fields of ADR activity will be considered in more detail elsewhere in the book.

³⁰ D. Lax and J. Sebenius, *The Manager as Negotiator: Bargaining for Co-operation and Competitive Gain* (New York: The Free Press, 1986), p.33. In their later work, *3-D Negotiation: Powerful Tools to Change the Game in Your Most Important Deals* (Boston: Harvard Business School Press, 2006), Lax and Sebenius reaffirm this tension in a section entitled “The ‘Negotiator’s Dilemma’: Productively managing the Creating/Claiming Tension” (p.131). This is further addressed in Ch.4 below.

³¹ Robert A. Baruch Bush and Joseph P. Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (San Francisco: Jossey-Bass, 1994).

³² Kenneth Cloke, *Mediating Dangerously: The Frontiers of Conflict Resolution* (San Francisco: Jossey-Bass, 2001), p.xi-xii.

³³ See, for example, J. Winslade & G.D. Monk, *Narrative Mediation: A New Approach to Conflict Resolution* (San Francisco: Jossey-Bass, 2000).

- 34 Joseph P. Folger and Tricia S. Jones, New Directions in Mediation: Communication Research and Perspectives (California: Sage Publications, 1994), p.ix.
- 35 Waldman offers an interesting early view of the facilitative-evaluative debate through the lens of therapeutic justice: *E. Waldman “The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence”* (1998) 82 *Marquette Law Review* 155.
- 36 This may be particularly the case in agreement-based processes which inherently involve an imbalance of power, such as National Human Rights Institutions which conduct mediation or conciliation processes to resolve individual human rights complaints.
- 37 Process management as applicable to various forms of ADR will be discussed in greater detail in other relevant chapters in this book.

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Defining the Processes

Brown & Marriott's ADR Principles and Practice, 4th Ed.

Mainwork

Chapter 3 - ADR Philosophies and Motivation: Common Values and Differences

Defining the Processes

- 3-058 Defining such a broad range of dispute resolution processes as introduced by the spectrum of processes from consensual to adjudicatory in Ch.2 is challenging. Attempts will be made to do so in subsequent chapters. For instance in relation to mediation,³⁸ the question has been asked: “What is real mediation and who decides?” This is relevant to ask, where one finds some people holding themselves out as the arbiters of what constitutes proper practice and what does not.
- 3-059 As there is no universally accepted definition of mediation, we are left with seeking a consensus among ADR practitioners as to what constitutes acceptable practice and what does not. Yet even that cannot be authoritative in a field that provides such a wide range of activities, fields of work, models and approaches in a wide range of countries and cultures.
- 3-060 Addressing this issue in 2009, Larry Gaughan, who co-founded the US Academy of Family Mediators, sought an end to a “fundamentalist” approach to mediation.³⁹ Referring to mediation’s rich history and its variety of successful approaches, he pointed out that:

“the more different kinds of skills and knowledge a mediator has, the more likely it is that he or she can apply a model that will get the job done properly, i.e., get a signed agreement that is both fair and workable.”

Gaughan cautioned mediators who only had training and experience with one model of mediation not to tell mediators who used other models successfully that they had to limit the scope of their practice.

- 3-061 The test of a successful and acceptable non-adjudicatory process, including mediation, should be threefold. Does it facilitate parties voluntarily shifting from entrenched positions? Is it ethical? Is it workable?

Footnotes

³⁸ See generally L. Steffek and H. Unberath, *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroad* (Oxford: Hart 2014).

³⁹ See Larry Gaughan, “Models”, in *Family Mediation News* (Newsletter of the Family Section of the Association for Conflict Resolution), Fall 2009.

The Momentum Towards ADR

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Mainwork

Chapter 3 - ADR Philosophies and Motivation: Common Values and Differences

The Momentum Towards ADR

- 3-062 Since the first edition of this work there has been a continuing momentum towards the use of mediation and other ADR processes in a wide range of activities. In that time, legal practitioners and other professionals, judges and the courts, the UK Ministry of Justice and other government departments, as well as the media and the general public, have developed an increasing awareness about it.
- 3-063 There are now pre-action protocols regulating parties' conduct before court action is commenced, which aim to facilitate settlement without the need to launch proceedings, all of which encourage the consideration of ADR.⁴⁰
- 3-064 As set out in Ch.5, the courts of England and Wales support and encourage ADR in many ways and will impose costs sanctions against a party who fails to attempt to resolve a dispute by using mediation or some other ADR process when it is appropriate to do so, on the basis of criteria that have been established.
- 3-065 The principles and ethos of ADR have also permeated the legal profession, and although there are still lawyers who resist its use the general trend in the profession is towards the concept of "dispute resolution" rather than litigation.
- 3-066 Many ADR organisations now exist, including specialist mediation bodies and thousands of mediators have been trained in the UK and throughout the world in a wide range of fields.
- 3-067 This is an international trend. The US has largely led the way, but Australia and Canada have also been influential, as well as many other countries, including a number in Europe, where the EU has supported mediation and issued Directives promoting and regulating its use, both for cross-border disputes and, on an optional basis, domestically. The momentum continues, both nationally and internationally.⁴¹

Footnotes

40 See Ch.5 for further information about the protocols.

41 See the Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, 26.8.2016, available at: http://ec.europa.eu/justice/civil/files/act_part1_adopted_en.pdf [accessed 10 May 2018].

Conclusion

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Chapter 3 - ADR Philosophies and Motivation: Common Values and Differences

Conclusion

- 3-068 ADR processes can stand in their own right as alternatives to adjudication; or they can complement the court's procedures. Lawyers need to be aware of the occasions when litigation, arbitration, mediation or any other ADR process has its appropriate value and to advise accordingly.⁴²
- 3-069 While acknowledging the difficulty in achieving any one agreed ADR philosophy, the following might perhaps embody much of the essence of ADR:

“ADR complements litigation and other adjudicatory forms, providing processes which can either stand in their own right or be used as an adjunct to adjudication. This enables legal practitioners to select procedures (adjudicatory or consensual) appropriate to individual disputes. ADR gives parties more power and greater control over resolving the issues between them, encourages problem-solving approaches, and provides for more effective settlements covering substance and nuance. It also tends to enhance co-operation and can be conducive to the preservation of relationships. Effective impartial third party intercession can help to overcome blockages towards reaching a settlement, and by expediting and facilitating resolution the costs, delays, risks and uncertainties of litigation can be avoided. Sometimes it can help to heal or provide the conditions for healing underlying conflicts between parties. ADR processes, like adjudicatory procedures, have advantages and disadvantages which make them suitable for some cases but not for others.”⁴³

Footnotes

- 42 Solicitors' Code of Conduct includes under r.2.02 (1)(b), the requirement to give the client a clear explanation of the issues involved and the options available. The obligation is further clarified under Guidance Note 15 to r.2.02 (1)(b), which states that when considering the options available to the client, if the matter relates to a dispute between the client and a third party, the solicitor should discuss whether mediation or some other ADR procedure may be more appropriate than litigation, arbitration or other formal processes. See generally Code of Conduct 2007, available at <http://www.sra.org.uk/documents/code/rule-2-client-relations.pdf>[accessed 10 May 2018].
- 43 Refer to Ch.2 and the spectrum of processes from consensual to adjudicatory for consideration of process suitability.

Negotiation—The Primary Tool

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Chapter 4 - Negotiation

Negotiation—The Primary Tool

- 4-001 Negotiation has been described as “the process we use to satisfy our needs when someone else controls what we want.”¹

Everyone learns to negotiate from the earliest age. Children learn to recognise when “no” means “maybe”, when they can trade favours with their parents and (sometimes) when something is genuinely non-negotiable. They may explore strategies including making persistent demands, promising something in the future to gain something more immediate, showing their distress when they do not get what they want and understanding when concessions have to be made to achieve their wishes.

- 4-002 As time passes, negotiation becomes more refined. By adulthood we will probably have negotiated many different kinds of agreements and we will have developed our own individual styles for trying to persuade others to give us what we want or need. People may bargain with ease or be uncomfortable with haggling; they may adopt a pleading manner or a browbeating style; they may avoid situations which involve confronting others in resolving differences; or they may use the threat of withdrawal as a strategy. This will to some extent reflect individual personalities, although learned negotiation skills will enhance and augment natural inclinations.

Awareness of the theories and principles of negotiation and conscious practice will enable practitioners to employ these effectively and appropriately and to help others to do so.

Footnotes

- ¹ Robert Maddux, Successful Negotiation, 2nd edn (London: Kogan Page, 1999), p.5. According to Maddux, negotiation normally occurs “because one has something the other wants and is willing to bargain to get it.”

Theories of Negotiation

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Chapter 4 - Negotiation

Theories of Negotiation

- 4-003 Theories of negotiation may be classified in a variety of ways. One important distinction lies between the interest-based, problem-solving or co-operative approach and the competitive approach.² These two predominant approaches will be discussed, as well as overlapping areas between them. Additionally other theories will be mentioned briefly.

Footnotes

- ² See Jeffrey Z. Rubin and Bert R. Brown, *The Social Psychology of Bargaining and Negotiation* (New York: Elsevier, 2013) (categorising negotiators as “co-operative versus individualistic versus competitive”); Gerald R. Williams, *Legal Negotiation and Settlement* 18–40 (1983) (studying negotiator behaviour and categorising negotiators as “cooperative” or “competitive” types) in Russell Korobkin, “*A Positive Theory of Legal Negotiation*”, 88 *Geo. L.J.* 1789 (1999–2000).

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An Interest-Based Problem-Solving Approach

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Chapter 4 - Negotiation

An Interest-Based Problem-Solving Approach

Getting to Yes

- 4-004 The interest-based problem-solving approach to negotiation is particularly helpful to consensus-based ADR practices. Also called “integrative” negotiation (because of the potential for parties’ interests to be integrated in ways that enhance the creation of joint value), interest-based negotiation focuses on the interests of the disputants, which may include their needs, wishes, concerns and fears. It aims to find a resolution of the issues that meets all such interests and needs in a mutually beneficial way. The process of interest-based negotiation involves joint problem-solving, expanding options and aiming for mutual benefit.
- 4-005 Fisher and Ury in their seminal work, Getting to Yes, developed their particular form of principled, problem-solving negotiation and identified certain key negotiation principles³:
- concentrate on parties’ respective interests rather than taking and defending positions;
 - adopt a problem-solving approach instead of allowing personality differences to side-track the negotiation;
 - before making decisions, generate as many options as possible particularly those creating mutual benefit;
 - establish objective and fair criteria for a resolution, rather than the judgment of either party.
- 4-006 Fisher and Ury describe how these principles can be achieved in practice through the concept of BATNA (Best Alternative to a Negotiated Agreement), which identifies to each party what the best outcome would be if the issues were not settled by negotiation.⁴
- 4-007 Alternatively, Haynes refers to WATNA (Worst Alternative to a Negotiated Agreement), which is the worst potential outcome if the issues are not settled by negotiation.⁵ Negotiators need to be aware of their own and the other side’s best and worst alternatives to a negotiated settlement, and by focusing on these are better able to make decisions as to whether or not to settle and on what terms.
- 4-008 The following demonstrates a creative example of undertaking a BATNA and WATNA exercise. In a passing off action between media companies, the defendant denied passing off but was willing in mediation to consider changing a competing brand name, albeit that there would be tens of thousands of pounds of expenses in doing so. The claimant calculated that its BATNA would be an injunction to stop use of the competing name; but this would involve over a year’s delay and an irrecoverable cost element of over £35,000. Its WATNA would see the case lost, with heavy costs of its own and liability for the other party’s costs. The claimant accordingly agreed to contribute £30,000 to the defendant’s expenses of voluntarily changing the brand name, which led to a settlement. The claimant got the best result it would have had at trial, with certainty, more quickly and at a slightly lower cost.

Galanter points out⁶ that as “transaction barriers”, such as legal costs, increase, so there is a greater range of possible settlements from which parties can choose rather than proceed to adjudication.

- 4-009 White criticised the Getting to Yes principles as being naive in the face of tough and unprincipled negotiators on the basis that the authors seem to assume that a clever negotiator can make any negotiation into problem solving and thus completely avoid the difficult distribution type situations which can arise in negotiations.⁷ Fisher however argued that to treat the distributional issue as a shared problem was a better approach than to treat it as a contest of will in which a more deceptive, more stubborn, and less rational negotiator would tend to fare better, and that even win/lose bargaining could profit from the kind of analysis suggested in Getting to Yes.⁸ There is no doubt that the Getting to Yes principles were ground-breaking in negotiation theory and practice, evidenced by the value still placed on them decades after initial publication.
- 4-010 Fisher and Brown, for example,⁹ further developed the original principles to deal with disagreements within relationships and to consider ways to nurture and maintain relationships. Ury, in later work, dealt with the subject of negotiating with people who do not use a principled, interest-based approach¹⁰ and more recently, in 2015,¹¹ continued the principled negotiation theme, but focused on the need to first negotiate with ourselves before attempting to achieve our negotiating goals.

Underlying needs

- 4-011 An important theme of interest-based negotiation concerns underlying needs. This theme suggests that the negotiator looks beyond stated aspirations and attempts to assess underlying needs or preferences. Distinguishing between needs and wants can allow many opportunities for arriving at creative solutions in all fields of activity.¹²

Creating value

- 4-012 A further approach adopts the view that it is possible to create value within the context of interest-based negotiation by taking advantage of differences. For example, it may be possible to construct a settlement that accommodates the different aspirations and priorities of the parties.
- 4-013 Behind the notion that it is possible to create joint gains, is the idea that a co-operative, problem-solving model, with pooled information, a flexible and creative approach and an appreciation of one another's interests and concerns, will enable parties to arrive at an outcome which enhances the position of all parties, rather than having one party as a "winner" and another as a "loser".
- 4-014 The following real life example illustrates this approach. Shareholders in a fast-food company with a number of branches found it impossible to continue working together. They split into two groups, each of which wanted to buy out the other. Neither would sell to the other, and each threatened court action. Their impasse left them at loggerheads. In a problem-solving negotiation they examined ways of dividing the company and arrived at a solution whereby each group took over the branches in an agreed area, with an appropriate cash adjustment. They agreed to operate independently but would liaise on activities that could benefit all branches, such as some joint publicity and occasional bulk purchasing to achieve advantageous buying prices.
- 4-015 As observed by Lax and Sebenius,¹³ there would ultimately be a tension between the creation of joint gains and the division of the resources. In the above example, there was also hard bargaining about the allocation and valuation of the branches and

the size of the cash adjustment. Nevertheless, this approach to problem-solving negotiation allowed greater opportunities for positive and mutually beneficial outcomes than a purely “value claiming” approach.

Principled rejection

- 4-016 Ury has identified, also, how important it is that parties are able to reject unacceptable requests or demands in an effective way that does not entrench conflict, but rather supports principled negotiation.¹⁴

The thrust of what Ury describes as a “positive No”, is that negotiators need to reflect on any underlying positive aspect of their reason for rejecting a particular demand and to maintain this at the forefront of their thinking and response. Negotiators need to prepare for the negotiation by rooting their approach in the positive principle and values, crystallising their positive intention and what they are aiming to achieve. Preparation also includes having a “Plan B”—what will be done in the event that agreement cannot be reached: this adds power to a negotiating position and removes dependence on gaining agreement.

- 4-017 The “No” should be thoughtfully and positively presented but remain firm about the commitment to address the underlying concerns. This avoids personal blaming, presents facts objectively, uses language with care, gives due respect to the other negotiator and where appropriate invokes common principles or shared interests. The clear rejection can then flow from that commitment and respect. Ideally, this should be accompanied by alternative options, appropriate qualifications or constructive requests.

- 4-018 Any reaction to rejection should be listened to with respect and with acknowledgement of the other person’s viewpoint, without concession of one’s own position and without over-reaction. Patience and consistency are needed. If there is an impasse, it may be necessary to explain the consequences of not reaching agreement, but care should be taken to ensure that this is not perceived as a threat. At this point, Plan B may have to be invoked, and cooperation withdrawn.

If underlying interests and needs cannot be met, then it may not be appropriate to enter an agreement at all.

- 4-019 However, there may still be ways to achieve an agreement. Ury suggests building a “golden bridge” for the other to cross towards resolution: reaching out to the other party, exploring their unmet needs and interests, helping them to save face, finding ways for them to present an outcome satisfactorily to their constituents, and rebuilding confidence—these may all help to bridge the differences. The secret, Ury suggests, is the integration of “Yes” and “No”: the ability to stand firm on what one needs without damage to valuable agreements and prized relationships.

Designing creative solutions

- 4-020 Another proponent of a problem-solving approach is Edward De Bono, the originator of the term “lateral thinking”, which he describes as being concerned with restructuring fixed concept patterns (insight) and creating new ones (creativity). De Bono believes that the traditional methods used to resolve conflicts and disputes are primitive, inadequate and destructive, and that a fundamental shift in approach is needed. Hence he advocates the adoption of techniques that facilitate the creative design of solutions to problems. His work,¹⁵ which analyses modes of thinking and the way the mind works, suggests that disputants themselves are worst-placed to resolve their own issues since they are caught up in a “tension of hostility” and take positions that do not allow them to communicate with or trust one another easily and, hence, are inimical to the design of solutions. The conclusion that either representation in negotiations or assistance, perhaps from a third-party neutral, can be drawn from

De Bono's views on this. De Bono suggests that the use of lateral thinking and the adoption of a creative, problem-solving, approach to the design of solutions, encourages the generation of alternative solutions to issues, large and small.¹⁶

Footnotes

- ³ See Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (New York: Penguin, 1981), Ch.2.
- ⁴ D. Lax and J. Sebenius, Harvard colleagues of Fisher and Ury, prefer the term “no-deal option” to BATNA. See their book *3-D Negotiation: Powerful Tools to Change the Game in Your Most Important Deals* (Boston: Harvard Business School Press, 2006), pp.23 and 256.
- ⁵ John Haynes and Gretchen Haynes, *Mediating Divorce* (San Francisco: Jossey-Bass, 1989), p.11.
- ⁶ See M. Galanter, “*The Quality of Settlements*” (1988) *Journal of Dispute Resolution* 82.
- ⁷ E.g. see James J. White, *Essay Review: “The Pros and Cons of Getting to Yes”* (1984) 34 *Journal of Legal Education* 115.
- ⁸ White p.121 (see fn.7); and see also Roger Fisher, “*Negotiating Power*” in (1983) 27 *American Behavioural Science*; and in J. Murray, A. S. Rau and E. Sherman, *The Processes of Dispute Resolution: The Role of Lawyers*, 2nd edn (USA: Foundation Press, 1989), pp.99–100.
- ⁹ Roger Fisher and Scott Brown, *Getting Together: Building a Relationship that Gets to Yes* (New York: Penguin (Non-Classics), 1989).
- ¹⁰ William Ury, *Getting Past No: Negotiating with Difficult People* (London: Random House, 1992).
- ¹¹ William Ury, *Getting to Yes with Yourself: and Other Worthy Opponents* (London: Harper Thorsons, 2015).
- ¹² Andrew Acland, *A Sudden Outbreak of Common Sense: Managing Conflict Through Mediation* (London: Random House Business Books, 1990) recommends mediators to discover the interests behind positions, and the needs behind interests.
- ¹³ See below under “The essential tension between interest-based and competitive approaches”.
- ¹⁴ Ury, *The Power of a Positive No: How to say No and Still Get to Yes* (2007). This work sets out both a theoretical underpinning as well as practical strategies that enable negotiators to reject inappropriate demands or behaviour but at the same time to maintain a positive approach.
- ¹⁵ Edward De Bono, *Conflicts: A Better Way to Resolve Them* (Penguin Books Limited, 1985).
- ¹⁶ An example of creative problem-solving provided by De Bono is illustrated in an exercise in “lateral thinking” called the Tale of Two Pebbles or The Black Pebble.

Competitive Theory

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Chapter 4 - Negotiation

Competitive Theory

- 4-021 The competitive approach to negotiation is sometimes called “positional”, “distributive” or “distributional” bargaining, in that there are seen to be limited resources for distribution and the more that one party achieves, the less there will be for the other. In this approach negotiation is a form of contest in which there will be a winner and a loser, and that in order to be the winner, the negotiator needs to be tough, powerful and skilful in maximising his own or his principal’s self-interest, irrespective of the overall effect on others.¹⁷ This approach is sometimes linked to “power-based” negotiation (determining who is more powerful).
- 4-022 Competitive negotiators may consider any gesture of goodwill as a mistake because there is no certainty that such a gesture will be reciprocated and because it may be construed as a display of weakness and, hence, may produce an even tougher response from the opposing negotiator. Toughness involves opening high, making few concessions, and being untroubled by the prospect of an impasse.¹⁸
- 4-023 Murray, Rau and Sherman¹⁹ have analysed the risks of adopting strategies favoured by competitive theory. These strategies tend towards a hostile and confrontational approach and response, focusing on manipulation and threat rather than on trying to understand the issues sufficiently to find a mutually acceptable solution. This means that joint gains cannot be identified, communications are distorted and tension, mistrust, anger and frustration may result. It is not uncommon that the brinkmanship inherent in the competitive approach and the concern not to be outdone by opponents results in deadlock and a breakdown of negotiations, with consequent delays, stress and additional costs of all kinds. This form of negotiation may be viewed as antithetical to some proponents of ADR, but it is an approach that is commonly used in one form or another and needs to be understood and accommodated.
- 4-024 The question that inevitably arises is how a negotiator who adopts a problem-solving approach can cope with one who adopts the competitive approach. Ury has suggested various practical techniques, such as recognising and responding appropriately to tactics used by the other side, making acknowledgments without conceding, using questions skilfully, reframing tactics, exposing tricks and helping the other side to save face.²⁰
- 4-025 Should these or any other problem-solving strategies not be fruitful, an appropriate response can be chosen: examining the best and worst alternatives, maintaining a principled position, trying to seek mutual gains through a problem-solving approach and resisting all attempts to bully, threaten and cajole, even if this may lead to an impasse. A problem-solving negotiator does not have to be weak, but can maintain a strong, principled approach in the face of the toughest negotiator.

Footnotes

¹⁷ See J. S. Murray, “Understanding Competing Theories of Negotiation” (1986) 2 *Negotiation Journal* 179.

¹⁸ See Gavin Kennedy, *Everything is Negotiable: How to Negotiate and Win*, 3rd edn (Arrow Books Limited, 1997). (See also 4th edn, 2008). In a personal email to this book’s consultant editor, Gavin Kennedy added: “I would not recommend aggressive behaviour; more firmness of trading than fighting talk.”

- 19 J. S. Murray, A. S. Rau and E. F. Sherman, *Processes of Dispute Resolution: The Role of Lawyers* (New York: Foundation Press, 1989), pp.78–80; (and 3rd edn, 2002).
- 20 See Ury, *Getting Past No: Negotiating with Difficult People* ([fn.10](#)).

The “Essential Tension” Between Interest-Based and Competitive Approaches

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Chapter 4 - Negotiation

The “Essential Tension” Between Interest-Based and Competitive Approaches

- 4-026 Lax and Sebenius²¹ have adopted a balanced position between the competitive and interest-based approaches. They view these two perceptions of the bargaining process as being a distinction between “value creators” and “value claimers”. Value creators are those who consider that the negotiators should be sufficiently co-operative and resourceful to ensure that their agreement produces more positive results for each party than if they had not reached an agreement. Value claimers believe that negotiation involves hard bargaining to ensure that negotiators, or the people they represent, obtain the most favourable terms, thereby “winning” as against the other party who thus necessarily “loses”. Lax and Sebenius consider that both kinds of process are present in negotiation, and that there is an “essential tension” between the creation of value and the division of it. Their understanding and synthesis of problem-solving and competitive approaches has resulted in a particularly useful model of negotiation.
- 4-027 Thompson also views the apparent dichotomy between the two approaches as a false choice and argues that a skilled negotiator does not have to choose between being tough or being nice but, instead, must be able to function both co-operatively and competitively, sometimes simultaneously.²²

Footnotes

²¹ See Murray, Rau and Sherman, Processes of Dispute Resolution: The Role of Lawyers (fn.19).

²² Leigh L. Thompson, The Truth About Negotiations, 2nd edn (Pearson, 2013).

Other Theories and Models

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Chapter 4 - Negotiation

Other Theories and Models

- 4-028 Interest-based negotiation is sometimes contrasted with rights-based negotiation, in which the negotiators are primarily concerned with the law and the likely outcome in the event of a court trial. While in practice negotiators may have regard to rights as an element in negotiation, in many cases this is unlikely to be the only consideration, and parties may well consider other factors, including commercial and personal ones. It is arguable that pedagogic practice in law schools continues to focus on a “rights-based” model of justice at the expense of considering either the existence or the value of interest-based negotiation.²³
- 4-029 Another model of negotiation, with a socio-anthropological base, is described by Gulliver. This comprises various phases which cover: the search for an appropriate arena for the resolution of the dispute, defining the issues and asserting differences, then narrowing these through the bargaining process, eventually “ritualising” the outcome.²⁴
- 4-030 Murray, Rau and Sherman²⁵ refer to further methodology: “Game Theory” which is in fact a method of analysis used to establish the optimum settlement strategy to be adopted in any particular case. In essence, it involves a “tit for tat” approach allowing for parties to negotiate co-operatively as long as both or all do so, but changes to a competitive and retaliatory approach as soon as anyone defects from a co-operative mode.
- 4-031 Brams and Taylor have devised complex processes to create fair divisions, whether of goods or preferred positions, on a set of issues in negotiations.²⁶ Their approach involves three elements. The first is to set forth explicit criteria, or properties, that characterise different notions of fairness. The second is to provide systematic procedures, or algorithms, for obtaining a fair division. The third is to illustrate these algorithms with applications to real-life situations. This approach brings together work drawn from different disciplines and includes philosophical questions of fairness and justice, economists’ issues of the requirements of a fair scheme, and mathematical concepts.
- 4-032 The methods and theories discussed in this chapter do not present an exhaustive or comprehensive chronicle but rather serve to indicate the range of possible approaches.

Footnotes

- ²³ See B. Waters, “The Importance of Teaching Dispute Resolution in a Twenty-First-Century Law School” (2017) 51(2) *The Law Teacher* 227–246.
- ²⁴ See G.P. H. Gulliver, *Disputes and Negotiations: A Cross-Cultural Perspective* (Academic Press, 1979).
- ²⁵ See Murray, Rau and Sherman (fn.19, p.89); see also R. Axelrod, *The Evolution of Co-operation* (New York: Basic Books 1984; Revised edn, 2006).
- ²⁶ Steven J. Brams and Alan D. Taylor, *Fair Division: From Cake-Cutting to Dispute Resolution* (New York: Cambridge University Press, 1996).

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Some Practical Aspects of Negotiation

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Mainwork

Chapter 4 - Negotiation

Some Practical Aspects of Negotiation

- 4-033 While it is not feasible to address the practicalities of negotiation in any comprehensive way, some aspects will be briefly mentioned.

Whether or not to negotiate

- 4-034 A fundamental question may arise at the outset as to whether or not one should be negotiating at all. Sometimes the “other side” may be perceived as untrustworthy, malevolent, dishonest or even evil. Should the issues rather be resolved in another forum, for example through litigation—or in an international context, through direct confrontation?
- 4-035 Mnookin has addressed this dilemma in Bargaining with the Devil: When to Negotiate, When to Fight.²⁷ In assessing real life situations—including Churchill who chose to fight rather than negotiate, and Nelson Mandela who chose to negotiate when others were fighting, in both cases correctly judged—Mnookin has provided helpful guidance for negotiations where this issue arises. In the former, the decision not to negotiate was influenced by Churchill’s personal moral beliefs and gut feelings; and Mandela’s decision to negotiate with the South African government was linked to the management of three tensions. The first of these being what is going on *across the table* with your adversary and what is happening *behind the table* with your constituents. The second relates to the tension between pragmatism and principle, or a clash between “rational” and “intuitive” thinking. The third tension relates to the contest between empathy and assertiveness, the former requiring good listening skills to demonstrate an understanding of the interests, needs and perspectives of your adversary and the latter, the ability to state clearly and confidently the interests and perspectives of one’s own side.
- 4-036 In essence, Mnookin’s conclusion is that there are situations where one should properly decline to negotiate but that more often than not negotiation may well be appropriate and productive in cases where the initial reaction might be to regard the other as “the devil”—too untrustworthy or dishonest to contemplate negotiating with.

Preparation and set-up

- 4-037 All practitioners and writers agree that preparation is fundamental to effective negotiation. For example, Fisher and Shapiro refer to the three lessons a lawyer had learned on one of Fisher’s negotiation workshops: Prepare. Prepare. Prepare.²⁸ Preparation includes reflection on purpose and goals; considering the present and future potential of the relationship with the other party; thinking about each party’s interests and how far these are compatible; listing and prioritising options; reflecting on one’s BATNA; being emotionally prepared; and having a clear idea of intended process.
- 4-038

Lax and Sebenius have referred to three dimensions of negotiation²⁹: *tactics*; *deal design*; and *set-up*. These aspects include: ensuring that the right parties and their decision-makers are involved; identifying potential blockers; researching and understanding all interests; avoiding psychological misconceptions; considering the no-deal options on all sides and the Zone of Possible Agreement (see below); ensuring that the other party understands that one is not compelled to agree at any cost; and preparing the correct process and sequence of steps to be taken.

- 4-039 In the design stage, Lax and Sebenius suggest negotiators consider how to create value by looking behind stated positions and understanding all the interests involved, thinking imaginatively how to create greater value all round, and dovetailing differences.

Zone of Possible Agreement and the negotiation dance

- 4-040 Howard Raiffa³⁰ has emphasised the need: to undertake detailed assessments of the risks of litigating, to analyse the parties' positions and prospects of success, and to examine the criteria for settlement on each side. He deals with the concept of "zones of agreement" (also called the "bargaining zones" or the Zones of Possible Agreement (ZOPA)) which denote the parameters of the range of possible terms of settlement within which a particular dispute may be resolved, given the aspirations of each party, and any other factors relevant to settlement.³¹
- 4-041 Raiffa refers to "the negotiation dance" or the fluctuating pattern of concessions and reassessment of perceptions and aspirations that takes place during negotiations. The concept of a negotiation dance has been put forward by other writers, for example Adair and Brett, who see it as the way in which co-operative and competitive behaviours wax and wane during the stages of the negotiation process.³²
- 4-042 Indeed Thompson has presented an image of ZOPA as a dance floor on which the negotiators dance, each trying to lead the other to the point beyond which they will not go—what Raiffa calls their reservation point (RP), sometimes viewed as a "bottom line".³³ To illustrate the "bargaining zone" or ZOPA between a buyer and a seller, if the buyer's RP is higher than the seller's, the distance between the two points is called the "bargaining zone".³⁴

Opening the negotiations

- 4-043 Korobkin makes the point that good negotiators do as much (or more) "asking" as they do "telling".³⁵ Hence, negotiation time should be spent on asking the other party questions in order to gain information. This enables the parties to establish the RPs and the bargaining zone.
- 4-044 Many negotiators prefer to allow the other side to make the opening offer rather than do so themselves. This avoids the potential risk of offering more than was expected and also gives an indication of the opponent's thinking first. This enables them to respond appropriately and enter into a negotiation process.
- 4-045 Thompson considers that this approach may well be correct where a negotiator does not know as much about the other side as they know about him; but considers that in other circumstances it will be advantageous to make the first offer.³⁶ Thompson's

assertion is that, although conventional wisdom suggests that one should not open first, the indications from research and literature are that it always benefits a party to make the opening proposal.

- 4-046 The reason for this lies in the principle of anchoring.³⁷ This describes a cognitive bias that occurs when individuals place undue weight on one piece of information, event or suggestion that has been placed before them. A significant body of research suggests that when an anchor is introduced, eventual agreements tend to be guided towards the anchor.³⁸ Whoever makes the first proposal establishes the anchor.

Responses to proposals

- 4-047 The following are some of the matters to be considered in responding to proposals.

Where an extreme and unrealistic demand is made, clearly the response must reflect its unacceptability. Two further points need to be borne in mind. First, there may be an impasse at some future stage that could lead to the suggestion, either explicit or implicit, that matters be resolved by splitting the difference (the midpoint rule). However, this may not have regard to the fact that one side may have started with an extreme position while the other started moderately, nor to the fact that one side may have made significant concessions in negotiations while the other has made smaller ones. Alternatively, some negotiators might respond to an extreme demand by making an equally extreme response. Hence, if a moderated response is made, this should be borne in mind if, subsequently, splitting the difference is proposed. Secondly, a response needs to undermine the anchoring effect of the initial proposal.

- 4-048 It is not easy to undermine the power of the initial anchor, which has a continuing effect even where people are aware of its influence. One possibility is to change the frame of reference in the response to the initial proposal. Lax and Sebenius give an example of this: in negotiations for the acquisition of a software company, the initial (anchoring) offer was based on a price/earnings ratio. In response, the required price was based on a different valuation method—a discounted cash flow analysis. This effectively unfroze the initial anchor.³⁹

- 4-049 Another way to overcome the initial anchor is to set out one's own proposals—supported as far as possible with data and facts. This can be further enhanced by writing down the responding proposals: it seems that putting proposals in writing, whether initially or in response, helps to entrench an anchoring effect.

- 4-050 Opening offers are not commonly accepted, as there is an expectation that the negotiation dance will take place. This is often built into the level of opening offer and response. If an opening offer is accepted, it may raise the question whether the proposal was too generous and lead to possible attempts to backtrack.

Continuing the negotiations

- 4-051 Some factors in this regard will be briefly mentioned.

Where there are a number of related issues it is generally advisable to negotiate them on a parallel basis rather than sequentially. This widens the range of possibilities for prioritising and trade-offs. If some of the issues are resolved, it is better to “park” them subject to addressing the others, rather than to regard them as finally settled: it is not at all uncommon to have to revert to

resolved issues and bring them into the reckoning during negotiation of the remaining issues. Ultimately, comprehensive terms will need to be formulated that pick up all the different elements.

Negotiators should be aware of some of the emotional and psychological factors at play in negotiations and which affect people generally.⁴⁰

- 4-052 Appropriate questioning and discussions are likely to take place during negotiations about: the issues, the effects of proposals, and express and underlying interests and concerns. Information can be released and exchanged that will help to provide insights both ways and to establish rapport between the negotiators, which can also be helpful.
- 4-053 The more parties are able to progress their negotiations, usually the greater the momentum there is to complete the remaining aspects: there is more to lose by letting a potential agreement slip the closer one gets to resolution.
- 4-054 Negotiators should also be aware of the power of symbolism that can disrupt settlements as they appear to be reaching conclusion. Sometimes symbolic issues need to be resolved by symbolic solutions. The power of words and physical things which are used to represent deeper meanings for negotiators may have a profound effect on how they function and make decisions. A word or image is symbolic. Symbolism may emerge in many contentious situations, should be taken seriously and where necessary negotiators should attempt to reach solutions that recognise the power (albeit sometimes disproportionate) that each party has invested in the issue. So, for example, apparently trivial issues may sometimes arise at the end of a successful negotiation, with the potential to disrupt agreement. This may symbolically represent to each party who was right and who was wrong, so each holds out for their position to be adopted. Solutions may need to respect the symbolic power attached to them by both parties and may often need to be creative and multi-layered.
- 4-055 Symbolic solutions may be illustrated by the significance placed on acknowledgments and apologies, for example in negligence cases, and the importance that may be placed on forms of restitution where the primary objective is not necessarily just the recovery of money—though symbolic acts may need to complement and not necessarily replace financial compensation. In some cases, symbolic restitution may for example be achieved by an agreed payment to a party's nominated charity or the wording of an agreed public statement.

Footnotes

- 27 Robert Mnookin, *Bargaining with the Devil: When to Negotiate, When to Fight* (New York: Simon & Schuster, 2010).
- 28 Roger Fisher and David Shapiro, *Building Agreement: Using Emotions as You Negotiate* (London: Random House Business Books, 2007), p.169.
- 29 See Lax and Sebenius, *3-D Negotiation: Powerful Tools to Change the Game in Your Most Important Deal* ([fn.4](#)).
- 30 Howard Raiffa, *The Art & Science of Negotiation* (Massachusetts: Harvard University Press, 1982).
- 31 Where a zone of possible agreement exists, it will be found in the overlap between the bottom end of what a claimant will ultimately accept and the top end of what a respondent will ultimately offer.
- 32 Wendi L. Adair and Jeanne M. Brett, "The Negotiation Dance: Time, Culture, and Behavioral Sequences in Negotiation" (2005) 16(1) *Organization Science*.
- 33 See Thompson, *The Truth about Negotiations* ([fn.22](#)).
- 34 Korobkin, *A Positive Theory of Legal Negotiation* (fn.2 at 1792).
- 35 Korobkin, *A Positive Theory of Legal Negotiation* (fn.2 at 1804).
- 36 See Thompson, *The Truth about Negotiations* ([fn.22](#)).
- 37 See Thompson, *The Truth about Negotiations* ([fn.22](#)).
- 38 See Lax and Sebenius, *3-D Negotiation: Powerful Tools to Change the Game in Your Most Important Deals*, ([fn.4](#)).

- 39 Lax and Sebenius 3-D Negotiation: Powerful Tools to Change the Game in Your Most Important Deal (fn.4, pp.194–196).
- 40 See the section “Perceptions and Psychology” below. See also Henry Brown, Neil Dawson and Brenda McHugh’s Psychology, Emotion and Intuition in Work Relationships: The Head, Heart and Gut Professional (Routledge, 2018).

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Skills, Strategies and Style

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Chapter 4 - Negotiation

Skills, Strategies and Style

- 4-056 Negotiation skills refer to the adeptness of the negotiator and include techniques and methods for dealing with situations as they arise; these may be learned or intuitive. Strategies refer more specifically to the actual approaches and tactics that a negotiator may employ in order to achieve the required end. Style refers to the way in which a negotiator presents himself or herself, and generally depends upon individual personality and attributes such as personal authority, humour, flair and demeanour.
- 4-057 As pointed out by Murray, Rau and Sherman,⁴¹ the terms strategy, theory and style are often confused and used interchangeably, whereas their differences are important; and there is not necessarily a relationship between them. A negotiator may well use an informal, relaxed style, follow an approach which falls, in theory, squarely into the competitive camp, and adopt a strategy which may be to make slight concessions in order to gain far more substantial advantages.
- 4-058 Individual strategy will be affected by a number of factors, including the following:
- The negotiating model followed by the negotiator: a competitive approach will give rise to a different strategy from a problem-solving approach:
 - If both (or all) adopt a co-operative approach, then the strategy is likely to be relatively open and creative, seeking joint gains and the most effective outcome for all. If the approach is competitive, the strategy is likely to include withholding information and lack of co-operation, manipulating and manoeuvring, scoring points, and seeking ways to achieve a better result than the opponent.
 - If, however, one negotiator adopts a competitive approach while the other is co-operative, the co-operative negotiator will need to adapt his or her strategy to accommodate this situation. This may require changing to a competitive mode or declining to negotiate. However a better response tends to involve maintenance of a strong, principled approach which is tough in substance but which keeps the possibilities for co-operation open, and continues to seek outcomes which work for both parties.⁴²
 - The relative power bases of the parties: this is dealt with below.
 - The culture within which the negotiator is operating and the values of the negotiators and their principals.
 - The aims, aspirations and underlying needs of the principals and the emotional factors underlying the issues.
 - The personalities and psychological make-up of the negotiators, the extent of their mandate and authority, their own private agendas, the skills which each uses, and the perceptions which each has of the personalities and aspirations of the other side.

Footnotes

41 Murray, Rau and Sherman, Processes of Dispute Resolution: The Role of Lawyers ([fn.19](#)).

- 42 See the discussion above, and see also Ch.18 of J. H. Wilkinson, Donovan Leisure Newton and Irvine ADR Practice Book (New York: Wiley Law Publications, 1990) entitled "Effective Negotiation" by Gerald R. Williams.
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Power, Culture and Gender

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Chapter 4 - Negotiation

Power, Culture and Gender

Power⁴³

- 4-059 Power may exist in different forms including: the relationship between the parties, hierarchical structure and patterns of behaviour; relative economic and financial circumstances; status and authority; relative prospects of successfully litigating the issues; greater access to information; or the power to harm the other side or damage their interests.
- 4-060 Power may also, however, be less obvious, and could for example reside in a morally strong (even if legally doubtful) position; the ability to withhold co-operation; the ability to inflict damage on another through damaging oneself (as where a debtor goes into bankruptcy). There is even the power of irrationality—the possibility that someone will act unpredictably and irrationally with uncertain effects and consequences.
- 4-061 Although power may be real, it may also be blurred by the perceptions which parties have of their own power and the power of the other side, neither of which may necessarily be accurate. Power is not a static concept and may change, for example where relationships change or where one side's vulnerability to adverse publicity may lessen, which in turn may weaken the other side's power base.
- 4-062 In negotiation, parties may use their power directly, in the form of an actual or implied threat, or indirectly merely by allowing the reality of the respective power bases to be understood. Where power vests wholly or substantially in one party, others may capitulate, or may decide to withdraw from the negotiations. Some may try to work out the best outcome achievable, recognising the other's power.
- 4-063 However, it is unusual for all the power to be on one side and none on the other. More commonly, even if one side may appear to be more powerful than the other, there may be balancing forces and consequences flowing from the exercise of power which make it necessary for power to be used with some circumspection.
- 4-064 A negotiator will need to understand the realities of his or her own power, strengths and weaknesses as well as those of the other side, and will be guided by these in formulating a strategy for the conduct of the negotiations. To redress the power imbalance a negotiator might want to think about being accompanied and supported by another person, possibly a legal advisor, at the negotiation.

Footnotes

- 43 An appreciation of power issues is crucial to effective negotiation and all processes involving negotiation. See Murray, Rau and Sherman, *Processes of Dispute Resolution: The Role of Lawyers* (1989), pp.212–220; S. Goldberg, E. Green and F. Sander, *Dispute Resolution* (Boston: Little, Brown, 1985), pp.24–33; G. Chornenki's chapter “Mediating Commercial Disputes: Exchanging ‘Power over’ for ‘Power with’” in J. Macfarlane, *Rethinking Disputes: the Mediation Alternative* (London: Cavendish Publishing, 1997); De Bono, *Conflicts: A Better Way to Resolve Them* (London: Penguin Books, 1986), pp.148–152; L. Parkinson, *Family Mediation*, 3rd edn (Bristol: Jordan Publishing, 2014), Ch.11.

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Culture, Gender and Values

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Chapter 4 - Negotiation

Culture, Gender and Values

4-065 These factors may affect negotiation.

Culture may relate to a number of different aspects, for example:

- there is the culture of the country within which the parties are operating;
- there will be cultural differences where negotiations are carried out across countries;
- local cultural differences or religious or other ethical factors may influence negotiations⁴⁴;
- there may be a culture in the industry or field of work in which the dispute arises.

In an increasingly complex and diverse world, an effective negotiator will need to appreciate the influence of cultural diversity on the course and outcome of any negotiations and to translate such understanding into a practical strategy.

4-066 Much has been written about cultural diversity in negotiation and mediation.⁴⁵ Certainly, flexibility and a non-judgmental approach are required, and an ability to obtain the acceptance of the parties in the process; the negotiator needs to be alive to the assumptions being made by the parties and their respective perceptions of fairness; and an avoidance of stereotypical responses is essential.

Gender

4-067 *Gender* in relation both to the parties and to their negotiators may influence negotiations.

Some common images and perceptions of men and women as negotiators reflect the gender stereotypes of society. For example, men are perceived as tougher and more competitive, women as more concerned and co-operative. These stereotypes have been under challenge, and one interpretation of some of the studies on the subject would suggest that these perceptions of gender differences may be a factor of power and status differentials rather than an effect of gender distinctions.⁴⁶

4-068 Nevertheless, the fact may remain that for whatever sociological, personal or other reasons, the different sexes may sometimes have real differences of power in the negotiating forum. This can be particularly relevant in family and domestic disputes, where patterns of behaviour between a man and a woman may result in disparities of power and influence.⁴⁷

4-069 A study of the methodology of conversation analysis, with mediators from a psycho-social background, concluded that women are neither generically advantaged nor disadvantaged by the process of mediation, although certain aspects of it may seem to have a more masculine character, which for some may pre-suppose that this may potentially disadvantage women in general. Mediators themselves were treated as gender-neutral, except occasionally in the context of hostile interactional moves.⁴⁸

- 4-070 Babcock and Laschever's thesis is that women need to negotiate more and that the enhancement of negotiating performance is essential for women. However, this does not translate into an assessment of the relative negotiating effectiveness of the sexes —though it may indicate that women are less likely than men to enter into negotiation following an initial offer.

Values

- 4-071 *Values* are concerned with individual ideals and principles. The values which parties and their negotiators hold is likely to influence negotiations to a certain extent. A party who has deep religious or ethical convictions may well take a different approach than a party who takes a robust competitive approach to life and to negotiations. Strongly held views and convictions about the subject of the dispute may also make a party less likely to bargain than a give-and-take approach to the matter. Sometimes it may be necessary to examine whether the issues are intractably bound up with principles, in which event negotiation might be very difficult, or whether they can be separated from the principles so as to leave the principles intact but the issues negotiable.

Footnotes

- 44 Rack has highlighted this in relation to mediations conducted between Latino and white parties. Latino culture embodies a strong notion of fairness which means that Latino bargaining begins with a fair offer. This opens the parties to disadvantageous negotiation: C Rack, *Latino Anglo Bargaining: Culture, Structure and Choice in Court Mediation* (New York & London: Routledge, 2006).
- 45 See, for example, Michelle LeBaron's excellent article: "Culture-Based Negotiation Styles" in G. Burgess and H. Burgess (eds), *Beyond Intractability*. Conflict Research Consortium (U. of Colorado, 2003). Also available at: <http://www.beyondintractability.org/essay/culture-negotiation> [accessed 11 May 2018]; John Paul Lederach, *Preparing for Peace: Conflict Transformation Across Cultures* (New York: Syracuse University Press, 1996); Michele J. Gelfand and Jeanne M. Brett (eds), *The Handbook of Negotiation and Culture* (California: Stanford University Press, 2004); and some negotiation stories across cultures in Guy Olivier Faure, *How People Negotiate: Resolving Disputes in Different Cultures* (*Advances in Group Decision and Negotiation*) (The Netherlands: Springer (formerly Kluwer Academic Publishers), 2003).
- 46 Carol Watson in SPIDR "Beyond Borders" 1991 Proceedings, 19th Annual Conference, An Examination of the Impact of Gender and Power on Managers' Negotiation Behaviour and Outcomes: Implications for ADR Practitioners.
- 47 See Ch.16: Ethics and values, fairness and power, also Ch.11 "Issues around mediating with domestic violence and abuse". Lisa Parkinson addresses the issue of gender issues in Family Mediation, 3rd edn, Family Law, (Bristol: Jordan Publishing, 2014).
- 48 See R. Dingwall, D. Greatbatch and L. Ruggerone "Gender and Interaction in Divorce Mediation" (1998) 15(4) *Mediation Quarterly* 277.

Perceptions and Psychology

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Chapter 4 - Negotiation

Perceptions and Psychology

- 4-072 *Perceptions* may have a fundamental effect on the attitudes of negotiating parties. These may or may not have any basis in reality, but their mere existence has its own effect. The concept of reality-testing, which is one of the functions of third-party intervention, is to help people review their perceptions against the facts.⁴⁹ During the course of bilateral negotiations, a similar reality-testing role may need to be performed by the negotiators.
- 4-073 *Psychological and emotional factors* may also influence negotiations. Negotiators should be aware of the extent to which individual personality traits affect negotiations. Murray, Rau and Sherman⁵⁰ highlight that this involves combinations of variables such as self-esteem, personal drive, risk-taking propensities, aggressiveness, tolerance for ambiguity and confrontation, and ethical flexibility.
- 4-074 Parties may also use psychological factors and ploys in the way they negotiate. Strategies are to some extent based on a judgment as to how the other side will react to a given offer, response or movement. This necessitates some ability to understand the other side and their own motivations and aspirations, and to have some insights into their psychology.⁵¹
- 4-075 Additionally, parties may have strong feelings about the issues or about the people with whom they are in dispute, whether this relates to personal and family issues or civil and commercial disputes.⁵² Negotiators may need to seek ways in which these can be expressed without damaging the negotiating process. Fisher and Shapiro suggest that such strong negative emotions may be dealt with by being prepared, which they consider involves: taking one's emotional temperature, and having an emergency plan in order to soothe strong negative emotions, to diagnose the triggers of one's emotions and to act with a clear purpose in mind.⁵³

Footnotes

49 For further explanations of reality testing, see Chs 10, 11 and 19.

50 In Processes of Dispute Resolution: The Role of Lawyers (1989), p.221, Murray, Rau and Sherman offer some valuable insights into the negotiating and litigation styles of lawyers, and how some may tend to make assumptions and unwittingly practise self-deception, which can sometimes result in their predicting their clients' prospects of success more favourably than warranted.

51 Lax and Sebenius, The Manager as Negotiator: Bargaining for Co-operation and Competitive Gain (1986), p.86. See also Henry Brown, Neil Dawson and Brenda McHugh's Psychology, Emotion and Intuition in Work Relationships: The Head, Heart and Gut Professional (Routledge, 2018).

52 See "The myth of rationality in civil and commercial disputes" in Ch.10.

53 Roger Fisher and Daniel Shapiro, Building Agreement: Using Emotions as you Negotiate (London, Random House, 2007), p.168.

Good Faith in Negotiation

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Chapter 4 - Negotiation

Good Faith in Negotiation

Theoretical Principles

- 4-076 Within common law jurisdictions, there are no fixed rules to suggest that negotiations should be entered into or conducted in good faith. Expectations about maintaining ethical standards are the closest in application and this will be dealt with in the context of mediation elsewhere in the book.⁵⁴ Goldberg et al make the point that within legal negotiations, the question is not whether a negotiator may mislead an opponent, but on what subjects and by what means. They go on to claim that it is difficult to obtain general agreement on ethical standards for answering such questions and equally difficult, in view of privacy in which most negotiations are conducted, to enforce agreed-upon standards.⁵⁵

Legal Principles

- 4-077 In the context of dispute resolution through the process of negotiation, in the UK there is no specific legal duty to negotiate in good faith and overall. Consequently, the concept of liability for a failure to enter into pre-contract negotiations in good faith remains relatively undeveloped in the English legal system. The situation is slightly more developed on the Continent however.

Good faith in ADR

- 4-078 A further issue to consider is whether parties owe a duty to negotiate in good faith with one another. In this regard, a fundamental difference of approach appears between the common law systems (which includes the UK, the US, and most Commonwealth countries), and the civil law systems (such as France, Germany, Switzerland and other European countries). Civil law systems are traditionally readier than common law systems to impose pre-contractual liability upon parties for a failure to negotiate and transact in good faith. Indeed, in civil law systems there is an overriding principle of good faith in the formation and performance of contracts. Common law systems, on the other hand, have traditionally been reluctant to impose a duty of good faith on negotiating parties, save where a specific fiduciary relationship exists.
- 4-079 In England and Wales good faith and fair dealing have so far played a limited role in English contract law. In fact, the House of Lords, in *Walford v Miles*, has gone so far as to say that:

“the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it

appropriate, to threaten to withdraw from further negotiations or to withdraw in fact, in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms.”⁵⁶

- 4-080 Even though there have not been any subsequent UK decisions since *Walford and Miles* (which was made in an adversarial and not private or consensual context)⁵⁷ specifically concerning the good faith issue within the context of ADR (see below), the “good faith” principle considered in that case has been revisited. For example in *Cable & Wireless Plc v IBM United Kingdom Ltd*,⁵⁸ court proceedings were stayed to enable ADR to be pursued, in accordance with the agreement between the parties.

Duty to perform in good faith?

- 4-081 No such duty has been imported into English law, but the remarks of Sir Thomas Bingham MR (as he then was) in the case of *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* are significant. He said:

“For the avoidance of doubt, we would add that we would were it material, imply a term that B Sky B should act with good faith in the performance of this contract. But it is not material”.⁵⁹

- 4-082 In civil law systems there are express statutory requirements of good faith and fair dealing such as are found in the Swiss and German codes and there is also the concept of culpa in contrahendo which does not have a statutory foundation. Courts and commentators have developed this notion by way of analogy to individual statutory provisions. According to this doctrine, the mere initiation of negotiations creates a pre-contractual relationship as a matter of law which imposes on the negotiating parties a reciprocal duty of care.

- 4-083 The following case, in which the German court granted a culpa in contrahendo claim, illustrates the doctrine. The owner of an apartment and a prospective tenant were negotiating a lease agreement. The owner gave the tenant the impression that the agreement would definitely be executed. On the strength of that, the prospective tenant terminated his current lease. Later, the owner refused without reasonable cause to rent the apartment. The court held the owner was liable for the prospective tenant’s damages.

- 4-084 Under English law, remedies in a similar case might be found by applying doctrines of misrepresentation or promissory estoppel.⁶⁰

- 4-085 Under both German and French law, there is a duty not to break off negotiations without reasonable cause if one party has led the other party to expect that the contract will be concluded in any event and if there is no reason to withdraw.

Good faith in the ADR context

- 4-086 The decision of *Walford v Miles*, in which the concept of good faith was described as “inherently repugnant” to the adversarial position of parties in negotiation, was made in the adversarial context.⁶¹ However, the concept of a contract negotiation has been described as:

“a battle of wits where each tries to manoeuvre the other into an unfavourable position, alone found in common law countries, seems deeply unattractive in the late twentieth century.”⁶²

- 4-087 ADR processes are designed to function not only in a co-operative environment but also within an adversarial context. Consequently, they may be used whether parties are negotiating in a hostile adversarial mode or a co-operative problem-solving mode. However, most consensual ADR processes would be enhanced by an obligation on participants to negotiate in good faith. This should not imply a duty on parties to act against their best interests, but rather a duty to conduct negotiations in a proper and constructive manner. There would also seem to be a distinction between two different good faith aspects. The one concept imports good faith principles into the process, by attempting in good faith to arrive at a settlement agreement, even if the negotiations are conducted with individual self-interest. This at least would be required. The other concept would import principles of good faith into the substance of the negotiations.
- 4-088 The question arises as to whether *Walford v Miles* would have been decided in the same way if it had arisen in the context of a consensual ADR process. The distinction would be that parties would have chosen a non-adversarial context for their negotiations. In such event, it would be arguable that any good faith provision in their contract should be respected and enforced. Of course, even in a non-adversarial, consensual process, parties in dispute retain separate interests. Each still aims to negotiate the outcome most favourable to him or herself, even if this may be arrived at through a principled and problem-solving approach. Hence there could well be a counter-argument that parties remain engaged in a process that respects their separate interests even where they have chosen a non-adversarial forum to try to resolve the dispute.
- 4-089 Any changes to the principles enunciated by Lord Ackner may well have to be introduced and implemented as part of a legislative programme, though judicial decisions could lead the way for this.

Footnotes

- 54 See Ch.16 for more detailed discussion on ethical standards when engaging in mediation.
- 55 Stephen B. Goldberg, Frank E. Sander, Nancy H. Rogers and Sarah R. Cole, *Dispute Resolution: Negotiation, Mediation and Other Processes* (Aspen: Wolters Kluwer Law & Business, 2014). See also James White, “*Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*” (1980) *Am. B. Found. Research J.* 926, 926-935,938, on the difficulty of proposing acceptable rules concerning truthfulness in negotiation, also available in Goldberg et al, at pp.70–71.
- 56 Lord Ackner in *Walford v Miles [1992] 2 A.C. 128; [1992] 2 W.L.R. 174 HL* at 181.
- 57 See below: “Good faith in the ADR context”.
- 58 [2002] EWHC 2059 (Comm).
- 59 *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd [1995] E.M.L.R. 472 CA (Civ Div)*.
- 60 Promissory estoppel is an equitable doctrine which prevents a party from going back on a promise which was not supported by consideration and is illustrated by the leading case of *Central London Property Trust Ltd v High Trees Ltd [1947] K.B. 130*.
- 61 Lord Ackner in *Walford v Miles [1992] 2 A.C. 128; [1992] 2 W.L.R. 174 HL* at 181. The distinction about the context is that if parties are negotiating the settlement of a dispute where there is a case pending and the negotiations are “adversarial”, Lord Ackner’s comments can be understood; but if the parties have agreed to go into mediation and have chosen a “problem-solving” or interest-based context, and have agreed to negotiate in good faith in that context, then it is questionable as to whether Lord Ackner was right to refer to good faith being repugnant to their positions.
- 62 Richard B Mawrey QC, “Good faith” *The Commercial Lawyer*, July/August 1995.

The Neutral Negotiation Role

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Chapter 4 - Negotiation

The Neutral Negotiation Role

- 4-090 The principles of negotiation outlined in this chapter apply in relation to bilateral or multilateral negotiations. They are not specifically geared to implementation through a neutral role. They are, however, also relevant to a neutral who needs to understand the issues outlined in this chapter and in particular to appreciate the theories, practice, benefits and shortcomings of problem-solving negotiation. An ADR neutral will need to draw on his or her own negotiating experience and skills to assist the parties with their negotiations. This should be done in a neutral and ethical way, without bias towards either party and without unduly influencing the parties in any way which is not expressly or implicitly envisaged and agreed by the ground-rules for the process.
- 4-091 Some ADR practitioners may initially be uncertain how to convert their negotiating experience and skills into a neutral role. When conducting separate meetings, do they negotiate with each side as if representing the other? Or do they hold back because they are in a privileged position and have some idea where the respective strengths and weaknesses lie? This uncertainty may have a paralysing effect and it is vital for an ADR practitioner to be comfortable in the neutral role of facilitating the parties' negotiations without becoming the champion of either.
- 4-092 An impartial ADR practitioner has various roles and functions, which include managing the process as well as facilitating the negotiations which may involve the use of various strategies and skills.⁶³ The practitioner can help the parties to move away from conflict and into a creative and constructive frame of mind, to implement the agenda, to communicate effectively, to generate and explore options and to re-examine their perceptions through reality testing. In these and many other ways, the practitioner helps them to engage in constructive dialogue and negotiations. Ultimately, it is the parties who negotiate with one another: the practitioner simply acts as a skilled facilitator of those negotiations, and neither an agent for either, nor a quasi-principal.

Footnotes

63 See Ch.14.

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Chapter 5 - ADR and the Courts

Introduction

- 5-001 Although ADR represents a range of alternatives to the court-based litigation system, it has also increasingly permeated and intersected that system in a number of significant ways, including the following:

oRules, practice directions and protocols:

The Civil Procedure Rules in England and Wales (CPR) contain various rules and practice directions relevant to ADR. In addition, a number of pre-action protocols have been established under the CPR, which specify certain preliminary steps to be taken before commencing proceedings, which include reference to ADR. In the family field, there have been major developments in relation to ADR including mandatory consideration of mediation.¹

oCourts adopting ADR processes:

There are a number of court procedures in which the principles of ADR are employed by judges or other court officials to cut through the full trial process in order to arrive at a speedy, informal outcome.²

oCourt-attached mediation by independent mediators:

Court-attached schemes exist and have been piloted to provide third-party mediation for litigants through independent mediators.

oCourts directing or recommending ADR processes to the parties:

Cases may be adjourned for parties to enter into mediation or some other form of ADR outside the court system. This may be ordered, or the court may simply adjourn with the proposal that the parties do so. The courts have also used judgments and other platforms to recommend the use of these processes.

oCourts imposing sanctions where ADR is not attempted:

As indicated below and in Ch.17, there has been a line of cases in the UK in which the courts have imposed sanctions for a failure by a party to mediate or enter into ADR in circumstances where it was considered reasonable that they should do so.

oCourts in some jurisdictions acting as a gateway to ADR (The Multi-Door Courthouse):

There is a concept of the court administration serving as the entry point to whatever kind of dispute resolution process may be appropriate—whether litigation through the courts or some alternative form of dispute resolution. This may be adopted in its entirety or perhaps only in some partial way.

Each of these will be considered together with other aspects of court-related ADR in the UK and elsewhere.

Footnotes

¹ Introduced under s.10(1) of the Children and Families Act 2014, attending a Mediation Information Assessment Meeting (MIAM) is a requirement for a person before making certain kinds of private family related applications to obtain a court order.

- 2 See for example: Solving disputes in the county courts: creating a simpler, quicker and more proportionate system A consultation on reforming civil justice in England and Wales—the Government Response at: https://consult.justice.gov.uk/digital-communications/county_court_disputes/results/solving-disputes-in-cc-response.pdf [accessed 11 May 2018].

Rules, Practice Directions and Protocols

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Chapter 5 - ADR and the Courts

Rules, Practice Directions and Protocols

- 5-002 The Courts of England and Wales have introduced and promoted ADR through a number of rules, practice directions and pre-action protocols.

Civil Procedure Rules (CPR)

- 5-003 A number of CPR provisions touch directly or indirectly on ADR, including the following:

Part 1—Rule 1:

The overriding objective of the Rules is set out in r.1.1(1), namely “enabling the court to deal with cases justly”, which in turn is achieved through the methods stipulated in r.1.1(2) which includes ensuring that parties are on an equal footing, saving expense, and dealing with cases proportionately, expeditiously and fairly. To this end, part of the Court’s duty of active case management arising under r.1.4(2)(e) is:

“encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure”.

Part 26—Rule 26.4:

- 5-004 This provides that a party may, when filing an allocation questionnaire, ask for the proceedings to be stayed while the parties try to settle the case by ADR or other means; and allows courts to stay cases to enable parties to try using ADR.

Part 44—Rule 44.3:

- 5-005 This outlines the court’s discretion as to the award of costs, and contains provisions regarding parties’ conduct that can be taken into account, which includes the extent to which parties followed pre-action protocols, as further mentioned below.

Family Procedure Rules 2010 (FPR)

- 5-006

The [FPR](#) have a broadly similar overriding objective as the [CPR](#), with an additional welfare consideration. [Part 3 of the FPR](#) deals specifically with [ADR](#) in family matters.

- 5-007 [Rule 3.1](#) refers to the court's powers to encourage the parties to use [ADR](#) and to facilitate its use. [Rule 3.2](#) provides that the court "must consider, at every stage in proceedings, whether alternative dispute resolution is appropriate". [Rule 3.3](#) allows the court to adjourn proceedings to enable the parties to obtain information and advice about [ADR](#), or to enable it to take place.
- 5-008 As amplified below, an important Practice Direction (3A) supplementing [Pt 3 of the FPR](#) has been issued that significantly extends the court's relationship with mediation by making it essential for divorcing couples to attend a mandatory meeting to consider mediation before being able to make an application to the court in relation to financial or children issues.

Pre-action protocols

- 5-009 Lord Woolf introduced the concept of pre-action protocols in 1996 as part of his Access to Justice Report. Their aims are to enable parties to settle their issues without launching proceedings, by encouraging them to exchange information about the issues, and to consider using a form of [ADR](#). The protocols describe the conduct the court will normally expect of the prospective parties prior to the start of proceedings. Courts making costs orders in any subsequent proceedings will have regard to the extent to which parties have complied with the protocols, or they may impose other sanctions such as staying the proceedings until the necessary steps have been taken.
- 5-010 Protocols have been established in relation to a range of specific kinds of actions, including for example personal injury, clinical negligence, defamation, construction and engineering, judicial review and professional negligence. A family law protocol has also been published. There has been relatively little support for a "one-size-fits-all" protocol; but s.III sets out principles governing the conduct of parties in cases not subject to a pre-action protocol.
- 5-011 A fundamental principle running through all the protocols is the clear support for the use of [ADR](#). Paragraph 8.1 of the Practice Direction stipulates that:

"Starting proceedings should usually be a step of last resort, and proceedings should not normally be started when a settlement is still actively being explored. Although [ADR](#) is not compulsory, the parties should consider whether some form of [ADR](#) procedure might enable them to settle the matter without starting proceedings. The court may require evidence that the parties considered some form of [ADR](#)."

Particular forms of [ADR](#) suggested are mediation, early neutral evaluation and arbitration.

Family pre-application protocol

- 5-012 Practice Direction (3A) supplementing [Pt 3 of the FPR](#) makes it essential for parties, with certain limited exceptions, to attend a mandatory meeting to consider mediation before making an application to the court in relation to various financial or children issues. This is not mandatory mediation, but mandatory pre-application consideration of mediation.
- These meetings to consider mediation, called Mediation Information and Assessment Meetings (or [MIAMs](#)) are further considered below.

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Courts Adopting ADR Processes

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Chapter 5 - ADR and the Courts

Courts Adopting ADR Processes

- 5-013 Although many courts and judges have traditionally encouraged settlement, ADR has had some influence on the way in which this is done, with formal structures created in which judges suspend their usual judicial role and assume a more facilitative function, or in which other court officials are employed to mediate or to support ADR or quasi-ADR processes. Some of these court-attached processes will be briefly considered.

Court Settlement Process and ENE: The Technology and Construction Court

- 5-014 The Technology and Construction Court (TCC) in its official Guide,³ and in its day to day practice, encourages ADR and the informal resolution of disputes. This is built into its pre-action protocol, its Case Management Conference and its procedures, which include provision for an ADR order to be made, with proceedings stayed while ADR is undertaken. The primary ADR procedures envisaged by the court—though parties are not limited to these—are mediation and Early Neutral Evaluation (ENE). The Guide provides (at 7.5.1) that:

“In an appropriate case, and with the consent of all parties, a TCC judge may provide an early neutral evaluation either in respect of the full case or of particular issues arising within it. Unless the parties otherwise agree the ENE will be produced in writing and will set out conclusions and brief reasons. Such an ENE will not, save with the agreement of the parties, be binding on the parties.”

If the judge assigned to the case undertakes the ENE, he or she will not take any further part in the proceedings, unless the parties agree otherwise.

- 5-015 The TCC also provides an innovative ADR procedure, the Court Settlement Process described (at 7.6.1) as a form of mediation carried out by TCC judges in appropriate cases and where all parties consent. The draft order for this process, contained in the Guide, outlines its procedure, which is generally decided by the parties together with the Settlement Judge. The Guide includes the following procedure for the process:

“Unless the Parties otherwise agree, during the Court Settlement Conference the Settlement Judge may communicate with the Parties together or with any Party separately, including private meetings at which the Settlement Judge may express views on the disputes. Each Party shall cooperate with the Settlement Judge. A Party may request a private meeting with the Settlement Judge at any time during the Court Settlement Conference. The Parties shall give full assistance to enable the Court Settlement Conference to proceed and be concluded within the time stipulated by the Settlement Judge.”

- 5-016 If the parties do not reach a settlement during the process, they may request a non-binding assessment from the Settlement Judge:

“setting out his views on such matters as the Parties shall request, which may include, for instance, his views on the disputes, his views on prospects of success on individual issues, the likely outcome of the case and what

would be an appropriate settlement. Such assessment shall be confidential to the parties and may not be used or referred to in any subsequent proceedings.”

5-017 This may be considered to be an evaluative form of mediation, with the evaluative element at the further end of the evaluation spectrum and undertaken by a neutral whose views are likely to be highly persuasive, given that he or she would have been the judge deciding the case at the trial. Of course, the whole process is confidential and privileged, and the Settlement Judge takes no further part in the case, and may not be called as a witness in any subsequent proceedings. The Settlement Judge is also given the same immunity from suit as he or she would have had if acting in a judicial capacity.

5-018 According to research on the TCC conducted by King’s College London⁴:

“an internal report by Akenhead J, summarised in the TCC’s 2008 Annual Report, suggests a slow take-up at the start but a high settlement rate (78%) in those cases which have been through the CSP”.

The 2014 Annual Report of the Technology and Construction Court reported that ADR has continued to play a large role in resolving technology and construction disputes, with many cases being resolved by means of ADR.

Financial Dispute Resolution (FDR)⁵

5-019 In this scheme, a District Judge meets the parties and their lawyers with a view to helping move them towards the settlement of financial issues arising on divorce. This FDR hearing is evidentially privileged, to allow the parties and their lawyers freedom to discuss the matter freely and to negotiate settlement terms.⁶ The judge dealing with the FDR does not hear the case if the parties do not settle: it is appointed to another judge. In this evidentially privileged environment, the judge is provided with information about offers, responses and counter-offers made to date, albeit that these have been made on a without prejudice, evidentially privileged basis, and can comment on the proposed terms, without hearing any evidence. The judge can also, if appropriate, indicate his or her views on the issues and what judgment he might give if he or she were to be hearing the case. Parties and lawyers are invited to consider these privately, and may return to the District Judge for further discussion and guidance from time to time after their private meetings.

5-020 The FDR meeting is conducted as an evaluative ADR process, albeit with a higher level of evaluation than in many other ADR forms. As with other non-binding neutral evaluative processes, the evaluation is intended to help the parties and their lawyers to address settlement realistically.

This procedure is reported to be working very successfully, though it can be stressful and some parties may prefer the mediation alternative.

The Small Claims Mediation Service

5-021 As outlined in the next section, the mediation of small claims by independent mediators, referred by the court, has been undertaken with reasonably significant success in a few courts for some years. There has, however, been a development with the establishment of a Small Claims Mediation Service, which initially employed in-house mediators to undertake the mediation of small claims by telephone (or occasionally face-to-face) as a free service.

5-022

The scheme was originally established to deal with claims of under £5,000 where proceedings have been started and if the parties agree to mediate, the service will contact them. The average time from allocation to mediation is around five weeks, and the average time for a mediation session is about one hour. In a keynote speech to the Civil Mediation Council in May 2014, Lord Faulks, then Minister of State for Justice, reported that HMCTS had expanded and centralised its Small Claims Mediation Service. All cases with a dispute value of up to £10,000 are now automatically referred to mediation, without judicial intervention, where all parties request it. He claimed that this service is now considering over 10,000 referrals a year, helping people settle disputes earlier in the proceedings, and so far saving over 9,400 hours of judicial hearing time. On average 64 per cent of cases referred to the service settle. He claimed that results of a recent survey reveal that 95 per cent of Small Claims Mediation Service users would use the service again.⁷

- 5-023** According to Lord Justice Briggs, statistics kept by the originator of the scheme in the Hampshire, Dorset, Wiltshire area suggest that 25 per cent of the entire small claims track list is disposed of due to non-attendance, 50 per cent at the conciliation hearing, and a significant proportion of the remaining 25 per cent settles before trial, due (anecdotally) to progress towards settlement achieved at the conciliation hearing.⁸

Judges as mediators

- 5-024** Apart from the processes outlined above in which judges and court officers have mediatory functions, there are many jurisdictions in which the judges serve as mediators in an ordinary mediation process. For example, in Quebec, the justice system integrates adjudication and mediation in all areas of law. “It is a unified and hybrid system of justice, unique in the world in its longevity and its comprehensiveness.”⁹
- 5-025** Quebec is not, however, unique in the use of judges as mediators. So, for example, this has been widely adopted in some Scandinavian countries. Germany has a tradition of judges helping to deal with cases consensually as well as adjudicating, and there are now a significant number of court-based mediation projects. Judges also act as mediators in Australia.
- 5-026** In Europe, the organisation GEMME—the European Association of Judges for Mediation—is a body with national sections whose members are judges working to support the development and implementation of mediation in a coordinated manner.
- 5-027** These are just examples of judicial interest and involvement in mediation. In addition, there is also an increasing trend of judges becoming private mediators after their retirement from the Bench, and making significant contributions to ADR in that capacity.

Issues around judges as mediators

- 5-028** Although the fact that judges are supporting and recommending mediation and other ADR processes is widely welcomed, there are concerns about judges themselves mediating in their judicial capacities, though there are also positive aspects to this development.
- 5-029** The arguments against judges mediating include the following:
- Mediation is not a proper exercise of the judicial function. Judges make determinations based on fair trial and the principles of natural justice. Sir Laurence Street, former Chief Justice of New South Wales and after retirement an eminent mediator, said that:

“A court that makes available a judge or a registrar to conduct a true mediation is forsaking a fundamental precept upon which public confidence in the integrity and impartiality of the court system is founded. Private access to a representative of a court, by one party, in which the dispute is discussed and views are expressed in the absence of the other party, is a repudiation of basic principles of natural justice and absence of hidden influence that the community rightly expects and demands that the courts observe.”¹⁰

•The mediation role is a very different one from the judicial one, requiring a different skills set and an entirely different way of exercising personal authority. Judges are used to being directive and making evaluations, neither of which is necessarily appropriate in mediation mode.

•Mediation by judges threatens public confidence in the court:

“Allowing judges to mediate cases can cause mischief to the point of seriously compromising both the impartiality and neutrality of the court and its appearance of impartiality and neutrality, thus undermining the public respect that is the foundation of its very existence.”¹¹

•Being a good judge does not automatically translate into being a good mediator. There is no recognised method of assessing judges’ qualification and ability to mediate, as there is in conventional mediation training programmes, nor is there any follow-up regime of continuing professional development (CPD).

•Confidentiality is vitally important in those models that involve separate and private meetings. Even if the judge who mediates will not try the case if it does not settle, there may be a risk of another judge in the same court becoming aware of what was said—or a perception in the parties’ minds that this might happen.

5-030 On the other hand, the arguments in favour of judicial mediation include the following:

•ADR has become part of the mainstream of dispute resolution, and courts and judges need to adapt to this reality.

•Judges would train and undergo the same rigorous preparation for mediation as private mediators undertake. There is ample experience that judges, lawyers and others accustomed to being directive in their usual professional roles and exercising authority can learn to work in another way required by the mediation process.

•Judges are used to being impartial and are:

“well-suited for the role of mediator for several reasons, relating both to the perceptions of the parties and to the specific skills possessed by judges. Of particular importance is the perception of the judicial office as one of impartiality and independence, which confers on judges a degree of moral authority,”

the exercise of which is “extremely delicate”.¹²

•Judges would maintain confidentiality of the process, and if the matter were not settled in judicial mediation, a different judge would have conduct of the case.

•The judge-mediator is well able to help parties “reality test” effectively, though there is a view that judge-mediators should not express any view on the merits.

•Judicial mediation can also be more cost-effective than private mediation, as there would not be a mediator’s fee to pay —making access to mediation more affordable for those in the court system.

5-031 It does seem that judicial mediation alongside the option of private independent mediation offers the public a valuable range of options.

Footnotes

- 3 Technology and Construction Court Guide, 3rd Revision (March 2014) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448256/technology-andconstruction-court-guide.pdf [accessed 11 May 2018].
- 4 Nicholas Gould, Claire King and Philip Britton, *Mediating Construction Disputes: An Evaluation of Existing Practice* (London: King's College, Centre of Construction Law and Dispute Resolution, 2010).
- 5 *Family Proceedings Rules 1991*, amended by *Family Proceedings (Amendment No.2) Rules 1999*.
- 6 *Practice Direction (Fam Div: Family Proceedings: Financial Dispute Resolution)* [1997] 1 W.L.R. 1069; [1997] 3 All E.R. 768, stipulates that “the FDR appointment is part of the conciliation process and should be so regarded by the courts and the parties”. It refers to r.2.75(1) and to *Re D (minors)* and concludes that, with specified exceptions, “evidence of anything said or of any admissions made in the course of an FDR appointment will not be admissible in evidence”.
- 7 See Lord Faulks, keynote speech at the Civil Mediation Conference, 22 May 2014 available at: <https://www.gov.uk/government/speeches/mediation-and-government> [accessed 11 May 2018].
- 8 Lord Justice Briggs, Civil Courts Structure Review: Final Report, July 2016 available at: <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf> [accessed 11 May 2018].
- 9 Louise Otis and Eric H. Reiter, “Mediation by Judges: A New Phenomenon in the Transformation of Justice” (2006) 6 Pepperdine Dispute Resolution Law Journal 351.
- 10 Sir Laurence Street, “Mediation and the Judicial Institution” (1997) 71 Australian Law Journal 794.
- 11 Alan Limbury, “‘Why judges shouldn’t be mediators’ and ‘mandatory mediation’—an Australian perspective” (Summer 2006) 11(1) The Expert & Dispute Resolver.
- 12 Otis and Reiter, “Mediation by Judges: A New Phenomenon in the Transformation of Justice” (fn.9).

Court-Attached Mediation by Independent Mediators

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Chapter 5 - ADR and the Courts

Court-Attached Mediation by Independent Mediators

- 5-032 The term “court-attached” mediation (sometimes also referred to as “court-annexed”, “court-related” or “court-linked” mediation) is used to describe the process in which the court incorporates mediation as part of its procedural system and/or makes the arrangements for the appointment of the mediator, and/or provides its premises for the mediation.
- 5-033 In some forms of court-attached mediation, a judge or court official will serve as the neutral. These have been considered in the previous section. In other forms of court-attached mediation, the mediator appointed is not a judge or court officer, but an independent third party, commonly on a court-approved panel. This form of court-linked process is considered in this section.

County Court mediation schemes

- 5-034 A number of pilot schemes have been established over the years in which selected County Courts in England and Wales referred cases to independent mediators. None of these have continued in operation, having been replaced in 2007 by the National Mediation Helpline, which itself has been replaced by an online directory hosted by the Ministry of Justice.¹³
- 5-035 Examples of pilot County Court schemes, now discontinued, include *The Birmingham Civil Justice Centre* which provided for litigants to be introduced to a professionally qualified mediator to conduct a three hour mediation at a modest fee; *The Leeds Combined Court Centre* pilot scheme, with mediators appointed on a rota basis and remunerated on a set scale of fees; and *The Central London County Court* mediation scheme, which was the first and main one to operate in England, having run as a pilot scheme from 1996 to 1998 and then as a permanent part of the court until 2006. The choice whether or not to use the scheme was voluntary, save for a trial of an Automatic Referral to Mediation Scheme (ARMS) in which selected cases were referred to mediation, with an opt-out provision, where considered justifiable. The scheme was evaluated in 1998 and again in 2007 by Professor Dame Hazel Genn.¹⁴

The Exeter small claims scheme¹⁵

- 5-036 In the Exeter scheme solicitor-mediators worked on a voluntary basis to provide free 30-minute mediation appointments (initially only 20 minutes) to litigants referred by the district judges.
- 5-037 The tight time frame meant that complex cases could not be undertaken. Each party was given about two minutes to explain their case, and the focus was then on settlement. Mediators also had limited time to prepare: they were required to read six files in about 40 minutes, on the mediation day. They thus only had a loose understanding of the issues, and limited time to explain their role to the parties. Although individual styles varied, mediators needed to be more directive in order to meet the required

time-frame. The judge was immediately available to make an order to reflect the settlement terms, which was helpful in itself, and also to give additional authority to the mediator and the process.

- 5-038 A research report on the Exeter scheme¹⁶ reflected that 70 per cent of the cases referred to mediation settled before trial—58 per cent in the mediation and 12 per cent either before or afterwards.

The Court of Appeal mediation scheme (CAMS)

- 5-039 Where a court has made a judgment or award and an appeal is made to the Court of Appeal, parties may use the mediation scheme provided by the Court of Appeal, which dates back to 1996, using independent mediators, to try to resolve their issues. Both or all parties need to agree to do so as the scheme is entirely voluntary.
- 5-040 Civil and commercial cases are administered by CEDR Solve, the service arm of the Centre for Effective Dispute Resolution. CEDR Solve will then arrange for the appointment of a mediator from a panel of independent mediators, unconnected with the court, and the process will take place on a confidential and evidentially privileged basis.
- 5-041 Where an appeal referred to CAMS is exceptionally complex or substantial, and the parties are able to fund mediation at commercial rates, CEDR Solve may suggest that a commercial mediation outside CAMS be arranged. Or if both parties are litigants in person and mediation through CEDR Solve may not be possible, LawWorks Mediation (a charity with lawyer volunteers offering support where public funding is not available) may be able to provide a mediator free of cost to the parties as well as pro bono assistance.
- 5-042 Family cases are administered and monitored by the Civil Appeals Office, which appoints a mediator from a panel of one of the specified family mediation providers authorised from time to time, including the Law Society.

Mediation Information and Assessment Meetings (MIAMs)

Family proceedings

- 5-043 Reference has been made to Practice Direction (3A), supplementing Pt 3 of the Family Procedure Rules, which applies where a person is considering applying for an order in relevant family proceedings (most proceedings relating to children or matrimonial finance, with specified exceptions such as emergency or enforcement proceedings), and under which it is mandatory to attend a meeting to consider mediation. The court will wish to know whether this has been complied with.
- 5-044 There are certain limited exceptions, for example where either party is bankrupt; where there has been an allegation of domestic violence against a party resulting in a police investigation or the issuing of civil proceedings for the protection of any party within the last 12 months; where an urgent application needs to be made that involves potential risk of harm or hardship; where there are specified difficulties in getting a mediator; or where a mediator considers that a preliminary meeting would not be suitable.

5-045 MIAMs are conducted by currently practising family mediators who comply with prescribed requirements, which include membership of an organisation belonging to the Family Mediation Council, complying with training, supervision/consultancy and continuing professional development criteria, and being specifically qualified to undertake MIAMs. This may either involve having been accepted to deal with public funding preliminary meetings or undertaking a specific MIAMs training workshop.

Civil proceedings

5-046 In 2012 The Ministry of Justice published the response to its consultation process, which included the question as to whether a procedure similar to the family MIAM might be introduced on a mandatory basis for civil claims of up to £100,000 and, if so, what form of process should be specified. Fifty-eight per cent of respondents disagreed with the proposal, with 42 per cent of respondents, mainly from the mediation provider sector, suggesting that compulsory mediation information sessions would be helpful to parties in court. Overall, respondents generally agreed that it would be useful for parties to have information to enable them to engage in mediation or other forms of alternative dispute resolution, and that information as to mediation could be sent to each party as a matter of course during the pre-trial process. They are, however, concerned that an additional compulsory stage might result in further unnecessary costs and delays being incurred as part of the civil justice process.¹⁷

5-047 There are no firm plans to introduce a MIAM for civil cases. However if this were to be introduced, questions arise as to who will conduct these meetings, what qualifications might be prescribed for them, and what exemptions might apply.

Footnotes

13 The online directory can be accessed at <http://civilmediation.justice.gov.uk/> [accessed 11 May 2018].

14 For the 1998 research, see: <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/research/1998/598esfr.htm> [accessed 11 May 2018]. For the 2007 research, see https://www.researchgate.net/publication/32894907_Twisting_arms_court_referred_and_court_linked_meditation_under_judicial_pressure which, as the title suggests, inter alia expresses concern at judicial pressure to mediate. See also fn.31 below.

15 This scheme was set up on the initiative of local solicitor Jeremy Ferguson together with District Judge Jill Wainwright.

16 Research Report by Dr Sue Prince, Court-based Mediation: A preliminary analysis of the small claims mediation scheme at Exeter County Court (Civil Justice Council, 2004).

17 See the Government Response to the consultation on reforming civil justice in England and Wales at fn.2.

Courts Directing or Recommending ADR Processes

Brown & Marriott's ADR Principles and Practice, 4th Ed.

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Courts Directing or Recommending ADR Processes

- 5-048 Another way in which ADR intersects with the court system arises when judges direct parties to try mediation or some other ADR process in appropriate cases.

The Commercial Court:

- 5-049 English Commercial Court judges have been making orders directing parties to try using ADR in appropriate cases since 1993, bolstered by two Practice Directions, one in 1994 and one in 1996.¹⁸ The relevant court guide¹⁹ states that:

“While emphasising its primary role as a forum for deciding commercial cases, the Commercial Court encourages parties to consider the use of ADR (such as, but not confined to, mediation and conciliation) as an alternative means of resolving disputes or particular issues.... The commercial judges will in appropriate cases invite the parties to consider whether their dispute, or particular issues in it, could be resolved through ADR.... The judge may, if he considers it appropriate, adjourn the case for a specified period of time to encourage and enable the parties to use ADR.... The judge may further consider in an appropriate case making an ADR order....”

- 5-050 A report on ADR in the Commercial Court was produced in 2002 by Professor Hazel Genn²⁰ who analysed the outcome of ADR orders and found that the success rate was around 50 per cent, with the majority of those that did not settle during the ADR stage settling afterwards and only a very small proportion proceeding to trial. Some solicitors expressed concerns and scepticism but in the majority of cases an ADR order was not seen to have a negative impact on negotiations, and experiences of ADR, when it was successful, were “overwhelmingly positive”. When ADR was not successful, there was—unsurprisingly—a lower level of satisfaction, and concern about increased costs, the time spent on the failed ADR, and the problem of putting pressure on an unwilling opponent to come to the negotiating table.

- 5-051 *The Technology and Construction Court* (TCC) has also taken a robust position in supporting ADR. In addition to its Court Settlement Process its official Guide provides as follows²¹:

“The court will provide encouragement to the parties to use alternative dispute resolution (‘ADR’) and will, whenever appropriate, facilitate the use of such a procedure.... at the first CMC [Case Management Conference], the court will want to be addressed on the parties’ views as to the likely efficacy of ADR, the appropriate timing of ADR, and the advantages and disadvantages of a short stay of proceedings to allow ADR to take place.... the court may order a short stay to facilitate ADR at that stage. Alternatively, the court may simply encourage the parties to seek ADR....”

- 5-052 The Guide indicates that mediation is most likely to be the appropriate process. The court expects parties to comply with any ADR procedure selected, and may impose a cost sanction if there is a failure to do so, though the confidentiality of the process is expressed as being something that will need to be preserved.

- 5-053 *The Chancery Division of the High Court* also supports ADR in its official Guide,²² which provides:
- “The settlement of disputes without a trial, by means of Alternative Dispute Resolution (‘ADR’) can help litigants (a) to save costs, (b) to achieve settlement of their disputes while preserving their existing commercial relationships and market reputation and provide litigants with a wider range of solutions than those offered by the determination of the issues in the claim.... The court will readily grant a stay at an early stage of the claim to accommodate mediation or any other form of ADR if the parties are agreed that there should be a stay....”
- 5-054 These are examples of the court’s encouragement of ADR and willingness to give directions and make orders for ADR; but many other courts similarly support and encourage the use of ADR, and mediation in particular. There are many reported cases in which mediation or other ADR has been promoted, in addition to those where the court actually imposed sanctions for a failure to mediate, including for example:
- 5-055 *Barker v Johnson* [1999] EWCA Civ 1088: This was a bitterly contested neighbour case, in which Ward LJ said:
- “I would urge these parties to seek the help of this court’s ADR service in order to explore whether a compromise would not only enable this litigation to be killed off sooner rather than later, but that some sense of compromise might bring a greater sense of happiness and peace in the respective homes of neighbours.”
- 5-056 *R. (on the application of Cowl) v Plymouth City Council* [2001] EWCA Civ 1935; [2002] 1 W.L.R. 803 Lord Woolf said:
- “Particularly in the case of such disputes, both sides must by now be acutely conscious of the contribution alternative dispute resolution could make to resolving disputes in a manner that both met the needs of the parties and the public, and saved time, expense and stress Today, sufficient should be known about Alternative Dispute Resolution to make the failure to adopt it, in particular when public money was involved, indefensible.”
- 5-057 *Al-Khatib v Masry* [2004] EWCA Civ 1353; [2005] 1 F.L.R. 381: This was a family case involving children and Sharia law, which was settled by mediation organised by the Court of Appeal, in which Thorpe LJ said:
- “From the point of view of the Court of Appeal it supports our conviction that there is no case, however conflicted, which is not potentially open to successful mediation, even if mediation has not been attempted or has failed during the trial process.”
- 5-058 *Burchell v Bullard* [2005] EWCA Civ 358: A building dispute in which Ward LJ, said:
- “The parties cannot ignore a proper request to mediate simply because it was made before the claim was issued. With court fees escalating it may be folly to do so. I draw attention, moreover, to para 5.4 of the pre-action protocol for construction and engineering disputes, which I doubt was at the forefront of the parties’ minds, it should preferably apprise the parties to consider at a pre action meeting whether some form of alternative dispute resolution procedure would be more suitable than litigation. These defendants have escaped the imposition of a costs action in this case but defendants in a like position in the future can expect little sympathy if they blithely battle on regardless of the alternatives.”
- 5-059 *IDA Ltd v University of Southampton* [2006] EWCA Civ 145: Jacob LJ said:
- “This sort of dispute is particularly apt for early mediation. Such mediation could well go beyond conventional mediation (where the mediator facilitates a consensual agreement). I have in mind the process called ‘medarb’

where a ‘mediator’ trusted by both sides is given the authority to decide the terms of a binding settlement agreement.”

- 5-060 *Egan v Motor Services (Bath) Ltd [2007] EWCA Civ 1002; [2008] 1 W.L.R. 1589*: Ward LJ said:

“This case cries out for mediation” should be the advice given to both [parties] Mediation can do more for the parties than negotiation Mediation is a perfectly proper adjunct to litigation. The skills are now well developed. The results are astonishingly good. Try it more often.”

Footnotes

- 18 Practice Note (Commercial Court: Alternative Dispute Resolution) Cresswell J [1994] 1 All E.R. 34; Practice Statement: *Alternative Dispute Resolution*, 7 June 1996, Waller J.
- 19 Ministry of Justice, The Admiralty & Commercial Courts Guide (2014, updated March 2016).
- 20 Professor Hazel Genn, Court-based ADR Initiatives for Non-Family Civil Disputes: The Commercial Court and the Court of Appeal (London: Lord Chancellor’s Department, 2002).
- 21 Technology and Construction Court Guide, 2nd edn, 3rd Revision March 2014.
- 22 Chancery Guide, February 2016.

Courts Imposing Sanctions Where ADR is Not Attempted

Brown & Marriott's ADR Principles and Practice, 4th Ed.

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Courts Imposing Sanctions Where ADR is Not Attempted

- 5-061 The policy of the courts in relation to the imposition of costs sanctions for a failure to mediate or use any other ADR process is set out in Ch.10. As mentioned there, the leading case on this is *Halsey*²³ in which the Court of Appeal set out guidelines for deciding whether costs sanctions should apply in the event of a refusal to mediate.
- 5-062 In his judgment, Lord Justice Dyson said:
- “The value and importance of ADR have been established within a remarkably short time. All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR.”
- 5-063 Indeed, no mediator would consider that mediation was appropriate in all circumstances and the issuing of guidance, adopted from the Law Society’s submissions to the Court of Appeal, helps clarify when it is or is not reasonable to expect parties to undertake ADR.
- 5-064 Two elements of the judgment may need further consideration, as raised by Lightman J in a speech on the subject.²⁴ The first is the issue of art.6 of the European Convention on Human Rights, which is dealt with further below; and the other is the question as to where the onus of establishing reasonableness or otherwise should fall. In this regard, Lightman J expressed the view, which the authors of this work would support, that it was wrong and unreasonable to place the burden of proof of reasonableness on the party who wished to mediate. He considered that this needed to be guided by three factors: access to justice,
- “the commonsense proposition that the party who has decided not to proceed to mediation and knows the reasons for his decision should be required to give, explain and justify his decision”;
- and the duty of the court to encourage the use of mediation. In his view, all these factors pointed in the opposite direction to that taken by the Court of Appeal.
- 5-065 The *Halsey* principles have been followed in a number of cases since they were formulated. In *Couwenbergh v Valkova*²⁵ the Court of Appeal reaffirmed the relevance of *Halsey*, notwithstanding serious allegations of fraud (negating any suggestion that it is not possible to mediate where there are allegations of fraud). Wall LJ was critical of the Legal Services Commission, who had funded the action but declined to participate in mediation, indeed were said to have obstructed it, saying that the court:
- “could not contain our criticism of the authorities for such an intransigent view. When costs do finally have to be allocated, we hope these observations will be borne in mind when the court comes to apply the guidelines in *Halsey v Milton Keynes General NHS Trust [2004] EWCA (Civ) 576* on how to deal with failures to mediate despite the encouragement to do so.”²⁶
- 5-066 But consider *Swain Mason v Mills & Reeve*²⁷ where in having regard to the Halsey guidelines, the Court of Appeal took the view that a parties’ refusal to mediate was in the circumstances of the case justified and in exercising the court’s discretion on

costs, held that having not acted unreasonably in refusing mediation, on that basis the successful party should not be penalised in costs. Each case must therefore be considered on its individual merits and with judicial consideration of the Halsey guidelines. What this case illustrates is that refusal to mediate, despite judicial encouragement to participate, may in some circumstances be justified and considered reasonable. Nevertheless declining an invitation to mediate remains a high-risk strategy, as an unreasonable refusal may result in the court imposing punitive costs sanctions.

Footnotes

- 23 [Halsey v Milton Keynes General NHS Trust \[2004\] EWCA \(Civ\) 576; \[2004\] 1 W.L.R. 3002](#). For further discussion and background, see Ch.17.
- 24 Speech given at the London law firm, S.J. Berwin, on 28 June 2007.
- 25 [\[2004\] EWCA Civ 676](#).
- 26 [Couwenbergh v Valkova \[2004\] EWCA Civ 676](#) at [55].
- 27 [\[2012\] EWCA Civ 498](#).

Courts Acting as a Gateway to ADR (The Multi-Door Courthouse)

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Chapter 5 - ADR and the Courts

Courts Acting as a Gateway to ADR (The Multi-Door Courthouse)

- 5-067 The concept of the multi-door courthouse was originated in 1976 by Professor Frank E. A. Sander, Professor of Law at Harvard University. He considered certain criteria to be important for determining the effectiveness of a dispute resolution system, namely:

“cost, speed, accuracy, credibility (to the public and the parties), and workability. In some cases, but not in all, predictability may also be important.”²⁸

- 5-068 Sander identified two questions as important, namely the significant characteristics of various alternative dispute resolution mechanisms, and how these characteristics could be utilised so that some rational criteria could be developed for allocating various types of disputes to different dispute resolution processes. He outlined a spectrum of processes, on a decreasing scale of external involvement, with adjudication at the one end and “avoidance” at the minimum involvement end (an approach he described as “clearly undesirable”).

- 5-069 Sander’s analysis led him to recommend:

“a flexible and diverse panoply of dispute resolution processes, with particular types of cases being assigned to differing processes (or combinations of processes) ... one might envision by the year 2000 not simply a court house but a Dispute Resolution Centre, where the grievant would first be channelled through a screening clerk who would then direct him to the process (or sequence of processes) most appropriate to his type of case.”

An initial enquiry to the court would be dealt with by an intake officer, who would aim to give an individual and specialised answer to each inquirer.

- 5-070 The Multi-Door Courthouse was implemented in several US courts, but although it was tested in many states, few of these went on to implement it. Nevertheless, the Multi-Door Courthouse may well have had a role in encouraging the exploration of new dispute resolution concepts, and may well have influenced the way in which the courts have supported ADR, albeit not in the structured way envisaged by Sander. The idea of courts being able to serve as an initial point of contact not just to litigation but to other appropriate forms of dispute resolution is an excellent one, and remains a valid aspiration.

- 5-071 Indeed, the concept continues to serve as an inspiration to court systems in some parts of the world. In Nigeria, the Lagos Multi-Door Courthouse is the first court-connected ADR Centre in Africa offering mediation, conciliation, arbitration and early neutral evaluation with its main focus on the enhancement of justice, facilitated by online case processing and scheduling. Changes to the Lagos Court’s civil procedure rules in 2012 made it mandatory for lawyers and litigants to embrace the multi-door ADR system. Singapore, too, has a multi-door courthouse for its subordinate courts.

Footnotes

[28](#) See the Pound Conference report, cited as 70 Federal Rules Decisions, (FRD) 79 at p.113.

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Mandatory ADR and Human Rights: The Article 6 Argument

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Chapter 5 - ADR and the Courts

Mandatory ADR and Human Rights: The Article 6 Argument

- 5-072 One of the issues that arises in the context of incorporating ADR as part of the court system is whether requiring parties to participate in an ADR process might infringe their rights under art.6 of the European Convention of Human Rights, which provides inter alia that:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

The contention is clearly set out in the *Halsey* judgment, in which Dyson LJ says:

“It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court. The court in Strasbourg has said in relation to article 6 of the European Convention on Human Rights that the right of access to a court may be waived, for example by means of an arbitration agreement, but such waiver should be subjected to ‘particularly careful review’ to ensure that the claimant is not subject to ‘constraint’: see *Deweerd v Belgium (1980) 2 EHRR 439*, para 49. If that is the approach of the ECtHR to an *agreement* to arbitrate, it seems to us likely that *compulsion* of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6.”²⁹

- 5-073 There are many reasons to believe that the Court of Appeal were mistaken in their view that compulsory mediation would infringe art.6. First, by way of background, it should be said that the Law Society, whose submissions as an Interested Party were adopted by the Court of Appeal in formulating their criteria, did not submit the proposition that compulsory mediation would be an infringement of art.6, and indeed that was not a view that they had expressed. Secondly, the court itself was not dogmatic about the proposition, Dyson LJ going on to say:

“Even if (contrary to our view) the court does have jurisdiction to order unwilling parties to refer their disputes to mediation, we find it difficult to conceive of circumstances in which it would be appropriate to exercise it.”

- 5-074 The fundamental point is that nobody is deprived of their right to a fair trial by virtue of being required to enter into mediation or any other consensual ADR process any more than if they were required to attend a hearing for directions as a procedural step in the process. Requiring parties to negotiate with one another on the basis that they can continue to trial if they are unable to agree simply cannot be regarded as depriving them of a “fair and public hearing within a reasonable time”.

- 5-075 Perhaps Lightman J may be quoted to sum up the position³⁰:

“(1) The court appears to have been unfamiliar with the mediation process and to have confused an order for mediation with an order for arbitration or some other order which places a permanent stay on proceedings. An order for mediation does not interfere with the right to a trial: at most it merely imposes a short delay to afford an opportunity for settlement and indeed the order for mediation may not even do that, for the order for mediation may require or allow the parties to proceed with preparation for trial; and (2) the Court of Appeal appears to have been unaware that the practice of ordering parties to proceed to mediation regardless of their wishes is prevalent elsewhere throughout the Commonwealth, the USA and the world at large, and indeed at home in matrimonial property disputes in the Family Division”

- 5-076 A similar point is made by Professor Hazel Genn and others in their evaluation review of the mediation programmes at the Central London County Court.³¹ They say:

“It is arguable whether, in fact, a direction to attempt mediation prior to a hearing would infringe Article 6. Referral to mediation is a procedural step along the way to a court hearing if the case does not settle at mediation. It does not exclude access to the courts and to require parties to attend a three-hour low-cost mediation session does not order them to compromise their claim. Having attended the mediation meeting, the parties are free to terminate and leave at any point and to continue with the litigation.”

It is to be hoped that the argument about the effect of mandatory mediation as part of a court process in relation to art.6 will be more fully presented and argued in the future, rather than the somewhat spontaneous way it arose in *Halsey*.³²

Footnotes

29 [Halsey v Milton Keynes General NHS Trust \[2004\] EWCA \(Civ\) 576](#) at [9].

30 Speech given at the London law firm, S.J. Berwin, on 28 June 2007.

31 See Genn et al at fn.14.

32 There is an argument that the position may be more nuanced than outlined above. Case law from the European Court of Human Rights suggests that, in certain circumstances, there could be an issue with the right of access to courts. See the article by Shirley Shipman, “*Compulsory Mediation: the Elephant in the Room*” (2011) 30 C.J.Q. 163. See also the forthcoming article by Lorna McGregor, Rachel Murray and Shirley Shipman in Human Rights Quarterly 2019, “Should National Human Rights Institutions Institutionalise Dispute Resolution?”

Court-Annexed Arbitration

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Court-Annexed Arbitration

- 5-077 In order to avoid confusion we should distinguish between two different kinds of arbitration through the courts:
- In England and elsewhere, a binding arbitration may be effected by a commercial court judge; or the county court may order that a small claims dispute be dealt with by binding arbitration by a district judge or a third party, with the force of a court order.
 - These conventional binding forms of arbitration by the court may be useful and valuable, but in this book they are not included in the terms "court-annexed arbitration" or "court-ordered arbitration", and will not be further addressed in this chapter.
 - In a different procedure, used in the US and elsewhere, but not in England, the court orders a case to be dealt with by arbitration by a third party, whose finding is initially non-binding. Either party may require a re-hearing by a judge, but if neither does so the award becomes a binding court order. However, if the case is re-heard by a judge, and the judge's decision does not result in a better award to the person who applied for the re-hearing, sanctions may apply to that party (where they are constitutionally allowed). It is this process that is called "court-annexed arbitration" (the term which for convenience this book will henceforth use) or "court-ordered arbitration".
- 5-078 Although court-annexed arbitration is not available in England, it has become established in a number of other jurisdictions as an effective way of dealing with disputes without having to embark on full-scale litigation.

Non-binding court-annexed arbitration

- 5-079 Non-binding court-annexed arbitration has been viewed as successfully achieving two goals:
- "… [providing] prompt, relatively inexpensive, fair and less formal resolution of a great many civil cases; and [preserving] at the same time the procedural and substantive rights of citizens involved in law suits."³³
- Court-annexed arbitration might be less effective if a significant proportion of disputants chose to have a re-hearing. Applications without merit for a re-hearing need to be discouraged, while preserving an effective right to do so. One such sanction in the US is a costs award against the applicant for a re-hearing who does not improve his position at a trial. This has been held to be invalid in Michigan by reason of being outside the trial court's rule-making authority³⁴; but the Washington and Florida ADR statutes make specific provision for this, and Washington state's intermediate appellate court has upheld such provisions.³⁵
- 5-080 The court-annexed arbitration procedure can also facilitate settlements because, after the non-binding arbitration, realistic settlement discussions can and do take place, which necessarily have regard to the non-binding award made by the arbitrator and the fact that the losing party may wish to seek a re-hearing.
- 5-081

The level of jurisdiction and the nature of subject-matter appropriate to court-annexed arbitration is generally fixed by the relevant statute or rules: this process tends to be used for lower levels of dispute and not for cases involving more substantial sums.

5-082 The hearings tend to be informal, brief and summary, and rules of evidence may be relaxed. The arbitrator will usually make an immediate decision. Unless otherwise agreed, any re-hearing of the case would ordinarily (but not necessarily) be fresh and without reference to the arbitration evidence.

5-083 The results of a number of studies indicate that most litigants are satisfied with this process and that it achieves a high rate of success. A study of one American programme found that the concern of some critics that this might deliver “second class” justice was not supported, and that the average citizen’s notion of “fairness” did not require:

“the judicial robes, formal procedures, or the various components of due process that are the hallmark of trial. But his notion of fairness is not simply cheap, quick dispute resolution. Rather, the average individual seems to believe that a ‘fair’ dispute resolution procedure is one that provides an opportunity for a hearing of the facts of the case before a neutral third party adjudicator. Our data suggests that ability to appeal the arbitration award contributes to individuals’ perceptions that the process is fair”³⁶

Adapting court-annexed arbitration principles

5-084 An informal alternative to the introduction of the court-linked process of court-annexed arbitration as described above, has been suggested in England. This process has been named “concilio-arbitration” by its proponent, Rowland Williams.³⁷ The suggested procedure is for a concilio-arbitrator to examine the case informally, consider the evidence, hear the parties’ representations and make a non-binding award. If both parties accept the award, it becomes binding. If one party does not accept then the case proceeds to litigation; and if the party who refuses to accept the award does not achieve a significantly better result at the trial, there is a costs penalty.

5-085 It will be apparent that court-annexed arbitration differs from ordinary arbitration by virtue of the fact that it is not binding in the first instance, and that disputants do not lose their right to have the matter heard by the court. Also, the awards, once accepted, become as effective as orders of the court. These differences appear to make them more acceptable to the public than traditional binding arbitration.

Footnotes

³³ First US National Conference Report, 1985.

³⁴ Tiedel v Northwestern Michigan College, 865 F. 2nd 88 (6th Cir. 1988).

³⁵ Colarusso v Petersen, 61 Wash. App. 767; 812 P. 2nd 862 (1991).

³⁶ J. Adler, D. Hensler and C. Nelson, “Simple Justice: How Litigants Fare in the Pittsburgh Court Arbitration Program” in J. S. Murray, A. S. Rau and E. F. Sherman, Processes of Dispute Resolution: The Role of Lawyers (New York: Foundation Press, 1989), pp.629–637.

³⁷ Rowland Williams, “Concilio-Arbitration: A New Proposal for the Quick and Inexpensive Resolution of Disputes” Law Society’s Gazette, 23 November 1983. See also Rowland Williams, “Concilio-Arbitration: the Service Commences” Law Society’s Gazette, 28 May 1986.

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Court-Attached ADR in Some Other Jurisdictions

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Court-Attached ADR in Some Other Jurisdictions

- 5-086 In this context, court-attached ADR means that the ADR process is available, and may be mandated, as part of the litigation process. The programme may be an integral part of the organisation of the court, it may be separate from the court and litigation process, or the connection between the court and the ADR programme may fall between these two poles.

United States

- 5-087 The use of ADR in US courts goes back to the mid-1970s but this was strongly reinforced by The Alternative Disputes Resolution Act of 1998³⁸ which required each federal district court to authorise the use of ADR in all civil cases and to establish its own ADR programme. It also required the district courts to establish procedures for making neutrals available, to adopt local rules regarding confidentiality, compensation, and conflict of interest and to appoint a judge or staff person to administer the programme.
- 5-088 Many court-attached or court-annexed ADR programmes tend to be administered by ADR Coordinators, who are responsible to oversee the programme, and who will generally arrange the appointment of a settlement officer or provide information about approved settlement officers so that the parties can make their own selection. The parties then usually contact their settlement officer directly and the court's involvement is suspended pending the outcome of the mediation. ADR Coordinators ensure that appointed settlement officers have been properly trained and accredited, and that they maintain proper standards of practice.

Canada

- 5-089 In Quebec, parties have an option to engage a private mediator, or mediation may be conducted by a judge in a settlement conference, which is free. A Code of Civil Procedure,³⁹ effective from 2003, includes provisions relating to the settlement conference. The principle is established that the judge, appointed by the Chief Justice, has the function of a conciliator or mediator.⁴⁰

Australia

- 5-090 Court-related schemes are well established in Australia. In the Federal Court, a judge will consider at an early stage of a case whether ADR, including mediation, is likely to assist, and may order the parties to attend mediation even if they do not agree to it.⁴¹ Ordinarily the mediator will be a Registrar of the Federal Court, who has been duly accredited under the Australian National Mediator Standards, though parties can engage a private mediator at their own expense.

- 5-091 In New South Wales, an ADR Directorate was established in the NSW Attorney General's Department to coordinate, manage and drive ADR policy, and to support a number of published proposals for the development of ADR.
- Voluntary and mandatory court-related mediation schemes are also in operation at the state and local levels.

Germany

- 5-092 Germany has a long record of judicial intervention in the settlement process, and has more recently developed a mandatory regime for judicial mediation. A number of administrative courts offer mediation by judges, pursuant to the German Code of Civil Procedure, under which judges order mediation hearings unless these would be inappropriate.⁴²
- 5-093 Until the turn of the 21st Century, interest in non-adversarial ADR methods was modest in Germany, with mediation rarely used, and limited to the fields of divorce and environmental disputes. In 2000, conciliation was introduced for small claims; and from 2003, a pilot programme for voluntary mediation was introduced in several courts, undertaken by judge-mediators. The success rate of this court-related mediation was 79 per cent.⁴³
- 5-094 The Mediation Act (Mediationsgesetz) 2012 was the first legislation to regulate mediation services in Germany. Exceeding the requirements of the European Directive, the Act incorporates incentives in the official procedural codes. For example, the court may suggest mediation and if the parties decline this option, the Court may suspend the proceedings.

Denmark

- 5-095 In Denmark, mediation projects have been piloted since the turn of the 21st Century. Court linked mediation is now widely available in Danish District Courts. Mediation can also be used in the Maritime and Commercial Court. A mediator can be a judge or an officer of the court in question who is designated to serve as a mediator, or a lawyer who has been approved by the Court Administration to serve as a mediator in the High Court district concerned. Mediation is also used in family proceedings, including children's issues, and in a wide range of civil and commercial disputes.

Japan

- 5-096 ADR processes in Japan are governed by the ADR Promotion Law,⁴⁴ which came into force in 2007, and which applies both to domestic and international disputes.
- 5-097 However, there are particular provisions for court-linked ADR procedures, contained in the Civil Conciliation Act 1951. Under this Act, any party can apply to the court for conciliation, or the court may order conciliation if it thinks that a case is suitable. Any conciliation or mediation undertaken by the court is confidential; and the court retains the power to decide whether a settlement proposed to be agreed by the parties is acceptable to the court. If an agreement is reached in court-annexed mediation, it will be registered at the court and may be enforced as a court judgment.

- 5-098 Both Government and courts are supportive of ADR in Japan, and the courts have recommended conciliation in many cases. Referrals to court-annexed conciliation have numbered around a half a million a year.

China

- 5-099 China's Civil Procedure Law⁴⁵ gives the courts discretion to attempt mediation in relation to cases before them. Article 85 provides:

“The people’s court shall, in handling civil cases, distinguish between right and wrong and conduct conciliation under the principle of voluntariness of the parties and on the basis of evident facts.”

Conciliation is conducted locally, where the court is located, either by a single judge or a collegial panel. If foreign parties are involved, they will be required to have Chinese legal representation for the process. Any agreement reached will have the same effect as a court judgment, but without any right of appeal.

Singapore⁴⁶

- 5-100 Court Dispute Resolution (CDR) has been available in the Subordinate Courts in Singapore since 1994 at the Primary Dispute Resolution Centre and is used in most cases going through those courts. CDR processes primarily involve Settlement Conferences, which are conducted as an integral part of the civil justice process, presided over by a District Judge who assumes the role of settlement judge. They also involve mediation, early neutral evaluation, and binding and non-binding evaluation.

- 5-101 CDR is a highly evaluative form of mediation, with settlement judges being proactive in their interventions and guidance to the parties. It is “rights-based” and the merits of the dispute are actively discussed and debated. Model Standards of Practice for Court Mediators of the Subordinate Courts refers to a Code of Ethics for Settlement Judges. These include aspects concerning training and qualification, impartiality, confidentiality, informed consent and other relevant matters.

India

- 5-102 ADR is covered in India by the Arbitration and Conciliation Act 1996, as amended in 2015, supplemented by s.4 of the Legal Services Authorities Act 1987, which provides for the establishment of people’s courts—Lok Adalats. These courts may deal with a dispute if the parties agree, if one party applies for referral, or if the court dealing with the dispute refers the matter to a Lok Adalat. The principles guiding the Lok Adalat are conciliation and compromise, based on justice, fairness and equity. The neutrals are commonly retired judges, and their awards are regarded as civil court decrees.

- 5-103 An alternative route lies under s.89 of the Code of Civil Procedure, which provides that if a court considers that elements of a settlement exist that may be acceptable to the parties, it is to formulate terms of settlement and give them to the parties for their observations. After receiving their observations, the court may reformulate the terms of a possible settlement and refer

these for arbitration, conciliation, judicial settlement including settlement through Lok Adalat or mediation. However, referral to arbitration or judicial settlement requires the written consent of all parties.

Footnotes

- 38 Public Law 105–315 codified at 28 U.S.C., ss.651 et seq.
- 39 Bill 54, An Act to reform the Code of Civil Procedure (CCP), 2002 c. 7.
- 40 Najda Marie Alexander, Global Trends in Mediation, 2nd edn (London: Kluwer Law International, 2006).
- 41 See the Federal Court's website: <http://www.fedcourt.gov.au/services/ADR>.
- 42 Article 278 of the Code—the Zivilprozessordnung.
- 43 Professor, Dr Renate Dendorfer, “One Continent: Many Methods: Mediation in Germany: Structure, Status Quo and Special Issues” (Paper to the 2011 Conference of the Chartered Institute of Arbitrators, European Branch, Paris). Available at: <http://docplayer.net/48518922-One-continentmany-methods-mediation-in-germany-structure-status-quo-and-special-issues-ciarb-chartered-institute-for-arbitrators-european-branch.html> [accessed 11 May 2018].
- 44 The Act on Promotion of Use of Alternative Dispute Resolution, Act No.151 of 2004.
- 45 Law of Civil Procedure of the People’s Republic of China, 1991. Chapter VIII deals with conciliation.
- 46 With acknowledgment to Michael Hwang SC of Singapore for his contribution to the Asia section. See: Michael Hwang, Loong Seng Onn & Yeo Chuan Tat, “ADR in East Asia” in J. C. Goldsmith et al (eds), ADR in Business: Practice and Issues across Countries and Cultures (USA: Kluwer Law International, 2006).

Conclusions

Brown & Marriott's ADR Principles and Practice, 4th Ed.

Mainwork

Chapter 5 - ADR and the Courts

Conclusions

- 5-104** Clearly, establishing proper court-annexed ADR programmes requires a substantial degree of innovative administration. The programmes cannot work satisfactorily without the wholehearted commitment of judges and practitioners.
- 5-105** There are also indications that some litigants and lawyers expect in court-annexed schemes a measure of helpful but not coercive evaluation. Parties are aware that if ADR fails in court-annexed mediation, the case will go back to the judge. For those requiring it, there is a case for providing some guidance about the merits of the issues.
- 5-106** It is also clear (unsurprisingly) that the quality of the ADR process is closely related to the quality of the mediator. It is essential to have mediators who are well-trained and of high quality. This in turn raises questions as to training, accreditation and control. If court-annexed ADR schemes are to work then the allocation of resources by both Government and the private sector is required. Government must be prepared to devote part of the expenditure on the court system to providing for the administration of court-annexed ADR. Initially there may need to be a significant contribution from the private sector.
- 5-107** As most informed commentators recognise, introducing ADR in the court system raises difficult constitutional and ethical questions. The constitutional right of access to the courts is central to the workings of a democratic and pluralist society. It is therefore essential that if ADR schemes are to be mandatory as part of the court system, safeguards exist against abuse. This means that the court has a role to play in developing systems which, even if mandatory, fit easily within adjudicatory processes. It also means that courts must insist on high standards of training, ethics and competence on the part of mediators to whom cases are going to be referred.
- 5-108** It is in our view false to judge the efficacy of court-related ADR only by applying economic yardsticks and establishing savings in time and cost. These do have a place, for example, in evaluating changes which may become necessary in existing systems or in deciding to which of a range of ADR methods resources should be applied. But the issue of court-annexed ADR transcends statistical analysis. Civilised society must be vitally concerned to ensure access to civil justice, by which is meant that citizens are able to take their legitimate complaints and grievances to the courts for fair, skilled and impartial resolution. We need to seek new ways of resolving civil disputes, but to do so respecting traditional and essential values of justice, fairness and equality before the law. The objectives of a court-based system must be to settle cases and, failing settlement, to ensure that cases are properly adjudicated in a manner appropriate and proportionate to the issues and amounts at stake.
- 5-109** Finally, the value of court-related mediation does not only lie in the saving of costs and of court time, as important as these considerations may be. Mediation also provides a route to empowering people to find creative ways of resolving their issues themselves, on terms that they decide, taking personal control and responsibility allowing them to move forward constructively without the stress and anxiety (let alone the risk and cost) of a trial. These factors all need to be weighed in the balance in valuing court-based alternatives to litigation.

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What is Mediation—and Who Decides?

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Mainwork

Chapter 8 - Mediation—General Principles

What is Mediation—and Who Decides?

- 8-001 Two children have a playground fight and a friend urges them to “break it up”, encouraging them to “make friends” again. Or a teacher intercedes and helps them to “sort it out”. Both of these constitute fundamental mediation: all the rest is gloss.
- 8-002 As Roberts has observed, in most societies, even for early nomadic hunters, “meeting and talking” has been used to resolve some disputes; and in stateless societies, with no central authority to make or enforce third party decisions, mediators would have been used “actively coaxing parties towards a settlement”. ¹ Gulliver described the mediator as “a facilitator and adviser but not a decision maker”² and has outlined how disputes might involve groups of kinsmen with third parties called in to perform a mediatory function.³ In relation to current mediation practice, Gulliver has pointed out that:

“contrary to some idealistic and ethnocentric assumptions, there is no such thing as *the* role of *the* mediator. The range is wide, both of the statuses of mediators (who they are and why they are so acting) and of the roles they play (the strategies they choose or are forced to adopt)...He may be rather passive... (he) may chair the talking sessions... he may work at clarifying issues, demands and offers and suggesting appropriate norms and their application; he may, from the first or later, make creative suggestions for outcomes... he may consult and advise parties in caucus or in joint sessions. At the extreme of mediation, he may press his own evaluations of the situation and his opinions as to effective outcomes”.⁴

- 8-003 This sums up the position. Mediation involves a wide range of practice and practitioners, using a wide range of strategies, from passive to highly directive and evaluative. It differs from arbitration in that the role of the neutral third party in arbitration is to consider the issues and then to make a decision which determines the issues and is binding on the parties. The neutral third party in mediation does not have authority to make any decision for the parties, nor is that the mediator’s role or function.
- 8-004 Even where the mediator expresses a view about the merits of the dispute, which may happen in some but not other models of mediation, this would only be a non-binding opinion to help parties with their decision-making, and in no circumstances would a mediator have the power to impose this view on the parties. Indeed, any such power would be contrary to the spirit of mediation, which is inherently consensual.

It is against this background, that some definitions of mediation are considered.

- 8-005 In previous editions of this work mediation has been described as:

“a facilitative process in which disputing parties engage the assistance of an impartial third party, the mediator, who helps them to try to arrive at an agreed resolution of their dispute. The mediator has no authority to make any decisions that are binding on them, but uses certain procedures, techniques and skills to help them to negotiate an agreed resolution of their dispute without adjudication.”

This definition continues to be applicable.

- 8-006

Mediation has been defined:

“in a broad and general sense to include all forms of decision-making in which the parties are assisted by someone external to the conflict, the mediator, who cannot make binding decisions for them, but assists their decision-making in various ways. It can be contrasted with those forms of dispute resolution in which the external person is the formal decision-maker for the parties, such as arbitration, adjudication, expert determination and court proceedings”.⁵

8-007 The Law Society of England and Wales has adopted a more detailed definition of civil-commercial mediation, namely:

“Civil and commercial mediation is a process in which:

- 1.1two or more parties in dispute
- 1.2whether or not they are legally represented
- 1.3and at any time, whether or not there are or have been legal proceedings
- 1.4agree to the appointment of a neutral third party (the mediator)
- 1.5who is impartial
- 1.6who has no authority to make any decisions with regard to their issues
- 1.7which may relate to all or any part of a dispute of a civil or commercial nature
- 1.8but who helps them reach their own decisions
- 1.9by negotiation
- 1.10without adjudication.”⁶

8-008 Clearly, the underlying elements of mediation are consistently reflected in these different definitions. Nor do these definitions limit the way in which mediation may be practised: as indicated by Gulliver,⁷ the range of strategies that mediators may adopt is wide, and indeed the models and approaches that they may use and the philosophies that they may follow are many and varied, reflecting the richness of the process.

What is “real” mediation?

8-009 Despite this broad range of possible mediation activity, voices are sometimes heard to the effect that some or other mediation model or approach “is not mediation” or “is not real mediation”. Gray,⁸ in relation to an issue about evaluation in mediation asked: “What is ‘real’ mediation and who decides?” Her underlying question was whether an evaluative form of mediation could still properly be termed “mediation”. Her concern was whether we could definitively state what constituted “real” mediation and what didn’t; and even if a definition could be agreed, “how do we measure whether something fits that definition? And if ‘experts’ are to decide, who will be the experts?”

8-010 There is, of course, no central authority deciding on informal dispute resolution processes and their definitions. Much of their vibrancy and value arises from the fact that they have developed spontaneously and creatively in response to the rigidities and limitations of formal court systems, and are continuing to develop.

8-011 Gray considers that it would be:

“better to consider mediation as a continuum from facilitative to evaluative, with a variety of styles of practice, a number of approaches, and a wide assortment of contexts in which it is practised”.

That is a view to which the authors of this book readily subscribe.

Conciliation and mediation

8-012 There is universal acceptance that conciliation has broadly the same attributes as mediation, involving the use of an impartial third person to help disputing parties to resolve their differences. However, there seems to be some variation of understanding as to what each concept involves, and whether or not there is any difference between them. There is no national or international clarity or consistency of usage of these terms.

8-013 Conciliation is sometimes described as a process in which the neutral, the conciliator, is more proactive and evaluative than in mediation, and in some views, may propose terms of settlement where the parties do not reach these themselves. For example, the Conciliation Rules of UNCITRAL, the United Nations Commission on International Trade Law, provide that:

“The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.”⁹

8-014 Conciliation has been described as:

“... an informal process for settling disputes through direct negotiations. A conciliator contacts the parties directly, usually by telephone, to attempt to encourage a negotiated settlement between them. The conciliator allows the parties to reach their own resolution to a dispute, although the conciliator has the power to recommend (but not impose) a particular solution in the event that the parties are unable to reach one themselves. Any settlement reached through conciliation will become binding as a contractual agreement once both parties sign a copy of it.”¹⁰

8-015 On the other hand, sometimes the opposite view is taken, with mediation rather than conciliation being evaluative. For example, ACAS—the UK’s non-governmental Advisory, Conciliation and Arbitration Service, largely funded by the Department for Business Innovation & Skills to deal with employment relationships—says that conciliation will be explanatory and will:

“help you to understand how the other side views the case, and explore with you how it might be resolved without a hearing; and tell you about any proposals the other side has for a settlement”

but the conciliator:

“will not make a judgement on the case, or the likely outcome of a hearing or advise you whether to accept any proposals for settlement or not”.¹¹

8-016 The term “conciliation” is also used to describe processes involving the informal resolution of complaints, for example in the UK’s National Health Service¹²; and to describe a court-based process in helping parties settle issues about children.¹³

- 8-017 Distinctions between mediation and conciliation generally arise because of differing conceptions as to what mediation entails. It can only be considered more evaluative than mediation if one takes the view that mediation is a purely facilitative process. If however mediation is seen as comprising a broad range of activity, including a spectrum from purely facilitative to evaluative, then this distinction loses its significance.
- 8-018 There seems little doubt that the term “mediation” is now generally regarded as a generic term and that “conciliation” is relatively declining in use. The National Family Conciliation Council changed its name in 1993 to National Family Mediation. The International Chamber of Commerce used to offer conciliation, but now offers ADR instead.¹⁴
- 8-019 In this book, the term “mediation” is treated as synonymous with “conciliation”. There does not seem to be any sound reason to maintain a distinction, given that mediation covers a wide range of practice, styles and approaches, and includes the whole spectrum between purely facilitative and wholly evaluative.¹⁵

Footnotes

- 1 S. Roberts, *Order and Dispute: an Introduction to Legal Anthropology* (London: Penguin, 1979), p.26. See also Derek Roebuck, *Disputes and Differences; Comparisons in Law, Language and History*, Pt 3, *The Myth Of Modern Mediation* (Oxford: Holo Books, 2010), outlining the use of mediation in the ancient world to AD 500 and then through the subsequent centuries.
- 2 P.H. Gulliver, “Arbitration and mediation” in Adam Kuper, and Jessica Kuper, *The Social Science Encyclopedia*, (Abingdon: Routledge, 1985). Gulliver, an anthropologist, specialised in processes of dispute management and decision-making in traditional African societies.
- 3 G.P.H. Gulliver, *Disputes and Negotiations: a Cross-Cultural Perspective* (New York: Academic Press, 1979).
- 4 Gulliver, fn.2.
- 5 L. Boulle and M. Nesić, *Mediator Skills and Techniques: Triangle of Influence* (Haywards Heath: Bloomsbury Professional, 2010).
- 6 The Law Society Code of Practice for Civil and Commercial Mediation (Last updated November 2011) under its Civil & Commercial Mediation Accreditation Scheme.
- 7 Gulliver, fn.3.
- 8 Ericka B. Gray, “What is ‘Real’ Mediation?” (1996) 15(2) AFM Mediation News.
- 9 Adopted in 1980, the UNCITRAL Conciliation Rules are expressed as providing “a comprehensive set of procedural rules upon which parties may agree for the conduct of conciliation proceedings arising out of their commercial relationship.”
- 10 The Centre for Effective Dispute Resolution: <https://www.cedr.com/idrs/documents/170823112849-conciliation-guidance-notes-for-consumers.pdf>.
- 11 See <http://www.acas.org.uk/index.aspx?articleid=2011> [accessed 15 May 2018].
- 12 Following Department of Health guidance, many Primary Care Trusts offer conciliation to address complaints.
- 13 See Imogen Clout, “The Which?” Guide to Divorce: The Essential Practical Guide to the Legal and Financial Arrangements for Divorce (London: Which? Books, 2005), p.81.
- 14 The ICC ADR Rules “offer a framework for the amicable settlement of commercial disputes with the assistance of a neutral. They were launched in 2001 to replace the 1988 Rules of Conciliation.”
- 15 Issues concerning the use of evaluation in mediation are addressed in Ch.8 and non-binding ADR in Ch.19.

The Principles of Mediation

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Chapter 8 - Mediation—General Principles

The Principles of Mediation

- 8-020 Some common threads run through all different forms of mediation. These should be viewed broadly rather than prescriptively, given the wide range of activity and philosophies that mediation encompasses. The most widely accepted principles are set out below.

The use of a mediator

- 8-021 It is fundamental to mediation that there is a third-party mediator involved in the process who assists the parties in dealing with the issues that they face. The mediator does not have to be present with the parties all the time, but may for example arrange for them to liaise with one another directly at some point or may set up other mechanisms without being present; but if there is no mediator in the process it is not mediation.

- 8-022 There are a number of reasons why a third party's involvement is so helpful. For a start, the presence of a third party creates a dynamic that does not exist when only the parties themselves or their representatives undertake direct negotiation. De Bono, who created the concept of "lateral thinking", says ¹⁶ that:

"In any dispute the two opposing parties are logically incapable of designing a way out. There is a fundamental need for a third party role."

De Bono describes this role as converting the two-party dispute "into a three-dimensional exploration leading to the design of an outcome."¹⁷

- 8-023 This concept of helping parties to design an outcome reflects the creative element of the third-party role. According to de Bono this "design idiom" generally develops as the mediator gets to understand the needs, interests, positions and priorities of the parties and is able to help synthesise these into acceptable terms.¹⁸

- 8-024 Even without this creative element, the mediator brings a different dynamic to the dispute. Parties explain and discuss their positions and views to an objective person, usually one who is encouraging a problem-solving mode and "testing reality"; and commonly this may assist a process of review and re-evaluation, of movement and shift, and of adopting a more realistic view of the deadlocked position. Of course, this does not always happen, and parties can sometimes remain entrenched notwithstanding whatever the mediator's may do efforts to bring about some re-evaluation and movement.

- 8-025 While the mere intercession of a third party brings this dynamic, mediation offers more than just another person in the room. Professional mediators bring communication and conflict resolution skills into the arena, as well as their personal attributes such as understanding, judgement, patience, creativity and sometimes authority.

- 8-026 Because negotiation is such a fundamental component of mediation and of most other non-adjudicatory dispute resolution processes, and because some dispute resolution organisations refer to negotiation as part of the resources that they offer, there is sometimes a view that negotiation stands on its own as an ADR process. The value of bilateral negotiation without a third party intermediary is beyond question,¹⁹ but it is not by itself mediation or an ADR process.

Impartiality or neutrality

- 8-027 It is fundamental to the integrity of the mediation process that the mediator should conduct it in an even-handed and impartial manner. In the sense of not favouring either party over the other, that is indeed the position. The Law Society of England and Wales for example, specifies in its Code of Conduct for civil and commercial mediators:

“The impartiality of the mediator is a fundamental principle of mediation. Impartiality means that (1) the mediator does not have any significant personal interest in the outcome of the mediation; and (2) the mediator will conduct the process fairly and even-handedly, and will not favour any party over another.”

- 8-028 The Model Standards of Conduct for Mediators²⁰ adopted in 2005 by the American Arbitration Association, the American Bar Association and the Association for Conflict Resolution describes impartiality as “freedom from favoritism, bias or prejudice”.

- 8-029 However, the situation is perhaps not entirely black or white: a mediator can be linked in some way to a party and can nevertheless still conduct the mediation. Gulliver points out that the mediator may often be a structural intermediary:

“the common kinsman or neighbour, co-member of their group, member of an allied group—who has legitimate concern for both the dispute and the disputants to whom he is linked.”²¹

- 8-030 If parties make an informed choice to engage a mediator who has links to either party, does that mean the process is not mediation? Clearly not, though there may be practical questions as to whether the mediator can be fully trusted and wholly effective; and there may be ethical constraints against such an appointment.²²

- 8-031 The mediator should not have an interest in the outcome of the mediation. However, here again Gulliver argues that every mediator brings interests, values, norms and ideas of his own, which will have some influence on his role in the mediation.²³ This brings into focus the distinction that is sometimes drawn between “impartiality” and “neutrality”. There is a view that mediator neutrality (as distinct from impartiality) implies that the mediator will not bring his or her personal values into the process.²⁴ As this may be difficult if not impossible to achieve, some consider that “neutrality” should not be offered unless the word “neutral” is used specifically in relation to outcome rather than process.²⁵

- 8-032 Generally, the concept of neutrality is given its everyday usage, i.e. “not helping or supporting either of two opposing sides, especially states at war or in dispute”. It is in this sense that neutrality is usually mentioned in an ADR context, and the noun *neutral* refers to a third party fulfilling the mediator role of impartiality and even-handedness.²⁶

Facilitation

- 8-033 Facilitation is an integral and primary aspect of mediation. All mediation involves some element of such facilitation, which is enhanced by the mediator's communication, negotiation and other skills. The mediator does not, however, negotiate with the parties, but rather assists them to negotiate with one another.
- 8-034 Facilitation can take many forms. Traditionally it involves helping parties with their communications and negotiations, helping them sort out misunderstandings and misconceptions, and supporting a problem-solving rather than a competitive approach.²⁷
- 8-035 If facilitation helps people towards better understanding and arriving at a good decision, there seems to be no reason why it should not include helping them towards a better understanding of the issues, a better perception of the merits of the dispute and a realistic view of the available options. Indeed, many mediators and organisations consider it to be entirely appropriate to test, question and challenge factual, legal or technical perceptions as part of facilitative party decision-making.²⁸
- 8-036 To what extent it is appropriate for mediators to carry out this facilitative function of helping parties obtain a better understanding of the issues and a better perception of the merits is a moot point. The more effectively and authoritatively a mediator may do this, the more this may constitute "evaluation" which for many mediators is not an acceptable way of working. The distinctions between facilitation and evaluation require reflection and review that has often been missing from any discussion about this subject: they are dealt with more fully elsewhere in this book.²⁹
- 8-037 Facilitation is also referred to as an ADR process in its own right, involving a third-party neutral, the facilitator, carrying out a role very similar to that of the mediator in mediation, in the context commonly of helping groups or organisations work more effectively together, either generally or in relation to specific projects.

Party self-determination

- 8-038 The essence of mediation is that it is non-adjudicatory and helps parties to make their own decisions. If the third party makes a binding determination of the issues, the process is not mediation. And if, for example, parties jointly ask a mediator to decide the issues on a binding basis, as in med-arb, and the mediator agrees to do so, the process changes from mediation to one of the adjudicatory forms such as arbitration.
- 8-039 This should though be distinguished from the situation in which the mediator is asked by the parties to make a non-binding settlement recommendation, which is part of the mediation procedure of some organisations and individual mediators. Such a recommendation allows the parties the freedom to accept or reject it, and consequently does not diminish their self-determination. There is a misperception among some practitioners that this transforms the process into an adjudicatory or quasi-adjudicatory form: that is certainly not the case. Whether it is an appropriate, wise or effective thing to do depends on the circumstances, but doing so does not change the character of the process.
- 8-040 Parties may be advised and assisted by their lawyers and perhaps other professionals in the process. This does not detract from the parties' role as the ultimate arbiters of how the matters should be resolved or from their self-determinative function.

- 8-041 If, however, a party is coerced into making a decision, that would generally undermine the principle of self-determination: negotiation should not be a coercive process.³⁰ Mediators may sometimes encourage parties towards settlement—if done appropriately this is a standard element of the process—but if they try to coerce a party into settling, or become so directive that their actions amount to coercion, that would undermine the principle of party self-determination and would not be acceptable mediator conduct.
- 8-042 This unacceptable form of mediator coercion within the mediation process should be distinguished from two other kinds of pressure. The one is pressure from another party or from personal circumstances that may compel a party to settle the dispute. This is probably inherent in most if not all disputes and in all fora. The risks, costs and delays of litigation, potentially damaging financial implications and the possibility of adverse publicity or other negative consequences are all factors that may impel a party towards settlement whether or not done within mediation, and are not peculiar to the mediation process. If, however, such pressure is improperly coercive, and for example amounts to undue duress, then the possibility may exist for any resulting settlement terms to be set aside.
- 8-043 The other distinguishable form of coercion is compulsion to enter into mediation, whether under Court Rules or judicial or other pressure. This may compel a party to try out the mediation process and forum, but cannot compel him to enter into any settlement and does not impinge on his self-determination within the process.

Secure environment: Confidentiality and evidential privilege

- 8-044 Although mediation may take place in very difficult and challenging circumstances, including perhaps in war zones and on the streets,³¹ the process in relation to civil-commercial, family, neighbourhood, employment and all other kinds of disputes and issues should take place in conditions that are conducive to discussion, negotiation and the exploration of settlement options and possibilities.
- 8-045 This applies to the physical arrangements, to the ambience that is created by the mediator, and to the ground rules regulating the process.³² Parties need to be able to negotiate freely, without fear, threat or harassment.³³
- 8-046 Providing a secure environment also includes the arrangements for confidentiality and evidential privilege. Unless otherwise agreed, or very exceptionally, for example if mediation is agreed to take place in a public forum when addressing an issue of public policy, parties will be entitled to expect that their issues and deliberations will be dealt with confidentially in mediation. This principle of confidentiality is built into virtually all agreements and Codes of mediation organisations and practitioners. Similarly, parties will generally agree that their deliberations may not be used as evidence in any court proceedings and here again virtually all mediation organisations and practitioners provide for their process to be conducted “without prejudice” or otherwise privileged from being used in evidence.³⁴

Authority derived from the parties

- 8-047 The mediator has no power or authority other than that given by the parties expressly or implicitly.³⁵ If any party decides to withdraw power and authority from the mediator, that ends the mediation. If mediation is part of a court-annexed procedure,

and the parties are compelled by the court to enter into it, they should nevertheless have the freedom to decide to end it with or without a resolution.

Consensual decision-making

- 8-048 The only binding outcome in mediation is one on which all the parties agree. No decision can be imposed on them, and no decision by some parties in a multi-party dispute can bind those who do not agree—even if the agreeing parties constitute a substantial majority. This does not preclude some parties, in appropriate circumstances, reaching agreement between themselves and the dispute continuing between those who do not agree, or some parties forming alliances to negotiate with others.
- 8-049 If the parties are unable to reach agreement on the resolution of their dispute, they will be free to have their issues dealt with in some other forum, usually adjudicatory. It is not uncommon in these circumstances for the dispute later to be resolved by agreement on terms flowing from those discussed in the mediation.

Dispute or conflict resolution or management as the objective

- 8-050 In the first edition of this book, mediation was expressed as having a “settlement objective”. That remains substantially true for many cases, especially in the civil-commercial field. Indeed, based on the research findings of Genn,³⁶ parties and their solicitors indicated that “the primary motivation for agreeing to mediate was the desire to end the litigation as quickly and cheaply as possible”.
- 8-051 In the second edition of this work, it was observed that some mediators did not see “settlement” as the objective, but also where appropriate addressing and resolving the underlying conflict causing the dispute. From the third edition onwards, “resolution” with its wider context has been adopted, which embraces both concepts.
- 8-052 While dispute resolution, incorporating settlement, remains a valid objective, the net is cast more widely. The objective of mediation may extend beyond the resolution of conflict and disputes, and this needs to be reflected. Mayer refers to conflict that may not be amenable to resolution, for some time in any event. Sometimes people may be in conflict that cannot be resolved, and mediation may be required to help them live with that conflict rather than actually resolve it. Mediation will not for example resolve the differences between those who oppose abortion and those who support it, but it may enable the two groups to co-exist without either attacking the other. Nor will it necessarily resolve fundamental value differences that divorcing parents may have about the bringing up of their children, but it may provide a machinery for these differences to be held without adversely affecting the children. Enduring conflicts or ongoing disputes may be deep-rooted and may reflect fundamental value differences that people have to accept will continue—and the role of mediation may be simply to help them find a modus vivendi that enables them to do so: what may be described as staying with and managing rather than resolving the conflict.³⁷
- 8-053 Mediation is also used in ways that are not necessarily dispute settlement or resolution. Indeed, helping a couple re-arrange their family structure on divorce does not necessarily fall within that ambit, though commonly it does include elements of dispute resolution. Deal mediation, or assisted deal-making, is another area in which parties are not concerned with settling disputes or resolving conflict, but rather gaining assistance in constructing a mutually favourable contract instead of simply negotiating it bilaterally. Brown refers to “the value of using mediators to cut deals” on the basis that parties negotiating a new contract can do so “more effectively if a neutral person is engaged to manage the process on the parties’ collective behalf”.³⁸

Accommodating the conflict dynamic: containing escalation

- 8-054 Conflict and dispute tend to have their own broadly predictable dynamic and momentum. Various writers and practitioners have observed that conflicts tend to pass through a series of phases, though it is also clear that no one model can adequately cover the wide range of conflictual situations that can arise in any sphere of life. While conflict models may be helpful to give a broad framework for guidance, they cannot possibly provide a definitive structure.
- 8-055 One such model is Friedrich Glasl's Nine-Stage Model of Conflict Escalation,³⁹ which describes the nine stages as:
- 1.*Hardening* in which differences about an issue become crystallised and fixed.
 - 2.*Debates and polemics* involving forceful verbal confrontations.
 - 3.*Actions not words* with parties promoting their own interests and blocking the other.
 - 4.*Images and coalitions*—negative stereotypes prevail with veiled hostility and an attempt to enlist support from others.
 - 5.*Loss of face* of the other, who is now seen in a new, transformed mode as having lost morality and entitlement to trust, with negative values and motives imputed to them.
 - 6.*Strategies of threats* now follow, increasingly firm and unequivocal and leading to ultimata, aiming to force concessions.
 - 7.*Limited destructive blows* with corresponding retaliation and an abandonment of any real or effective communication.
 - 8.*Fragmentation of the enemy* with destructive attacks.
 - 9.*Together into the abyss* as the need to destroy the other dominates even at the cost of one's own self-preservation.
- 8-056 Other models include reference to a possible latent period, during which the conflict exists but is undeveloped, contained or suppressed, and which eventually becomes a manifest conflict, with all the uncertainties and difficulties that this brings in its wake; and a stalemate period during which both parties may suffer but neither can shift the other.⁴⁰
- 8-057 The common thread among conflict theorists is that conflict has a tendency to harden and escalate at some stage, and this is certainly the experience of practitioners dealing with the realities of conflict and disputes. Ultimately, it is into this scenario that mediation may enter, and its role in all cases is to accommodate itself to the stage that has been reached and to contain any further inappropriate escalation.⁴¹ Insofar as the mediation is geared to attempts to resolve or manage the conflict or dispute, containment is an obvious goal irrespective of the stage at which the mediation process starts.
- 8-058 In practical terms, the mediation process tends to encourage a problem-solving approach (albeit that this is not always practicable), to facilitate communications and to allow feelings to be expressed in a respectful forum. Consequently, mediation generally has the effect of containing escalation. This in turn means that parties in disagreement who have a relationship with one another, whether business, family or personal, are generally more likely to sustain that relationship, or to vary or end it in a more co-operative way in mediation than through the adversarial process.

Empowerment of the parties

- 8-059

The question of empowerment of parties in dispute arises in two ways. At one level, it relates to the relative power of the parties as between themselves. At another level, it concerns the relationship between the parties on the one hand and their lawyers and the legal system on the other.

- 8-060 As between the parties themselves, it is inevitable that there may be some power differences and imbalances. As mentioned elsewhere in this book,⁴² the mediator can and should help to redress imbalances insofar as they may affect the mediation process, for example, by allowing each to be properly heard, by checking that they can each obtain necessary advice and information, by preventing any abusive or manipulative behaviour and by maintaining an even-handed approach to each. In some cases, particularly in family and inter-personal issues, the dynamic of the process, the way in which communications can be improved, and the attention given to power imbalances in the process can all have an empowering effect on an individual party. However, if one party has greater financial resource than the other, or is better able to undertake litigation than the other, or has better support, these will be inherent in any process and cannot be addressed in the mediation.
- 8-061 At the other level, mediation enhances the power of the parties in dealing with their dispute. In the traditional court system, the decision-making power is in the hands of the judge, and the way the process is conducted is generally in the hands of the parties' lawyers, who are of course bound by court procedures and conventions. The parties in dispute may feel like third party observers in a process that makes what may be profound decisions for them.⁴³
- 8-062 Empowerment in this context means the increase in the parties' ability to make their own decisions as to the outcome of their dispute, and the corresponding reduction of their dependence on third parties including professional advisers and judges. This arises in mediation because the parties are directly involved in the process and retain control over whether they wish to settle and on what terms.
- 8-063 Empowerment is an important part of mediation, and to some mediators, an essential one.⁴⁴ This is true in the sense that parties will always have control over the outcome. For some parties, this control is a fundamental issue, for others it may be peripheral as their primary objective may be to find a pragmatic way to end litigation or a practical way to sort out their family and domestic arrangements.

Footnotes

16 Edward de Bono, *Conflicts: A Better Way to Resolve Them* (Harmondsworth: Penguin 1986).

17 De Bono, fn.16.

18 De Bono, fn.16.

19 De Bono, fn.16, and see Ch.4.

20 Available at: https://www.mediate.com/articles/model_standards_of_conflict.cfm [accessed 15 May 2018].

21 Gulliver, fn.3.

22 Parties can agree to engage a mediator whose connection with either or both parties is known or disclosed provided that this is not precluded by the mediator's Code of Practice. For further comments on conflicts of interest and other ethical considerations, see Ch.16.

23 Gulliver, fn.3.

24 See Lisa Parkinson, *Family Mediation* (London: Sweet & Maxwell, 1997), p.491. In the 2nd edition of her book (Family Law, 2011) she points out that mediators "cannot be neutral in the sense of having no influence, because their personal and professional values and experience inevitably have some influence in the mediation process", p.20.

25 See Principles III (i) and (ii) of the Council of Europe's Recommendation No. R (98) 1 on Family Mediation (1998) which provide that the mediator is "impartial between the parties" and "neutral as to the outcome".

26 See Oxford English Dictionary Definition.

- 27 There is though a view that even within a problem-solving, interest-based approach, parties are still likely to seek to maximise their own separate interests: there is an “essential tension” between value creating and value claiming see D. Lax and J. Sebenius, *The Manager as Negotiator: Bargaining for Co-operation and Competitive Gain* (New York: The Free Press, 1986); reinforced in their later work D. Lax and J. Sebenius, *3-D Negotiation: Powerful Tools to Change the Game in Your Most Important Deals* (Boston: Harvard Business School Press, 2006).
- 28 This is generally described as “reality-testing”.
- 29 See [Ch.19](#). In the 1st edition the authors of this work adopted the commonly-held perception of mediation as being either facilitative or evaluative, albeit not in later editions. That perception, which continues to be widely held today, has arguably had an insidious effect on training and practice as it has diverted productive discussion about what kind of evaluation is useful in mediation, with the result that many mediators have surreptitiously used their own versions of evaluation in what is (simplistically) said to be a purely facilitative process.
- 30 The Model Standards of Conduct for Mediators adopted in 2005 by the American Arbitration Association, the American Bar Association and the Association for Conflict Resolution reflects self-determination as the first standard and says: “A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.”
- 31 Mediating conflicts between gangs can be a hazardous activity taking place wherever necessary including “on the streets”. For further information about gang mediation see [Ch.12](#).
- 32 See for example the suggestions for protecting vulnerable parties where mediation takes place in the context of potential domestic violence, at [Ch.11](#).
- 33 Though in mediation as in other processes, the threat of litigation or other lawful action that underlies negotiations may be very powerful.
- 34 Confidentiality and privilege are addressed in [Ch.15](#).
- 35 See *Bernard Mayer; “The Dynamics of Power in Mediation and Negotiation”* (1987) 16 *Mediation Quarterly* 75, dealing with the sources of a mediator’s power. These sources include the structure and credibility of the process, the mediator’s personal authority and qualities, substantive and process expertise, procedural control, and the value of his or her neutrality and independence in helping to achieve a resolution.
- 36 Professor Hazel Genn, Evaluation Report of the Central London County Court Pilot Mediation Scheme (London: Lord Chancellor’s Department, 1998), para.7.7.3; available at: http://www.cnmd.ac.uk/laws/judicial-institute/files/Central_London_County_Court_Mediation_Scheme.pdf [accessed 15 May 2018].
- 37 See Bernard Mayer, *Staying with Conflict: A Strategic Approach to Ongoing Disputes* (San Francisco: Jossey-Bass, 2009).
- 38 John Seely Brown, the former Chief Scientist of Xerox Corporation, International Mediation Institute at: <http://www.imimediation.org/deal-mediation> [accessed 15 May 2018]. This subject is also further dealt with in [Ch.10](#).
- 39 Contained in his book Friedrich Glasl’s, *Konfliktmanagement. Ein Handbuch für Führungskräfte, Beraterinnen und Berater* (Bern: Paul Haupt Verlag, 1997) and in his English language work, *Confronting Conflict: A First-aid Kit for Handling Conflict* (Gloucester: Hawthorn Press, 1999). Glasl’s model is comprehensively covered by Thomas Jordan, “Glasl’s Nine-Stage Model of Conflict Escalation”, available online at <http://www.mediate.com/articles/jordan.cfm> [accessed 15 May 2018].
- 40 See generally Bernard Mayer, *The Dynamics of Conflict: A Guide to Engagement and Intervention*, 2nd edn (Jossey-Bass, 2012), Ch.1, pp.1–33, by way of a theory example.
- 41 There are some cases, involving enduring conflict, in which a mediation process may not necessarily be geared to containing the conflict, but to helping parties develop multiple sources of power for sustaining the conflict in a more effective way. This is a theme developed by Mayer in *Staying with Conflict—A Strategic Approach to Ongoing Disputes* (San Francisco: John Wiley & Sons 2009).
- 42 The question of power and its imbalances is dealt with in [Ch.16](#).
- 43 Linda Singer, a Washington D.C. lawyer, mediator and arbitrator, puts this succinctly: “Court or administrative action displaces litigants’ power over their own disputes. The legal process distorts reality; not only are speed and economy affected, but the real issues in dispute and the treatment of disputants by the professional dispute resolvers escape our control as well. Even top corporate managers feel as if their business problems take on a legal life of their own once they are turned over to the lawyers and courts”, see *L. Singer, “The Quiet Revolution in Dispute Settlement”* in (1989) 7(2) *Mediation Quarterly*.
- 44 See for example Paul Wahrhaftig, “Nonprofessional Conflict Resolution” in J.E. Palenski and H.M. Launer, *Mediation Contexts and Challenges* (Springfield: C C Thomas, 1986) referring to mediation as the attempt by “everyday people

to wrestle back control” over their issues. And see R.B. Bush and J. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (San Francisco: Joey-Bass, 1994).

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Different Models: The Strands of Practice

Brown & Marriott's ADR Principles and Practice, 4th Ed.

Mainwork

Chapter 9 - Mediation—Practice Overview

Different Models: The Strands of Practice

- 9-001 Describing mediation practice is not straightforward because although there are shared principles—as outlined in the previous chapter—the process may vary considerably between different fields of activity, models of practice, cultures, philosophies and ideologies, ways of working and styles, approaches and roles adopted by individual practitioners. There is a wide range of activity under the generic heading of “mediation process”. This is a reflection of the richness and diversity of mediation practice, but it does make the description and classification of practice more complex.
- 9-002 By way of overview, mediation practice will be considered having regard to the broad models and approaches in use, then to an analytical breakdown of mediation practice into a series of notional stages. Practice in different fields of activity is then developed in separate chapters.
- 9-003 Models of practice tend often to blur and overlap, with shades of grey within each approach, so categorisation in this way can be misleading; but if seen together with other aspects, it can, like the pieces of a jigsaw puzzle, help to provide the bigger picture. With these reservations in mind, the following is a broad outline of mediation models and approaches.

Rights-based or interest-based mediation

- 9-004 The concept of a rights-based mediation is that the parties aim to achieve an outcome by negotiation that as closely as practicable corresponds to the outcome that they might expect to achieve in the court process. The concept of an interest-based mediation is that the parties focus on their respective interests, rather than their rights, and seek an outcome that best meets those interests.
- 9-005 Following an interest-based process was largely motivated by Fisher and Ury¹ who distinguish between the positions that people take and their interests, which these authors describe as “the silent movers behind the hubbub of positions”—the factors that in effect cause you to take your positions. Lax and Sebenius define interests as “whatever you care about that is potentially at stake in the negotiation”.² Interest-based negotiation looks at shared interests and valuecreation, as opposed to a more competitive negotiation approach that looks at value claiming, which is commonly at the core of a rights based approach.³
- 9-006 In practice, a rights-based approach process is likely to give more attention to the parties’ respective legal positions, may allow more time for the presentation of legal argument and may allow the parties’ lawyers a greater negotiation role. In an interest-based approach, the mediator is less likely to focus on legal issues and the process will be geared towards an exploration of the parties’ needs and interests and helping them engage in a process of mutual problem-solving.
- 9-007 In most cases, even if a party is motivated by asserting his rights, other considerations of an interest-based nature are inevitably likely to be taken into account; and even if a party has an interest-based approach, it is unlikely that he will be totally oblivious to the respective rights position and the way that a court or adjudicator might deal with the matter.

- 9-008 The position is well addressed by Lax and Sebenius⁴ who argue that “there is an essential tension between cooperative moves to create value and competitive moves to claim it.”⁵ In essence, even if someone is negotiating in an interest-based mode, there is still likely to be an objective of achieving the best available outcome—maximum value. Lax and Sebenius refer to the need to balance these competing tensions.

Pure facilitation or an evaluative component

- 9-009 Although the first edition of this work distinguished between facilitative and evaluative mediation, the authors do not wish to perpetuate this division, which can be argued as being a false dichotomy. In fact all mediation is facilitative, since that is an integral aspect of the process, with parties for example being assisted in communicating and negotiating effectively. Onto that fundamental base, many practitioners graft elements of probing, questioning, “reality-testing”, challenging perceptions, eyebrow-raising and other strategies designed to facilitate parties assessing their positions more realistically—another facilitative function, particularly where parties are having regard to their perceived rights as a factor in arriving at a resolution.
- 9-010 In this spectrum of facilitating a better understanding of their positions, which starts at one end with minimal evaluation such as challenging perceptions and reality testing, and continues through making private non-binding and indirect hints and observations, to expressing a view on the merits at the other end, the question arises as to where it is proper for a mediator to “draw the line”. At what point does this evaluation become inappropriate? These are proper questions of strategy and propriety, but to suggest that evaluation within mediation is an alternative to facilitation, rather than a supplementary way of working, is arguably a misunderstanding.⁶
- 9-011 There is a view that working exclusively in a facilitative mode without introducing any kind of challenge to a party’s perceptions and understandings, or any other evaluation, is a “pure” form of mediation. That view makes a number of assumptions about the nature of mediation and its objectives that require further debate.

Settlement-geared process

- 9-012 This approach sees settlement as an objective and the negotiation process as a route to achieving it. It does not view mediation as a relationship-enhancing or healing process, though it may have this indirect consequence, but simply as a method of achieving settlement.
- 9-013 This objective may be achieved by using a rights-based or a problem-solving interest-based approach and by incorporating any other model or approach with the mediator possibly incorporating any level of evaluation into the process. A settlement-geared mediator may concentrate on trade-offs and bargaining and seek practical ways of resolving impasse, as well as developing creative problem-solving solutions where possible.

Therapeutic mediation process

9-014 The mediation process can also be seen as having the capacity to address unresolved emotional issues, to help communication and understanding between parties, and consequently to have some healing function. Those who tend towards the therapeutic approach are more likely to favour problem-solving rather than competitive negotiation. They would be more responsive to the expression of emotions; they would examine interests and needs rather than rights; and they are more comfortable with uncertainty and a slower pace in the conviction that the parties themselves have the competence to work things out for themselves eventually, given appropriate help and sometimes greater directiveness.⁷

9-015 The therapeutic approach may well be helpful for inter-personal issues, including for example working with parents in conflict about their children, or conflict within families and groups, or between neighbours and others who require an ongoing relationship, focusing on better understandings, reduction of conflict and improved communications rather than the settlement of legal issues.

However, perhaps not surprisingly, this approach may be less well suited to civil court disputes and the expectations of parties as found in research undertaken by Genn.⁸

Transformative mediation

9-016 The transformative view was primarily developed by Bush and Folger, whose proposition is that mediators may help people to change by achieving greater personal efficacy and empowerment while allowing for respect and recognition of the other party.⁹

9-017 Bush and Folger are critical of the problem-solving approach, which they consider to be unduly directive in its aim of settling the immediate dispute rather than enabling the parties to define the issues themselves and arriving at their own solutions. The transformative approach goes deeper, and has the capacity to change not only how people behave in a particular conflict, but also in their future life. In Bush and Folger's own words "they learn how to draw on those positive capacities in dealing with life's problems and in relating to others".¹⁰

9-018 The twin goals of empowerment and recognition are fundamental to the transformative model: the settlement of the dispute is not viewed as a primary goal. By empowerment, Bush and Folger mean helping parties to find their own strength to explore goals, resources and options and make their own decisions. By recognition they mean giving due consideration and recognition to the views of the other party to the conflict: "the evocation in individuals of acknowledgment and empathy for the situation and problems of others".¹¹

9-019 Transformative mediation practitioners are likely to have a different approach and procedure from those using other models, and would eschew the problem-solving model. They would also challenge the proposition that, whereas the parties control outcome, the mediator controls the process: mediators should not exercise such control. Bush and Folger identify ten hallmarks of transformative practice.¹² These include articulating the principles of empowerment and recognition at the outset, adopting a responsive rather than a directive approach, particularly towards emotions and past events, patiently exploring uncertainty and ambiguity, and optimistically supporting the parties' ability to arrive at their own resolution.¹³

Other models

- 9-020 Other mediation models include for example the *narrative model*, which is based on the proposition that conflict arises from the stories and descriptions that people have constructed, both personal and from within a socio-cultural context, and that the mediator's function is to hear those stories, analyse them with the parties, uncover assumptions and biases, and help the parties move away from their narratives into new understandings, respect and collaboration. These understandings are not based on problem-solving or interest-based principles, but rather on "... helping mediators and their clients make sense of the complex social contexts that shape conflicts."¹⁴
- 9-021 The *humanistic model* of mediation is geared towards the healing of relationships and according to Umbreit it:
- “parallels a humanistic style of psychotherapy or teaching which emphasizes the importance of the relationship between the therapist and client and embraces a strong belief in each person’s capacity for growth, change, and transformation”.¹⁵
- The model aims to help parties find inner peace.
- 9-022 *Hybrid models* of mediation involve drawing on elements of more than one model, and different ways of working. There seems to be an increasing trend towards adopting hybrid models in various fields of activity, so that the distinctions outlined above may sometimes blur—though the transformative model does tend to remain purist in its approach.
- 9-023 Vindeløv has adopted the concept of a mediation non-model, which she characterises as being eclectic, “because it allows for inspiration to be drawn from all the best known mediation models” and applies elements of them as appropriate in practice. Vindeløv is rather more concerned with the mediator’s values and assumptions that are integrated into his or her practice.¹⁶

Footnotes

- ¹ Roger Fisher and William Ury, Getting to Yes: Negotiating Agreement Without Giving In (New York: Penguin 1981).
- ² This theoretical approach is taken by Fisher and Ury’s Harvard colleagues David Lax and James Sebenius, in 3-D Negotiation: Powerful Tools to Change the Game in Your Most Important Deals (Boston: Harvard Business School Press, 2006).
- ³ For a more detailed discussion about negotiation approaches, see Ch.4.
- ⁴ See Lax & Sebenius, fn.2.
- ⁵ See Lax & Sebenius, fn.2, p.33.
- ⁶ For a fuller discussion about forms of non-binding evaluation, see Ch.19.
- ⁷ For a detailed work on therapeutic mediation in the family context, see for example Howard H. Irving and Michael Benjamin, Therapeutic Family Mediation: Helping Families Resolve Conflict (USA: Sage Publications, 2002).
- ⁸ Professor Hazel Genn, Evaluation Report of the Central London County Court Pilot Mediation Scheme No.5/98 (London: Lord Chancellor’s Department, July 1998), paras 6.3.1, 6.3.2 and 7.6.3.
- ⁹ Robert A. Baruch Bush and Joseph P. Folger, The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition (San Francisco: Jossey-Bass, 1994).
- ¹⁰ See the Preface in Bush and Folger, The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition, fn.9.
- ¹¹ Bush & Folger, The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition, fn.9, p.2.

- 12 Robert A. Baruch Bush and Joseph P. Folger, "Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice" (1996) 13(4) *Mediation Quarterly* 263.
- 13 For more information about the transformative model and practice, see the Institute for the Study of Conflict Transformation Inc at <http://www.transformativemediation.org/> [accessed 15 May 2018]; and Joseph P. Folger, Robert A. Baruch Bush and Dorothy J. Della Noce, *Transformative Mediation: A Sourcebook—Resources for Conflict Intervention Practitioners and Programs* (New York: Association for Conflict Resolution and the Institute for the Study of Conflict Transformation, 2010).
- 14 John Winslade and Gerald D. Monk, *Narrative Mediation: A New Approach to Conflict Resolution* (San Francisco: Jossey-Bass, 2000), p.xi (Preface).
- 15 Mark S. Umbreit, "Humanistic Mediation: A Transformative Journey of Peacemaking" (1997) 14(3) *Conflict Resolution Quarterly* 201.
- 16 Vibeke Vindeløv, *Mediation: A Non-Model* (Copenhagen: DJØF Publishing, 2007).

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The Stages of Mediation

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Mainwork

Chapter 9 - Mediation—Practice Overview

The Stages of Mediation

- 9-024 Breaking the mediation process down into a series of stages is a helpful way of gaining an overview, though it should be emphasised that these will not necessarily follow the same sequence or be present in every case, and the stages may well overlap and blur in practice. It is simply a device to help provide a useful framework for the process and practitioners are cautioned against viewing stages and practices as a rigid norm that has to be observed.
- 9-025 These stages can be formulated in different ways. For example, The Law Society of England and Wales envisages ten stages in its schedule of competencies for mediators.¹⁷ Acland identifies nine stages, from preparation, designing the mediation process and bringing the parties together through to formulating and formalising the proposals.¹⁸ Parkinson refers to a 12-stage process for family mediation.¹⁹ Gulliver has adopted a staged process for cross-cultural negotiation from an anthropological perspective.²⁰
- 9-026 However a staged process does not work for every model of practice, and in particular it is not fully compatible with the transformative model which may prefer a non-sequential paradigm that focuses on whatever emerges for the parties (an “emergent-focus” model).²¹
- 9-027 For the purpose of this work the pre-mediation and post-mediation activities will not be considered as part of the mediation process, so that there should be no risk of blurring the boundaries of when mediation might start and end. It has become clear that those boundaries might well be important.²²
- 9-028 The following framework provides a structural overview:

Pre-mediation:

- 9-029 Considering mediation, assessing suitability and obtaining commitment.

During mediation:

- 9-030
- 1.Preliminary communications and preparation.
 - 2.Establishing the issues and setting the agenda.
 - 3.Information gathering.

4. Conducting substantive negotiations.
5. Dealing with impasse.
6. Concluding mediation and recording the outcome.

Post-mediation:

9-031 Addressing post-mediation issues.

Footnotes

- ¹⁷ Helpfully divided by the Law Society into three phases: Before mediation, during the substantive mediation and the end of mediation and afterwards.
- ¹⁸ Andrew Acland, *A Sudden Outbreak of Common Sense: Managing Conflict through Mediation* (London: Random House Business Books, 1990).
- ¹⁹ Lisa Parkinson, *Family Mediation*, 3rd edn (Bristol: Jordan Publishing, 2014).
- ²⁰ GPhilip Gulliver, *Disputes and Negotiations: a Cross-Cultural Perspective* (Academic Press, 1979).
- ²¹ See the article by *James R. Antes, Donna Turner Hudson, Erling O. Jorgensen and Janet Kelly Moen*, “*Is a Stage Model of Mediation Necessary?*” (1999) 16(3) *Mediation Quarterly*.
- ²² See *Brown v Rice [2007] EWHC 625 (Ch)*, where one of the issues was whether a term of the Agreement to Mediate was or was not in force, which in turn depended at least in part on whether the parties were “in mediation” at the time certain proposals were made. See also below: When does the mediation start?

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Pre-Mediation: Considering Mediation, Assessing Suitability and Obtaining Commitment

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Chapter 9 - Mediation—Practice Overview

Pre-Mediation: Considering Mediation, Assessing Suitability and Obtaining Commitment

- 9-032 This initial stage, before mediation commences, may involve informing parties about the mediation process, dealing with queries, where appropriate checking that mediation is suitable and obtaining a commitment to the process.

Providing information:

- 9-033 Information about the mediation process is increasingly available, including as follows:

- Lawyers are being encouraged by the courts to refer cases to mediation where appropriate and many firms promote it actively.²³
- Mediation and other dispute resolution organisations and groups provide information on their websites and commonly through newsletters, information sheets, practice updates and other resources
- Individual mediators may provide relevant information and material on their websites, electronically, through the post and/or by phone. This may outline procedures, give estimates of time and cost, provide a biography indicating their qualifications and experience, and generally address standard questions.
- A preliminary pre-mediation meeting or “intake session” with the parties and/or their lawyers can serve a number of functions: the mediator can provide process information and answer questions and can assess suitability of the case and parties for mediation, and the parties can decide whether or not they want to mediate and whether they wish to appoint the mediator to do so. This would not form part of the mediation process, as the parties have not yet committed to it or signed a mediation contract; but they should agree on confidentiality and that this preliminary process is evidentially privileged.

Considerations affecting the decision to mediate

- 9-034 There may be other considerations affecting a decision whether or not to mediate. These may include commitments that the parties may have given at some earlier stage, for example a contractual provision when entering into a commercial relationship that any disputes would be dealt with in a prescribed way, such as mediation and/or arbitration.²⁴

- 9-035 Both government and the courts are keen for parties to seek ways of resolving their disputes through negotiation and ADR processes before using the courts, and this is reflected in various ways, including for example, costs sanctions for a failure to do so where appropriate. For all family disputes there is a requirement for the parties to attend an intake meeting before making certain kinds of applications to obtain a court order.²⁵ Pre-action protocols regulating matters to be dealt with before commencing proceedings generally provide for ADR to be considered.²⁶

- 9-036 These matters and other relevant considerations are addressed in the context of the different fields of activity dealt with in the chapters relating to those activities.

Assessing suitability

- 9-037 Mediation is likely to be appropriate whenever parties wish and have the legal capacity to settle their differences, however far apart they may be in their thinking.²⁷ There are however some circumstances in which mediation would be inappropriate, for example if a party does not have legal capacity to enter into an agreement, or if the issue affects status or constitutional rights, or if it is essential to have a precedent or injunctive relief, or where either party is likely to abuse the process, or where a party is unable to negotiate freely.
- 9-038 In the family field in England and Wales, a preliminary Mediation Information and Assessment Meeting (known by its acronym MIAM) is mandatory in certain circumstances unless specified exemptions apply before parties may make certain kinds of application to the court. One of its primary functions is to assess the suitability of mediation for the dispute.²⁸ This process also involves screening parties to ensure that there is no threat of violence or abuse that might adversely affect participation or outcome.

Obtaining commitment—the contract to mediate

- 9-039 Parties or their lawyers may jointly decide to mediate or to explore the possibility of doing so. Where an enquiry is made by only one party, ADR organisations and practitioners may assist that party as necessary to gain the agreement to mediate of any other party, for example by providing material to send on to the other party. Some mediators or organisations will agree to approach the other party themselves, outlining their services, enclosing material and enquiring if the party would be interested in mediation.
- 9-040 A pre-mediation meeting can be useful as a way to provide information and to engage both parties in the process. It can provide an opportunity for them to work with each other and with the mediator, and can lead into the substantive mediation process, for example by dealing with some of the procedural practicalities in anticipation of any substantive meeting(s). This is further addressed in the chapters on individual fields of activity.
- 9-041 Mediation voluntarily entered into involves some form of contract, explicit or implicit, regulating the relationship between the mediator and the parties. Ordinarily, and particularly for civil, commercial and family mediation, parties will be required to enter into a written agreement to mediate before the mediation starts. Of course parties may orally agree with a third party to act informally as a mediator. It is, however, good practice to have a written agreement that records the terms and ground rules of the process and avoids any possible misunderstanding later about the basis on which the mediation was undertaken, and this is commonly required by the relevant Code of Practice. Some terms may be important, especially if parties do not reach agreement and any issue arises about what took place in the mediation.²⁹
- 9-042 The agreement may explicitly or implicitly provide that the mediation will take place under the rules or provisions of a particular Code of Practice to which the mediator and/or the organisation subscribes.³⁰ It will usually record matters such as confidentiality, privilege, payment of fees and other practical aspects. It can outline the ground rules of the mediation. Parties

may in some instances be required to commit themselves to dealing with one another in good faith in the mediation, though different systems of law place different weight on good faith commitments.³¹

- 9-043 All parties signing the agreement at the start of the initial mediation meeting, having approved it in advance, has a symbolic significance, committing the parties to the search for a resolution.

When does the mediation start?

- 9-044 In some situations it may well be essential to know whether parties are “in mediation” and whether the terms, express or implied, of an Agreement to Mediate are in force. For example, a dispute resolution clause in a contract may provide for parties to be free to pursue litigation or arbitration if the matter is not resolved within a specified period from the start of the mediation. Or if a party makes a statement or concession believing it to be protected as to confidentiality and evidential privilege, it may be critically important if the terms of the agreement are not applicable. In *Brown v Rice & Patel*³² a term of the Agreement to Mediate was that “any settlement reached in the mediation” would not be binding until reduced to writing and entered into. In that case, one of the questions was whether the parties were still “in the mediation” at the time that certain alleged proposals were made.

- 9-045 In practice, the start of the mediation is often blurred. Parties or their lawyers might meet the mediator on a preliminary basis to assess suitability and consider initial matters, and may move on seamlessly to the substantive part of the process. Or initial communications on the phone, electronically or by mail may take place before any initial meeting with a mediator, when certain things may be said that could later be in issue and need to be examined.

- 9-046 One of the UK’s major bodies refers in its standard terms to the “mediation” as being the actual day on which the substantive meeting takes place and by implication does not include preliminary or subsequent communications.

- 9-047 The mediation may actually begin before the initial substantive meeting, or more rarely after the start of that meeting.³³ Clearly, the signing of an Agreement to Mediate, or implicitly accepting its terms, would be a possible point of starting the process, as may the appointment of a mediator—and sometimes these are done simultaneously. Ultimately, the question might be, what was the intention of the parties, as indicated by them and by their actions?

Footnotes

23 For further information about courts’ increasing encouragement of mediation, see Ch.5.

24 See “ADR pledges and contract clauses” in Ch.10.

25 See fn.28 below; and see Ch.11 for further consideration of this.

26 See Ch.5.

27 The English Court of Appeal, adopting submissions made by the Law Society of England and Wales, provided in the case of *Halsey v Milton Keynes General NHS Trust [2004] EWCA (Civ) 576; [2004] 1 W.L.R. 3002* a list of guidelines as to when parties might face costs sanctions for failing to mediate. This list—outlined in Ch.10 and Ch.17—indicate the factors relevant to suitability to mediate in civil and commercial cases.

28 Practice Direction 3A (Pre-application protocol for mediation information and assessment)—supplementing the Family Procedure Rules 2010, came into force on 6 April 2011 and was updated in January 2018.

- 29 There are a number of cases in point on this for example *Farm Assist Limited (In liquidation) v Secretary of State for the Environment, Food and Rural Affairs* [2009] EWHC 1102 TCC; [2009] B.L.R. 399.
- 30 See [Ch.16](#) dealing with codes of practice.
- 31 As to the requirement to negotiate in good faith, see [Ch.4](#). An example of an Agreement to Mediate in the family context can be found in Appendix I, Document 10 at para.[A1-044](#); and reference to an agreement in the civil-commercial context can be found at para.[A1-043](#).
- 32 See *Brown v Rice* [2007] EWHC 625 (Ch), where one of the issues was whether a term of the Agreement to Mediate was or was not in force, which in turn depended at least in part on whether the parties were “in mediation” at the time certain proposals were made.
- 33 In one case at the start of the joint meeting the mediator asked the parties and their lawyers to sign the Agreement to Mediate, which had been approved electronically beforehand. Before they did so, an initial issue arose about the true identity of one of the participants and the process was abruptly terminated. Various potential questions might have arisen as to the status of the meeting, whether confidentiality and privilege applied, and whether mediation costs were payable. In the event, these did not become live issues; but they illustrate the possible relevance of the question as to whether or not the mediation had started. This also illustrates the need to obtain a firm commitment to the terms of the agreement before attending a meeting.

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During the Mediation: Stage 1: Preliminary Communications and Preparation

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Chapter 9 - Mediation—Practice Overview

During the Mediation: Stage 1: Preliminary Communications and Preparation

- 9-048** Having agreed to mediate, the parties are likely to have some preliminary communications with the mediator or with the organisation arranging the mediation. This may be by telephone, electronically, by mail or personally.

Preliminary communications

- 9-049** Preliminary communications may cover a range of subjects, which may vary according to the field of activity concerned and individual needs, but which may broadly include the following:

- Addressing procedural matters such as arranging the venue and timetable for the initial or substantive mediation meeting, identifying what documents and information are required and within what time frame, and perhaps arranging to obtain an indication or summary of the parties' respective cases and contentions.
- In one model, particularly in civil and commercial disputes, a single block of time is generally allotted, which may vary between a few hours and a few days or more. In another model, mainly in relation to couples' issues, shorter meetings—often 1 and a half hours each—may take place over weeks or months.
- Establishing who will attend the mediation, including legal representatives. All necessary parties should attend the mediation: the whole process can be frustrated if a party whose agreement to a settlement is essential to make it effective is missing.
- Representatives of corporate or institutional parties need to have authority to negotiate and reach agreement. If authority is limited or conditional, this fact needs to be known and may need to be recorded. Where parties are indemnified by their insurers, they should arrange with the insurers to honour any agreement reached by them, perhaps within specified parameters; or alternatively the insurers might send a representative to the mediation.³⁴ In a multi-party dispute, the mediator will generally want to ensure that all parties attend whose agreement is essential for an effective resolution.³⁵
- Consideration can be given to the way in which legal issues, either specific or general, will be addressed so that there are no inappropriate expectations. There may, for example, be short presentations by the lawyers so that each side can have a better idea of the other's contentions, especially as in many cases negotiations will take place "in the shadow of the law" inasmuch as parties know that they will be able to have the issues adjudicated upon if they do not resolve them in mediation.³⁶
- Consideration can be given to steps that might be taken before an initial substantive meeting so as to enhance the prospects of resolving issues at that meeting. For example, accountants might be asked to prepare certain accounts, or experts might be asked to liaise and produce a note specifying areas of agreement and disagreement, or preliminary drafts of required documents might be created.³⁷

- 9-050**

These early communications set the process up effectively, introduce the mediator to the parties or their lawyers and start the process of establishing a working relationship, rapport and trust; and may also give the mediator an initial picture of the issues.

- 9-051 These preliminary communications may be conducted with each party separately, but where practicable they may be carried out by a preliminary meeting with the parties or their lawyers.

Preliminary meeting

- 9-052 The preliminary mediation meeting may be distinguished from the pre-mediation intake meeting in that the intake meeting is intended to help parties decide whether or not to enter into mediation whereas the preliminary mediation meeting is held once parties have entered the process and as a step in it.
- 9-053 There may sometimes be a blurring of the two kinds of initial meetings in practice. A mediator may, for example, meet parties or lawyers to help them assess whether or not mediation is appropriate. If they are satisfied and wish to go ahead, they can immediately sign the Agreement to Mediate and convert the meeting into a preliminary meeting and start addressing procedural matters or sometimes even substantive issues.
- 9-054 Where it is practicable to hold a preliminary meeting, all the preliminary communications outlined above can be dealt with at one time, rather than the mediator doing so through a series of phone calls and emails. Not only is this efficient, but it affords the parties and the mediator an opportunity to start working together and perhaps to touch on some of the issues that will need to be addressed, facilitating preparation for the substantive meeting. It may also stimulate dialogue about ways of considering the issues, and allow the parties to explore steps that they might take before the substantive meeting to narrow the issues—something that cannot be done where the preliminary communications are conducted through a series of separate exchanges.
- 9-055 It is of course not always practicable to hold a preliminary meeting, and mediators and parties will be guided by pragmatic considerations of cost and proportionality particularly where parties and lawyers are based some distance apart. However, with the improvement and development of technologies such as Skype, video conferencing, telepresence video telephony and virtual meetings, travelling to meetings may well not be such a necessity or inhibition to preliminary meetings.³⁸

Preparation

- 9-056 After dealing with preliminary matters, the mediator generally needs to prepare for the substantive meeting(s). This may include the following:

oEstablishing a venue:

If practicable this should be neutral though the premises of the lawyer for either party may in some cases be acceptable. There needs to be a room in which the parties and the mediator can meet jointly; and in those models which involve separate meetings, also separate (soundproof or well apart) rooms for each party. The joint meeting room can double as a room for one party.

oReception arrangements:

These should ideally be planned to provide that the parties are not kept waiting together in the same waiting room if there is a high level of animosity or tension between them.

oSeating arrangements:

This should be arranged with care. Where practicable it should avoid the parties facing one another in a way that could feel confrontational.³⁹

oHosting arrangements:

One of the mediator's roles is that of host.⁴⁰ The mediator needs to ensure that there are adequate facilities, refreshments and meals for the parties, as well as resources such as wi-fi if practicable, flip charts, printers, photocopiers and anything else that may be needed to enable the process to function efficiently.

oReading and research:

The mediator will read any material submitted by the parties. Some mediators also undertake research into the issues, for example concerning legal or technical aspects, others prefer to be educated by the parties into the issues as the mediation progresses.

oCoaching:

Some mediators find it helpful to provide informal coaching to the parties and/or their lawyers as to how to make best use of the process, on the phone or by providing information sheets. Lawyers may be encouraged to adopt an explanatory rather than combative approach in making their contentions, and generally parties may be encouraged to adopt problem-solving rather than adversarial strategies.

oOther practical preparation:

There may be other matters that can usefully be prepared in advance. The mediator may suggest that arrangements be made for experts to be contactable by the parties as needed during the process, or may arrange for after-hours facilities to be available where it is contemplated that the mediation could run beyond the anticipated time. All preparation will depend on the needs of each individual matter.

Footnotes

- ³⁴ As to the relationship between insurance interests and compromise, see D. Foskett, *The Law and Practice of Compromise*, 7th revised edn (London: Sweet & Maxwell, 2010); and Foskett on *Compromise*, 8th edn 2015.
- ³⁵ Sometimes though the mediation can take place on a more limited basis with some parties missing. See "Multi-party disputes" below.
- ³⁶ A concept based on the article by *R. H. Mnookin and L. Kornhauser*, "Bargaining in the Shadow of the Law, The Case of Divorce" (1979) 88 *Y.L.J.* 950.
- ³⁷ See fn.2: Lax and Sebenius emphasise the importance of set-up in preparing for negotiations.
- ³⁸ For more information about the use of technological developments in relation to dispute resolution processes, see Ch.20.
- ³⁹ See the comments about seating arrangements in Ch.10, para.10-070.
- ⁴⁰ See Ch.14 for mediator roles including that of host.

Stage 2: Commencement, Establishing the Issues and Setting the Agenda

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Chapter 9 - Mediation—Practice Overview

Stage 2: Commencement, Establishing the Issues and Setting the Agenda

9-057 In most models and fields, the mediator will welcome the parties, make some form of opening statement outlining the process and any relevant ground-rules, and facilitate getting the proceedings under way. In some models, the parties or their lawyers may make a formal opening statement, in others this is not required or considered appropriate. This stage commonly tends to be conducted by way of joint meeting, though not necessarily. This joint meeting may be an opportunity to explore matters of common concern before separating into private meetings, in those models where parties separate for negotiations.

9-058 One of the mediator's initial tasks is to establish the issues for resolution and to establish an agenda for the process. This may be done formally, with the agenda agreed and recorded, or informally and even implicitly, with the mediator merely maintaining a personal note that is not specifically shared with the parties.

This stage may be viewed from three perspectives:

1. The issues as presented

9-059 In a more formal and structured process the parties provide an initial written summary of the issues and their positions, amplified by oral presentations, whereas in more informal processes the issues are outlined orally in the course of discussion.

9-060 Once the mediator and the parties have an indication of the issues in dispute, the issues may be crystallised into a formal written agenda, which can be varied as the mediation progresses and aspects are addressed and new issues emerge. Having these presented in a visual format, for example on a flipchart, can be helpful to the parties and the mediator in maintaining focus and prioritising issues.

9-061 Parties do not necessarily share the same view as to what the issues are, particularly in family, couples' and inter-personal disputes. The mediator may need to find a neutral problem-definition that will satisfy both or all parties.

9-062 An agenda should ordinarily be a flexible tool, guiding the progress of the mediation. Where mediation takes place over a series of meetings, it may be advisable for the mediator to check the agenda at each meeting to ensure that new or other issues do not need to be addressed, or the prioritisation of issues re-organised.

2. Underlying issues: the “iceberg” factor

9-063

In many cases, the presenting issues may be “the tip of the iceberg” and other issues, often underlying, emerge. A commercial dispute between two corporations may well turn out to reveal underlying issues of competition, lack of trust, anger at past dealings and other deep-seated negative attitudes existing between the management of the respective companies. A boundary dispute between neighbours may conceal underlying issues about individual autonomy, lifestyle choices and mutuality of respect. A clinical negligence damages claim may be as much about getting an explanation, apology and accountability as receiving compensation.

- 9-064 Sometimes the parties are aware of the underlying issues and quickly bring them into the open. Sometimes, however, they take time to surface, either because the parties do not want to express them directly, or perhaps because they are unaware of their existence or are not conscious of their effect on the dispute.
- 9-065 Mediators should be sensitive to the possibility of underlying issues emerging, and should watch for them through remarks and body language, and gently—or if necessary robustly—probe where appropriate. Some commercial mediators are encouraged to take time at the outset, usually in the initial confidential session with each party, to explore all issues, including those that may underlie the dispute as presented. A common experience is that underlying issues if left unaddressed can subvert the resolution of the main issues.⁴¹ It is a matter for the judgment of the mediator to consider whether, how and at what stage to bring any underlying issues into the open, having regard to confidentiality, party preferences and the efficacy of the process.

3. The mediator's working principles

- 9-066 Clearly the agenda is that of the parties and not the mediator's. A rather more subtle and difficult question is how to ensure that the parties understand and approve of the underlying approach and working principles used by the mediator, which may constitute a different basis from the parties' expectations, given especially the different models and approaches outlined above.
- 9-067 As observed by Brown in relation to the conduct of mediation undertaken by dispute resolution organisations, “... it would be helpful to the creation of confidence to have a note that briefly sets out the process and the individual mediator's approach to material aspects particularly evaluation. (How this is done will need some discussion and coordination between organisations and mediators).”⁴²
- Mediators should be explicit about the process that they offer to the parties, so that the parties can make an informed choice as to what they want.

Footnotes

- ⁴¹ See fn.18 where Acland suggests in *A Sudden Outbreak of Common Sense*, that the more that comes out at this early stage, the fewer the new issues that will emerge later when agreement may be approaching.
- ⁴² Henry Brown, “Creating Confidence in Mediators and the Process: An Exploration of the Issues” (2010) Chartered Institute of Arbitrators Symposium 2010.

Stage 3: Information Gathering

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Chapter 9 - Mediation—Practice Overview

Stage 3: Information Gathering

- 9-068 The way in which information is gathered may vary. In civil and commercial disputes, where the substantive mediation meeting commonly takes place over one block of time, relevant documents are ordinarily required to be with the mediator before the substantive mediation begins. Where, however, the mediation takes place over a number of sessions, as in a family model, information may be received throughout the process, supplemented as required.

Information may be of different kinds and come from different sources:

- Facts about the parties and the issues, and each party's views and submissions, may be obtained from an initial referral form or from written statements furnished by the parties.
- Copies of relevant documents may be submitted by the parties.
- Oral comments may be made by each party at the initial joint meeting and/or in separate meetings with the mediator and will of course continue informally throughout the process.
- Technical, legal and other expert opinions, valuations and other specialised data can be introduced into the mediation through the respective lawyers, experts and professional advisers, or the parties may obtain such information and opinions from neutral sources.
- Witnesses of fact are not involved as such in the mediation process, though this has been suggested⁴³ and is sometimes done in the mini-trial, which may be viewed as a structured form of evaluative mediation.⁴⁴
- The mediator's observations during the mediation may also provide useful insights.⁴⁵ The dynamic between the parties, their attitudes and underlying concerns all comprise part of the broader picture. Indirect and sometimes quite subtle clues —tone of voice, a remark, a nod, a smile, a gesture of disapproval or irritation, a shift of the eyes, signs of distress—these may all help the mediator to gain insights into the motivations, concerns and aspirations of the parties.

Displaying information: the flip-chart⁴⁶

- 9-069 Some of the data gathered during the mediation will be noted and retained by the mediator, some will need to be shared and perhaps more prominently displayed for the mutual benefit of the parties and the mediator. In the latter regard, a flip-chart is an invaluable aid to the displaying of information, and also serves other functions:

- It can be seen by all parties and keeps information and issues in focus.
- Data can be reverted to as matters develop. For example, financial data in family mediation may be recorded and amended from time to time as supplementary data is received and information becomes clearer.
- The overt sharing of information can be an empowering process.
- Some facts are more graphic when they appear on a chart, and can have an impact on the parties without having to be orally articulated.

- Listing options and recording brainstorming ideas visually helps to create a positive sense of seeking problem-solving approaches to the dispute.⁴⁷
- It can be used to distract parties from negative exchanges.

How much information is enough?

- 9-070 There can be no standard answer to this question: much invariably depends on the nature of the issues. As a general proposition there needs to be sufficient information for the parties and the mediator to understand and address the issues: there is no need to replicate the document disclosure process or further particularisation in litigation. Disputes can be and are resolved at any stage, very often before the start of any legal action and commonly before the exchange of document disclosure or witness statements, so clearly these are not essential to settlement.
- 9-071 This principle does not, however, apply to couples' mediation in jurisdictions like England and Wales where issues on divorce require full and frank disclosure of all, and not just selective, financial information. The mediation process accommodates this by requiring the same level of disclosure in divorce mediation as would be provided in contested proceedings.

Footnotes

⁴³ Peter Lovenheim and Lisa Guerin, *Mediate Don't Litigate* (California: Nolo, 2004), p.94 say that a mediator may suggest that witnesses of fact should be called. However, this is rarely if ever done.

⁴⁴ See [Ch.19](#) on neutral evaluative processes.

⁴⁵ See [Ch.14](#) and in particular the section on communication skills such as listening, observing non-verbal communications and questioning.

⁴⁶ Electronic digital "flip charts" exist which can replicate material from laptop to screen. The principles outlined here apply to any such method of displaying information.

⁴⁷ The corollary is that the deletion of an option may inhibit parties from re-opening a deleted option if on subsequent reflection it may become relevant. Consequently, in narrowing options, it is better to focus on preferred options without physically deleting those initially expressed to be unsuitable.

Stage 4: Conducting Substantive Negotiations

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Chapter 9 - Mediation—Practice Overview

Stage 4: Conducting Substantive Negotiations

- 9-072 In this stage the mediator helps the parties to communicate with one another, either directly in joint session, or indirectly by means of separate meetings (“caucuses”), explores and narrows options, and generally facilitates the parties’ negotiations with a view to narrowing their differences and helping them eventually to resolve their issues. Approaches and strategies relevant to this phase of the mediation include the following:

Managing the process ⁴⁸

- 9-073 In most models, the parties are responsible for decision-making in relation to the substantive outcome whereas the mediator is the manager of the process and responsible for making the administrative arrangements for the mediation, organising the facilities, chairing the meeting and the process, and maintaining an orderly, secure and constructive working environment in which the parties can negotiate effectively.
- 9-074 The mediator derives authority from the parties and should not be autocratic, riding roughshod over their views and wishes. This does not, however, mean that the mediator should not, after due consultation where appropriate, make necessary management decisions.

Facilitation

- 9-075 The primary and fundamental role of the mediator is to facilitate the parties’ negotiations with one another. Mediators may try to help parties to use an interest-based problem-solving approach in their negotiations though that will not always be possible or practicable: parties commonly adopt a competitive approach, and in the mediation process may move to a mixture of this and problem-solving.⁴⁹
- 9-076 The mediator will also try to facilitate communications between the parties. This may be particularly important where they have a continuing relationship such as parenting or partnership. Usually this can better be achieved through joint rather than separate meetings.

Holding joint or separate meetings (caucuses)

- 9-077

A mediator may meet the parties together, separately, or both. Practice tends to vary in different fields of activity, but some factors are relevant in all kinds of disputes:

- Conducting mediation exclusively through joint meetings demands substantial mediator skill and care. Parties cannot speak privately to the mediator, so the mediator must continually be alert to the parties' stresses, power imbalances and negotiating inequalities. Separate meetings demand different kinds of skill and care. Mediators are subject to competing party pressures and greater risks of triangulation, and need to exercise great judgment and care in carrying proposals and communications between the parties.
- The mediator needs to make it clear whether discussions in the separate meetings will be shared with all parties, or whether separate confidences will be maintained, save as the mediator is authorised to disclose, which is more usual. In joint sessions there are no secrets between parties and the mediator, whereas separate meetings inherently involve private communications between each party and the mediator, especially where the mediator promises each party confidentiality. This places the mediator in a powerful position as the keeper of separate secrets. Some mediators do not favour being placed in this position and prefer not to undertake separate meetings.
- The mediator will ordinarily encourage each party in the separate meetings to disclose their aspirations, interests, needs and concerns and to indicate broadly what nature of settlement terms would be acceptable. The mediator may try to establish any hidden agendas of each party, going behind their stated positions and aspirations to seek information to help them devise options that will meet all needs.
- Separate meetings are commonly conducted on a shuttle basis. The mediator moves between the parties, narrowing and helping resolve the issues between them.
- By their nature separate meetings may reinforce detachment, which may be inappropriate where the process is trying to heal relationship rifts, unless they are used with a view to re-establishing a joint process. Parties may feel isolated and be anxious about what is being said to the mediator by the other during the separate meeting. Having some support and a task such as considering some aspect or making specified enquiries while the mediator is engaged with the other party can be helpful.
- Separate meetings take longer than joint meetings and require ample time to be effective.

Generating and developing options

9-078 Parties in dispute cannot always see their options clearly, often focusing on one specific outcome instead of viewing matters more widely. Developing options is an intrinsic part of the problem-solving approach and a significant part of the mediator's role is to help the parties to generate and consider their options, and to develop them into viable courses of action.

9-079 Options may be suggested by the parties or the mediator. Sometimes the mediator may suggest ways in which other people in disagreement have dealt with similar situations, or may indicate different approaches that courts have taken. There should be no inhibition on the mediator adding ideas, as long as these are expressed in a way that does not cause them to be perceived as "the mediator's recommendations". As parties examine and work through their options, narrowing or eliminating some and widening others, their ability to work together in finding a solution is likely to increase.

Brainstorming 50

9-080

Brainstorming involves the mediator encouraging the parties to put forward as many ideas and options as possible as they come to mind without inhibiting their flow by considering them individually or rejecting any at that stage, even if they may seem unworkable.

- 9-081 The mediator may need to manage the brainstorming session firmly and creatively, helping parties to build on and develop options as they arise and deterring parties from examining them while they are being generated.
- 9-082 As options are being generated they are recorded and prioritised later. When subsequently considering options, it is not a good idea to eliminate any notwithstanding that some may be unacceptable. It is not uncommon that options initially considered to be unacceptable later come back into focus as possibilities, perhaps by way of permutation with other ideas.

Building trust and understanding

- 9-083 People in conflict may find it difficult to trust one another, especially where they are or have been in a personal or business relationship that has deteriorated. The mediator can normalise the lack of trust by pointing out that this commonly happens where relationships break down, and can try to help to improve the trust of the parties in one another, where appropriate. The parties now have an opportunity to explore ways of restoring that trust.
- 9-084 This is not a naive exhortation to “trust one another”. It is rather a process of providing the parties with opportunities to demonstrate their sincerity and credibility. This could, for example, take place where possible solutions are tested for short periods before they are applied on a longer-term basis. The mediator can also help the parties to understand one another more clearly by presenting their perceptions in a way that the other can comprehend and by correcting distortions or misunderstandings. Of course, many disputes are resolved pragmatically without trust or understanding; but these factors are helpful in the process of resolving issues consensually. It is also particularly important where the parties are hoping to re-establish working or personal relationships.

Using communication and other skills ⁵¹

- 9-085 The mediator uses various skills at all stages of the proceedings, but especially during this negotiating phase. These include listening, observing body language, helping parties to hear and understand what others are saying, summarising accurately and appropriately, giving appropriate acknowledgment and where appropriate mutualising concerns and interests. It may where necessary involve reframing what they have said so that it may be better understood in its context. The effective use of questions is also a considerable mediator skill.
- 9-086 The mediator’s skills constitute a critically important ingredient in mediation. While some people may have many of the required attributes and skills to enable them to mediate effectively, mediators invariably need to train in order to make the transition from their occupation of origin to mediator.

Testing perceptions, positions and proposals

- 9-087 People in dispute may develop their own “view of the world” based on their understanding of the facts and issues. Prospects of success, perceptions of the other party’s position and the acceptability of proposals are all assessed on the basis of those views and understandings.
- 9-088 The mediator may need to “reality test” parties about these matters by checking that parties appreciate their implications and consequences by asking appropriate questions (“What if ?”) which compel the party to reflect on the position more carefully, or by making appropriate observations which do not damage the mediator’s impartiality.
- 9-089 Lawyers, while giving realistic assessments, will generally do so within the context of supporting the client. Lawyers appreciate that their clients wish them to be partisan on their behalf and to champion their cause. This often makes it difficult to express views that contradict the client’s views and expectations. Even when told the true position and risk, people do not always accept and act on that advice. It is against this background that mediators may “test reality”. The mediator’s challenges may not be welcomed, but this may be an essential exercise if the mediator is to have an effective function in helping the parties to move towards a realistic settlement.
- 9-090 The mediator of course brings a subjective element into this process of reality-testing.⁵² What one person considers reasonable and proper another may believe to be unreasonable and improper. Consequently, this exercise must be undertaken with sensitivity and judgement.

Sensitivity to the expression of emotions

- 9-091 People in conflict will often have strong feelings about the position. They may be distressed, angry, frustrated, apprehensive or disappointed, or they may experience other emotions, without even necessarily being consciously aware of them. Mediators need to be sensitive to these feelings and to be able to respond appropriately without crossing the boundary into counselling or therapy. They can recognise and acknowledge the feelings and help a party nevertheless to deal with the substantive issues in the mediation.
- 9-092 This can be necessary. Submerged anger can sabotage attempts to reach an agreed resolution, as the anger manifests itself in a disguised form, such as destructive comments or an unwillingness to co-operate with the other party or the process. Other emotions may block progress towards resolution in the short term, apart from any adverse long-term implications.
- 9-093 The mediator can maintain a balance, providing a safe environment for emotions to surface and accepting the normalcy of that, but ensuring that it does not destabilise the process. The mediator will generally try to bring the parties back to the task of dispute resolution as quickly and gently as practicable. Mediation is not a counselling or therapy process (though it can in some cases, especially inter-personal, have a therapeutic effect).

Evaluation

- 9-094 In some models of mediation, a mediator may, in addition to the usual facilitative role, also adopt an element of evaluation of the issues, or may be required to assist in the formulation and development of settlement terms. This is dealt with in Ch.19.

Footnotes

- 48 For further details of the mediator's management role, see Ch.14.
- 49 Theories of negotiation are outlined in Ch.4. See also fn.2 and Lax and Sebenius's observations about the essential tension between interest-based approaches and an individual's aims to achieve the best available outcome for himself.
- 50 See Edward de Bono, Lateral Thinking: An Introduction (London: Vermilion, 2014) in which he suggests that the three principal elements of brainstorming are putting forward ideas to stimulate others; suspending judgment, so that no idea is thought to be too ridiculous to put forward; and a relatively formal setting.
- 51 The skills used by mediators are set out more fully in Ch.14.
- 52 Reality-testing, even by asking questions, constitutes a form of evaluation: see Ch.19.

Stage 5: Dealing With Impasse

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Chapter 9 - Mediation—Practice Overview

Stage 5: Dealing With Impasse

- 9-095 Mediation procedures provide a framework within which the parties can generate momentum towards resolution. An impasse arises when negotiations grind to a halt, momentum stops and the mediation seems set to terminate. In this event, some strategies may help the parties back into negotiation. Although this may occur at any stage of the process, it will be treated here for convenience as a separate stage of mediation.
- 9-096 An impasse strategy is not something that aims to settle all issues but rather a course of action that helps to get parties back into negotiation. These will be considered more specifically in relation to different fields of activity. Meanwhile the following are some generic strategies that can be applied to all kinds of mediation:
- 9-097 First, it can help to consider the cause of the impasse, which may arise from any one or a combination of the following factors:
- the mediator's role and assumptions: this will be further considered below;
 - an external cause over which the parties have no direct control—in which case pragmatic alternatives and perhaps short-term by-passes may need to be explored;
 - a transactional issue, in which proposed terms are unacceptable because they do not meet the needs of the parties—needing creative strategies to explore alternative terms;
 - an internal cause arising from emotional issues, differing values or a sense of unfairness—needing a sensitive approach to address this underlying cause.

The following strategies may be appropriate in all kinds of mediation:

The mediator's role and assumptions

- 9-098 The mediator may be perpetuating the problem by perhaps being stuck in one approach or by unwittingly supporting one party or position. Self-reflection might reveal that the mediator is unconsciously following a line that is not acceptable, and from which everyone including the mediator should be stepping back. Or the mediator may unconsciously be making inappropriate assumptions or may be triangulated with one of the parties causing a block in the dynamic of constructive facilitation.
- Bringing this into the mediator's awareness and taking some deliberate step to redress the position can change the dynamic and help the process to shift forward again.

Blocks caused by terminology or symbolism

- 9-099

Where the impasse arises because of terminology or a symbol, it can help to remove the focus from the words or symbols in question, and to examine the underlying needs and concerns giving rise to the impasse.

9-100 This is sometimes called the “ginger jar factor” arising from a case in which a complex divorce settlement broke down over the question of who would get a ginger jar, which was a gift from someone who, the other party felt, would not have approved of the behaviour of the person now claiming it. The jar represented symbolically who was right and who was wrong, and also symbolised the ending of the relationship. To resolve this, a creative and symbolic solution was needed, involving both parties giving the jar to a child of the family.

9-101 This symbolic aspect can arise in all kinds of situations, not just family. An example arose in relation to claims brought against the Alder Hey Children’s Hospital, in which the organs of hundreds of children and non-viable babies were retained following post-mortems without the knowledge or consent of the next-of-kin. Some 1,200 claimants brought litigation against the hospital, and the dispute was dealt with, and resolved, by way of mediation. Ian Cohen, lead solicitor for the claimant legal team, subsequently wrote:

“It is quite clear that, had the defendants only offered a financial remedy, the litigation would not have concluded. The offer of seven non-financial remedies, including a press conference, letters of apology and a plaque being erected at the hospital, were without question the key to the parents accepting the offer of settlement.”⁵³

9-102 Parties may adopt strong positions about something which does not appear to have any significant economic value or other importance, causing an impasse. To overcome impasses based on symbols it may be necessary to identify the issues underlying the symbolism. Sometimes creative solutions can then be found with the benefit of these insights.

Differences of perception: fairness, values and other aspects

9-103 Where there are differences of view about fairness, it can help to explore what this means to each party. What aspect of the proposals is not fair? What needs to happen to make it fair? Exploring different perceptions of fairness may not be conclusive, but it allows each side to obtain a better understanding of the other’s sense of fairness, and to confront one notion of fairness with another equally strongly held one.

9-104 Perceptions can also differ in other respects, such as with regard to motives, values and aspirations. The mediator can help parties by identifying and normalising differences of perception, explaining that they are quite common and refusing to be drawn into accepting either side’s views. Rather, the mediator can seek ways of clarifying the factual position and reframing the differences.⁵⁴

Emotional blocks

9-105 An impasse may arise because of strong emotions. It is not only family or other inter-personal disputes that give rise to strongly felt emotions. Contrary to a popular perception, there is often a high degree of emotional intensity in civil and commercial disputes.⁵⁵

9-106

In such event, the mediator may need to allow the emotional issues to surface, rather than allowing them to fester, even if they cannot be resolved.⁵⁶ In appropriate circumstances the mediator may wish to discuss with the parties the possibility of their seeking other professional help such as counselling, especially where the emotional blocks run deep.

- 9-107 Where the representatives of corporate parties cannot move forward because of their emotional involvement with the issues, the mediator may consider suggesting that different people take over or augment the party's representation. This may, however, not always be possible or appropriate; and in any event would need to be handled with tact and discretion.

Conflicting legal or technical advice

- 9-108 In most models, the mediator would not express a view on the respective merits when faced with parties who are deadlocked because they have received conflicting advice from their respective lawyers or technical advisers. The mediator can, however, reality-test with each, being careful not to impose his or her views indirectly through the form of questioning. It can also help to have the lawyers outline their positions to one another and to the parties and mediator at a meeting, not necessarily to persuade the other, but to allow a forum for each to hear the other's argument, and maybe to realise that there are sustainable arguments on both sides. The risk of a court accepting the other's case can be made more manifest.

- 9-109 Where the deadlocked issue is capable of some form of third-party adjudication, one option may be for the parties to refer it to an appropriate third party for a non-binding opinion while the mediation is pending. Where the sticking point is a legal one, the mediator could, for example, assist the parties to formulate an agreed form of instructions to solicitors or counsel, whose opinion would be helpful but not binding. That opinion could then be brought into the mediation as a discussion document to help move matters forward.⁵⁷

Helping parties to assess risk

- 9-110 Some mediators tend to encourage parties in rather general terms to consider the risks of proceeding to trial, drawing attention to the uncertainties of doing so. While this may be a sensible reminder, it is questionable whether this is likely to have any significant impact and it certainly does not amount to effective reality testing or risk assessment.

- 9-111 Where parties are deadlocked, it can be more helpful to assist them to undertake a risk analysis, particularly if this can be done on a considered and systematic basis. This does not involve the mediator evaluating the outcome—though in some models it might—but rather providing a framework for the parties to make their own assessments and helping them to identify the factors that they might usefully consider.

- 9-112 There are different ways of doing this, including providing a formal risk analysis framework, or more informally drawing their attention to their BATNA (Best Alternative to a Negotiated Agreement) and WATNA (Worst Alternative to a Negotiated Agreement). These strategies will be more fully considered in reviewing practice in each field of activity.⁵⁸

Other strategies

- 9-113 The impasse strategies outlined above are by no means comprehensive, but are merely examples of the kinds of strategies that a mediator might wish to consider. Many other options exist, some of which will be further considered in examining specific fields of activity. These may include the obvious options of splitting the difference, deferring stuck issues while tackling others or taking time out.⁵⁹
- 9-114 Sometimes there is no easy answer for the parties, and they are faced with a stark choice either to settle or to litigate. “Just do it!” may be the watchword from their advisers.
- 9-115 Deciding to terminate the mediation because impasse cannot be resolved and offering to explore whether mediation can help narrow the issues in litigation may serve as an impasse strategy itself and a stimulus to finding a way to resolve the impasse. Parties should however not regard it as a failure if they need a third-party decision: that is an ultimate remedy that may be appropriate where people cannot agree on the proper outcome themselves.

Footnotes

53 Ian Cohen, “Apology accepted” *The Lawyer*, 7 April 2003.

54 For reframing, see [Ch.14](#).

55 Roger Fisher, co-author of the classic *Getting to Yes*, and Daniel Shapiro have written a helpful book addressing the effect of emotions on negotiations—*Building Agreement: Using Emotions as You Negotiate* (London: Random House Business Books, 2007).

56 Christopher Moore refers to a Circle of Conflict, with value, relationship and data conflicts including strong emotions and misperceptions that need to be addressed before people can engage in effective negotiations about interests. Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 4th edn (San Francisco: Jossey-Bass, 2014).

57 Such an opinion would have to be sensitively drafted with an awareness that it will be used in a negotiating process.

58 See [Ch.4](#) and the references to BATNA and WATNA: (best and worst alternatives) in the section “An interest-based problem-solving approach”.

59 See for example John Wade’s 16 options for overcoming deadlock in his chapter “Crossing the Last Gap” in Andrea Kupfer Schneider and Christopher Honeyman, *The Negotiator’s Fieldbook: The Desk Reference for the Experienced Negotiator* (Washington DC: American Bar Association, 2006).

Stage 6: Concluding Mediation and Recording the Outcome

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Stage 6: Concluding Mediation and Recording the Outcome

- 9-116 Mediation may terminate in a number of circumstances. All the issues may have been resolved or the parties may have resolved some issues and decided to take the others into a different forum such as arbitration or litigation; or may resolve the remaining issues themselves or through lawyers. Alternatively, the mediator may decide that it is inappropriate to continue with the mediation because there is no reasonable prospect of resolution or because the relevant Code of Conduct requires this.
- 9-117 Where settlement terms have been agreed, procedures vary in different fields of activity and models. In civil-commercial mediation, the parties would usually sign a binding agreement before concluding the session. In the family field, the proposed terms may be non-binding pending the parties obtaining legal advice and the respective lawyers preparing the final form of agreement or court order. In such cases, it is common for the mediator to prepare a non-binding and off-the-record summary of the proposals that would be acceptable to both parties, commonly in the form of a Memorandum of Understanding.
- 9-118 Where the mediation ends without settlement terms being agreed, there are no specific formalities. Some mediators conscientiously persevere in assisting the parties to reach agreement despite the imminence of ending the process, for example by suggesting concluding communications or strategies, which are dealt with in the chapters about different fields of activity. Others bring the process to an immediate end.

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Addressing Post-Mediation Issues

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Addressing Post-Mediation Issues

- 9-119** In most cases, the termination of the mediation and the recording of the settlement terms will signal the end of the mediator's role. However, it is possible for the mediator, or the ADR organisation that arranged the mediation, to have a post-mediation function, for example:

oStakeholder:

The parties may wish the mediator or the ADR organisation to act as a stakeholder in relation to funds to be released on agreed terms (though this is rare), or to hold documents in escrow pending the implementation of the settlement.

oContinuing mediator:

The parties may agree that if any issues should arise in the course of executing their settlement obligations, these will be referred to mediation for further discussion. Or where there is a continuing relationship between the parties (whether working or personal, as in parenting), the parties may agree that if any new problems arise in the future, they will revert to mediation.

oAdjudicator:

The parties may appoint the mediator to act as an arbitrator, expert or adjudicator in relation to any issues that may in the future arise in relation to the fulfilment of the settlement terms. This should be distinguished from med-arb, where all the initial issues are dealt with by arbitration if mediation does not resolve them. In this case, the initial issues are resolved in the mediation, but any new aspects of the agreed terms may be dealt with by informal adjudication.

oSettlement supervisor:

Although in practice this is unusual, the parties may wish the mediator to supervise the implementation of the settlement terms.

Multi-Party Disputes

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Chapter 9 - Mediation—Practice Overview

Multi-Party Disputes

- 9-120 Any early concerns about mediating multi-party disputes have been wholly dispelled by the success achieved with them in practice in a variety of fields including especially the construction industry. David Richbell, who has mediated a large number of multi-party cases, has written about his experience and way of working with them, and concludes that, although they are very demanding “most do settle”.⁶⁰ There are many other examples: in one case, claims of mismanagement of an investment portfolio of a pension scheme were mediated. The respondents included the pension trustees, company directors, legal advisors, bankers, investment advisors and insurance underwriters. All were represented in the mediation, in a complex negotiation involving seven different parties, resulting in an agreed settlement.
- 9-121 Randall W. Wulff writes of having taken part as a mediator or as an advocate in many multi-party disputes, one involving 28 parties and their respective counsel, and another necessitating the hire of a hotel banquet room and suites to accommodate some 60 participating client representatives and witnesses.⁶¹ Gerald S. Clay writes from his personal experience that neither the degree of complexity of a case nor a multiplicity of parties are any hindrance to mediation.⁶²
- 9-122 Public law disputes and environmental issues generally involve multiple parties, and mediation is used for dealing with many of these.⁶³ Professor Lawrence Susskind considers that:

“the mediation of multi-party, multi-issue disputes at the local level, such as battles over the design and location of public facilities, the setting of policy priorities (like how to spend public funds), and the specification of health and safety standards (like acceptable levels of risk) can be particularly effective.”⁶⁴

Some practical points for multi-party mediation

- 9-123 The following practical suggestions are based on the experience of multi-party mediation in the civil-commercial field in the UK:
- Multi-party mediation requires significantly more planning than two-party mediation. There is a consensus among practitioners who undertake multi-party work that preparation is key, and that time needs to be spent with the parties in designing a suitable process.⁶⁵
 - It is helpful and in some cases essential to have a preliminary meeting with the parties and their lawyers.⁶⁶ In addition, separate meetings with each may also be useful. These allow the mediator to obtain information about each party’s position, and to start building rapport. It also helps to identify parties whose interests may coincide and who may decide to join one another for the purpose of mediation discussions.
 - Co-mediation is commonly indicated for multi-party disputes. If a sole mediator is initially appointed, these preliminary exchanges allow the mediator to assess whether a co-mediator is needed.

- The simultaneous exchange of written statements by the parties can be difficult to arrange and implement. It may be advisable to have them all sent (with copies if required) to the mediator, who can dispatch them simultaneously to the parties when all are received.
- Parties can be asked to send draft statements to the mediator on a confidential and interim basis, in advance of their final versions. This can be especially helpful where time constraints exist. This allows the mediator to consider the position and if appropriate to seek clarification or particularisation.
- The time between separate meetings is invariably longer in multi-party disputes. If this is explained to parties in advance, they will be more prepared for the delays between separate meetings and less likely to be troubled by them. The mediator may suggest that they bring work files, reading matter or anything else to occupy themselves between meetings. Richbell refers to this “idle time” and suggests that the parties’ lawyers have responsibility for keeping everyone in their team engaged and active, preferably with useful activities such as risk analysis, brainstorming and considering possible solutions.⁶⁷
- The opening oral presentations will be important to each party, and sufficient time needs to be allowed for them; but to avoid these taking too long, time limits should be agreed, appropriate to the complexity of the issues. The sequence of presentations also needs to be considered, and where practicable, agreed.
- The joint meeting may continue for as long as the mediators consider this to be helpful. Richbell finds these valuable and points out that it is also an efficient use of time, since everyone is engaged. This is an opportunity to seek common ground insofar as it may exist and to identify and prioritise areas of disagreement.
- Once separate meetings are set up, co-mediators must decide whether they should conduct their meetings together or split up. If time permits, they may wish to be together for the initial meeting in the mediation with each party, but then separate for subsequent meetings.
- The mediator needs to have a separate room as a base for managing the discussions. This is particularly important for co-mediators, who may also wish to have a flip chart for keeping a record of their meetings as well as the issues and possible solutions as they develop. This can also help to tell one where the other is at any time.
- If long delays between meetings are expected once the process is under way, the mediator may wish to release parties from waiting, by agreeing a time to return or being available on short notice. Some mediators prepare outline timetable schedules so that parties or their lawyers can actually leave the meeting and return when needed, with flexibility: mobile phones can be useful here.
- Mediators will be alert to possible changes during the process, as parties identify their interests and may find alliances with others. In some cases, this may involve physically moving groups together with one another, either generally or for specific discussions.
- Personal meetings can be supplemented by telephone or Skype discussions with parties who are unable to attend in person or who are not immediately available.

9-124 Wilkinson suggests that the key to using ADR in disputes involving multiple parties is to get the process going with those who are willing to participate, and others may join in later. Even if they do not, those parties participating in the ADR process may be able to arrive at resolutions helpful to their mutual interests.⁶⁸ While this view has been shown to be workable in practice, it does call for some note of caution in that a mediation or other ADR process which proceeds without all the essential parties being involved runs the risk of being abortive. If the missing parties are not crucial to the outcome or if the participating parties can identify areas in which limited agreement would be helpful to them, then there is no reason why the process should not proceed without full participation.

9-125 One strategy for complex and prolonged multi-party disputes might be for the mediators from time to time to prepare interim summaries of the position as it develops, which clarify the extent of agreement reached and the range of issues still outstanding.

This would, of course, need to have careful regard to such duty of confidentiality as may exist in relation to the respective parties. The agenda can be reviewed from time to time in the light of any such interim summaries and reports.

- 9-126 If agreement is reached, all parties will need to review and comment on any draft document and to execute it when it is in its final approved form. In some cases, separate agreements between different parties may be required, rather than one document embodying all settlement terms. Procedures for obtaining court orders where necessary, for implementing the agreement and for dealing with any residual issues should they arise may also need to be considered.

Footnotes

- 60 Chris Newmark and Anthony Monaghan, Butterworth's Mediators on Mediation: Leading Mediator Perspectives on the Practice of Commercial Mediation (Haywards Heath: Bloomsbury Professional (formerly Tottel Publishing), 2005), Ch.13 (Mediating multi-party disputes).
- 61 See Randall W. Wulff, "A Mediation Primer" in J. H. Wilkinson, Donovan Leisure Newton and Irvine ADR Practice Book (New York: Wiley Law Publications, 1990), p.114.
- 62 Wilkinson, Donovan Leisure Newton and Irvine ADR Practice Book, 1990, Ch.9 (Counselling clients on mediation).
- 63 See, e.g. S. Murray, A. S. Rau and E. F. Sherman, Processes of Dispute Resolution: The Role of Lawyers (New York: Foundation Press, 1989), pp.329–336 (Public law disputes).
- 64 Professor Lawrence Susskind, "Multi-Party Public Policy Mediation: A Separate Breed" (Fall 1997) Dispute Resolution Magazine (ABA Section of Dispute Resolution).
- 65 See Lax and Sebenius fn.2, in which they emphasise the need to set matters up properly in all negotiation situations, and this applies especially in multi-party disputes. This includes ensuring that the right people are brought to the table and the process thoughtfully designed. *Michael T. Lesnick and John R. Ehrmann* in their article "Selected Strategies for Managing Multiparty Disputes" (1987) 16 *Mediation Quarterly* suggest a number of strategies for dealing with multi-party disputes, including designing the process structure, establishing an agenda and in suitable cases establishing an advisory committee to address preliminary issues.
- 66 See "Preliminary meeting" above.
- 67 See fn.60.
- 68 J.H. Wilkinson, Donovan Leisure Newton and Irvine ADR Practice Book (John Wiley & Sons, 1990) pp.22–23.

Outline of Different Fields of Mediation Activity

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Chapter 9 - Mediation—Practice Overview

Outline of Different Fields of Mediation Activity

9-127 Mediation can take place in any environment, whether between sovereign states or in the school playground. This book will however be limited to the use of mediation in relation to disputes arising in the following fields of activity:

- civil and commercial;
- family issues particularly couples issues arising on separation and divorce;
- workplace and employment;
- neighbourhood, community mediation and Restorative Justice;
- online dispute resolution (issues arising from, or addressed via, Web usage).

9-128 Each field has its own culture and practice in dealing with disputes in the traditional way and these differences have at least to some extent been imported into mediation practice, though general mediation principles will overlap all fields of activity.

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What is Covered in the Field of Civil and Commercial Mediation?

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Chapter 10 - Civil and Commercial Mediation

What is Covered in the Field of Civil and Commercial Mediation?

- 10-001 Distinguishing different fields of activity is necessary and useful for a number of reasons. In each sphere there are different cultures, laws, procedures, expectations and judicial approaches, so it is not surprising that mediation processes, models and approaches should differ, albeit that there may be some increasing cross-over. As a consequence, training programmes similarly vary between the fields of activity.¹ Most mediation organisations make these distinctions, with practitioners in each field joining organisations specific to their areas of work. Similarly, court directions and practice, European directives and statutory and quasi-statutory provisions differentiate, for example between civil-commercial and family mediation.
- 10-002 With some qualifications, the category of civil and commercial mediation relates to all kinds of disputes that might be dealt with in the civil and commercial courts. The qualifications concern areas of overlap with other fields of mediation activity. So, while this kind of mediation would ordinarily exclude couples' issues on separation and divorce, other kinds of family disputes could come within the ambit of civil and commercial mediation, including for example, family business disputes, property or other civil disputes between siblings or between parent and child, or contentious issues concerning the administration of trusts involving family members.
- 10-003 Another potential overlap relates to some community or neighbour disputes which are capable of being litigated in the civil courts. Similarly, workplace disputes fall into their own category, but some may overlap and be regarded as civil-commercial. There is no strict demarcation, nor a need for one.
- 10-004 A very wide range of cases fall into the civil and commercial field. They include all kinds of issues arising under contract or tort. It is impossible to list these comprehensively, but they would cover all contractual and general business and property disputes, claims for negligence and breach of duty and personal injury cases, partnership disagreements, shareholder and other company disputes and claims for maladministration of estates or trusts. Specialist areas such as libel, intellectual property and passing off, disputes in the construction industry, shipping and aviation disputes, commodity disputes, banking, insurance and other financial disputes, computer software and other information technology disputes would all be included.

Footnotes

¹ There are generic training courses, but people undertaking them may also undertake follow-up specialist training in particular areas of work.

Development of Civil-Commercial Mediation in the UK

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Development of Civil-Commercial Mediation in the UK

Private sector civil-commercial mediation bodies

- 10-005 Two organisations, the ADR Group and CEDR (the Centre for Effective Dispute Resolution), effectively led the way for civil and commercial mediation in the UK around the late 1980s. Both followed a similar model, adapted from US practice, in which broadly speaking a block of time is fixed for the process, commonly a day, but more or less as needed, at which each party outlines their case in a joint session, followed by a series of separate, confidential meetings undertaken by the mediator “shuttling” between the parties in separate rooms, carrying thoughts, ideas and proposals and endeavouring to craft an acceptable resolution, with other permutations of meetings as required.
- 10-006 A number of other organisations have also joined the field of mediation provision, including the Academy of Experts; the Chartered Institute of Arbitrators, which extended its activities from arbitration and adjudication to include mediation; ADR Chambers; ADR-ODR International; and the RICS (The Royal Institution of Chartered Surveyors). In addition, mediation groups and panels of mediators were established, including Independent Mediators; In Place of Strife; PIM Senior Mediators (originally the Panel of Independent Mediators); Clerksroom (mediation chambers); and Core Solutions in Scotland. Mediation panels were also set up by the London Court of International Arbitration, London Maritime Arbitrators' Association, the MMTA (Minor Metals Trade Association) and others.
- 10-007 The Law Society of England and Wales has established a specialist panel of civil and commercial mediators and the Bar Council has an ADR Committee to guide and assist barrister mediators. A number of law firms and barristers' chambers have set up specialist mediation sections and some practitioners from different backgrounds have established mediation practices and groups.
- 10-008 Regional groupings include the Association of Midlands Mediators, the Association of Northern Mediators, the Association of Cambridge Mediators, the Association of South West Mediators, Middlesex & Thames Valley Mediators, Oxford Mediation, and Solent and Wessex Civil Mediation.

Low cost and publicly funded mediation

- 10-009 Unlike the family and community fields, where some mediation organisations concentrate on the public sector and others on the private sector (though not exclusively in either case), there are no civil and commercial mediation bodies that focus primarily on publicly funded or low cost services, although the pro bono lawyers' group, LawWorks, supported by the Law Society, has in the past had a mediation arm offering this service on a pro bono basis.²
- 10-010 However, there are a number of options for low cost and publicly funded civil mediation, which include the following:

- Initially a National Mediation Helpline was established for civil court users, with a sliding scale of low cost services and referral to LawWorks where appropriate. This was replaced by a website³ which offers advice about mediation and links to a panel of approved mediators.
- Following a successful pilot scheme, HMCTS provides a Small Claims Mediation Service on a free and confidential basis for court users who are involved in defended small claims cases. This process is usually carried out by telephone, though where necessary, face-to-face meetings can be arranged. Mediation appointments generally occupy about an hour in total. Anecdotally, it appears that demand from parties who wish to use the small claims mediation service regularly outstrips supply. There has been some criticism of the number of small claims mediators who have been available in recent years as well as a suggestion that the system of arranging appointments is somewhat inflexible.⁴
- Some mediation organisations offer low cost options. For example, CEDR Solve has a Personal Injury Unit that covers not only substantial cases, but also time-limited lower cost mediations for lower value cases and telephone mediation where a full mediation may not be necessary or justifiable. It also offers a process called eEvaluate, which is a paper neutral evaluation service helping the parties towards finding a solution.
- While public funding (legal aid) is available for family mediation, civil mediation may be funded as a disbursement under certain forms of public funding, namely Legal Help, Legal Representation or Support Funding.⁵
- Private sector mediation organisations and individual mediators may be willing to provide low-cost or pro bono services by special arrangement.

Specialist civil and commercial mediators

- 10-011 Within the field of civil and commercial mediation, there are a number of specialist sectors, including for example clinical negligence and personal injury; the construction industry; banking; the insurance industry; shipping and aviation; property law; intellectual property; information technology; and indeed, in all the fields of law in which lawyers may specialise. Some mediators are seen and wish to be seen as being specialists in particular areas.
- 10-012 The question arises as to the relevance or otherwise of a mediator having substantive specialist expertise in the subject matter of the dispute. The conventional answer is that it is more important for the mediator to be skilled in the mediation process than to be knowledgeable about the substance of the dispute. That distinction is otiose where parties should be able to have both: a skilled mediator who also has substantive knowledge of the issues in dispute.
- 10-013 In practice, although there are excellent generalist mediators who are well able to undertake specialist cases, and although many people will instruct a well-regarded and trusted generalist mediator for a specialist dispute, there does seem to be a tendency for parties to appoint mediators with expertise in the subject-matter of the dispute. So in a construction dispute, parties might prefer a mediator who is a lawyer with construction law expertise, or an engineer or surveyor; and in a dispute involving complex accounting, they might prefer an accountant or business-based mediator. There are a number of reasons for this. First, there is a sense that the mediator will understand the issues and the parties' needs without requiring a lengthy explanation. Secondly, experts carry some implicit authority, and many people prefer a mediator who has the authority to help move everyone towards a resolution. Thirdly, there is a perception that a specialist mediator will be better able to ask the right questions and to "test reality" effectively. Fourthly, insofar as there may be some spectrum of evaluation, and insofar as a mediator may find it helpful and appropriate to challenge stuck perceptions, a mediator with substance expertise may be preferred to a generalist. On the other hand, some parties may want a fresh and creative view from someone unconnected with their industry; and in many cases, the issues do not necessarily turn on the specialist topic.

The Civil Mediation Council

10-014 Over the years, the Civil Mediation Council (CMC), which was established in 2003, has become an increasingly accepted umbrella body for civil, commercial and workplace mediation in the UK. Its objectives include primarily the promotion and a wider understanding and use of mediation, acting as a voice for civil, commercial and workplace mediators, and encouraging good practice in the interests of mediators and users. In this last mentioned role, it accredits mediation providers who satisfy them as to their standards of practice. It has from the outset accredited mediation providers. It has recently begun to publish a register of individual mediators and mediation training bodies. It is a matter of some controversy as to whether this is properly to be regarded as regulation of the profession or not.

The membership of the CMC comprises both individuals and mediation organisations, both of whom are represented on its Board.

Footnotes

2 See the LawWorks website at <http://www.lawworks.org.uk/> [accessed 16 May 2018].

3 See: <http://civilmediation.justice.gov.uk/> which provides a link to mediation services.

4 Lord Justice Briggs, Civil Courts Structure Review: Final Report, July 2016 paras 2.14 and 2.15, available at: <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-reviewfinal-report-jul-16-final-1.pdf> [accessed 16 May 2018].

5 Eligibility for legal aid can be checked online at <https://www.gov.uk/civil-legal-advice> [accessed 16 May 2018].

Lawyers and Rights in Civil and Commercial Mediation

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Lawyers and Rights in Civil and Commercial Mediation

- 10-015** It is widely accepted that rights significantly influence parties in civil and commercial mediation. This is because they mediate “in the shadow of the law”,⁶ in the sense that they could rely on their respective rights if they chose to resolve the matter in court or any other adjudicatory forum. Having said this, there are costs and risks in litigating, and many factors apart from rights, such as continuing relationships, may influence the parties in seeking a solution. This is, after all, why they choose the mediation forum. They will have regard to rights and to the possible outcomes of potential or actual litigation, but not necessarily as an exclusive consideration.
- 10-016** The significance attached to legal rights is at least in part reflected by the extent to which parties tend to be represented by their lawyers in civil and commercial mediation. The majority of mediations undertaken through mediation organisations take place with legal representatives in attendance.
- 10-017** Commercial and civil mediations may be conducted without lawyers attending, though they may have advised parties outside the process. This is especially the case with disputes having a personal element such as inheritance and partnership disputes. It is also the case in small claims disputes and those where it is uneconomic for a lawyer to attend—though in all these cases parties are still likely to have regard to their legal rights, as they perceive them.
- 10-018** Mediators tend to be drawn from a wide range of background disciplines. This reflects the fact that law does not dominate civil and commercial mediation. Not surprisingly, solicitors and barristers almost certainly constitute the largest group based on background disciplines. The Law Society has recognised the part that solicitors play in dispute resolution generally and mediation in particular, and has developed a Code of Practice and training standards for solicitors who undertake civil and commercial mediation.⁷
- 10-019** A distinction exists between mediation that is purely facilitative and mediation that may contain an element of evaluation of the respective rights of the parties. Some civil and commercial mediators, in common with their colleagues from other fields, will only mediate on a facilitative basis. They will decline to offer any element of evaluation. Others may be willing, if appropriate, to introduce some element of non-binding evaluation if the facilitative approach proves to be insufficient.⁸

Footnotes

⁶ A concept based on *Robert Mnookin and Lewis Kornhauser*, “Bargaining in the Shadow of the Law, The Case of Divorce” (1979) 88 *Y.L.J.* 950.

⁷ The Solicitors Regulation Authority (SRA) regulates solicitors in all aspects of their practices, including mediation. Solicitor mediators must comply with the Code and regulations of any mediation organisation to which they belong, but this does not avoid the necessity for them also to comply with SRA and Law Society requirements.

⁸ See Ch.19 for discussion about evaluative mediation.

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The Stages of Civil and Commercial Mediation

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The Stages of Civil and Commercial Mediation

- 10-020** The stages set out below follow the outline contained in Ch.9. It must be emphasised that these are not intended to provide a rigid structure, but rather a notional framework to facilitate consideration of the process. Within this broad framework, there may be considerable flexibility and huge variations of practice.
- 10-021** As stated in Ch.9, the pre-mediation and post-mediation stages do not take place within the mediation process but outside it. They are nevertheless included here as they form an important part of understanding and providing a context for the process.

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Pre-Mediation: Considering Mediation, Assessing Suitability and Obtaining Commitment

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Chapter 10 - Civil and Commercial Mediation

Pre-Mediation: Considering Mediation, Assessing Suitability and Obtaining Commitment

- 10-022 The impetus for considering the use of civil or commercial mediation may come from a number of different sources, including:
- lawyers representing clients in dispute may be considering the process and may or may not have agreed with the other party that mediation is the best way forward;
 - individuals or corporations in dispute may be considering mediation as a suitable way to deal with their issues.
 - the court may adjourn a pending case so that the parties may try to mediate the issues, or there may be court rules, directions or procedures requiring this to be done or sanctions for failing to do so;
 - pre-action protocols consistently require due consideration to be given to the use of mediation or other ADR processes;
 - parties may have given a commitment to consider ADR or may have entered into a contract containing a dispute resolution clause providing for mediation as a part of the resolution procedure;
 - some industries and trade associations have dispute resolution mechanisms that include mediation.

Mediators need to be able to provide information about the mediation process and about their own services and qualifications, and to respond appropriately to enquiries arising from these sources and any others.

The following may help to amplify these considerations:

Raising public and professional awareness

- 10-023 Commercial ADR organisations have been active in raising public awareness of the availability, practice and potential value of using ADR for civil and commercial disputes. The CMC has also been instrumental in engaging government in discussions about promoting the use and development of mediation; and government itself is supportive of the process.
- Individual mediators have written articles, given talks and promoted mediation, and some have established effective groups and websites that explain and promote mediation.
- 10-024 Both the Law Society of England and Wales and the Bar Council have incorporated mediation into their structures, and few solicitors or barristers can legitimately claim not to be aware of the availability and benefits of the mediation process, especially as there have been many cases in which the use of mediation and other ADR mechanisms has been referred to with approval, as well as others imposing potential costs sanctions for a failure to consider the use of ADR where it is appropriate.⁹

ADR pledges and contract clauses

10-025 It is sensible and pragmatic for people entering into commercial relationships to address the question of how they will address disagreements should these arise. Among other things, this means that disputes may be “nipped in the bud” before they turn into full-blown cases taken through the courts or some other adjudicatory mechanism.

10-026 It also means that neither party may be perceived as suggesting mediation or some other ADR process out of weakness. This used to be a concern in the earlier stages of mediation development, but this has become much less the case as the mediation process has become more widespread, supported and expected by the courts, and generally accepted. Referring to ADR processes, a Ministry of Justice Consultation Paper says that:

“of all these processes, mediation and arbitration are most common and are well established and sit parallel to the legal and judicial framework in England and Wales.”¹⁰

Nevertheless, having a prescribed and pre-agreed process does help provide the route to a negotiated outcome.

10-027 The concept of making a pledge to consider and use ADR was developed by the US institute CPR (The International Institute for Conflict Prevention and Resolution, originally the Center for Public Resources) which has a number of different pledges: a Corporate Pledge to explore the use of ADR for business disputes, a Law Firm Pledge to ensure that members of the firm are knowledgeable about ADR and to discuss its use, and Industry Specific Pledges. This has been extended worldwide, in conjunction with ADR organisations in other countries, including CEDR in the UK.¹¹

10-028 In the UK, the then Lord Chancellor, Lord Irvine in 2001 committed government departments and agencies to using ADR processes in suitable cases whenever the other side to litigation agreed to it.¹²

10-029 Dispute resolution clauses in contracts may take various forms. They may for example provide for mediation, or for arbitration, or for mediation to be followed by arbitration if the dispute is not settled in the mediation phase. They may provide for a specified organisation to appoint the mediator or arbitrator in the event that the parties are unable to agree on one.¹³

10-030 There is a question as to whether an agreement to mediate would be upheld by the court. In the past, agreements to negotiate have not generally been regarded as enforceable; but there has been a line of cases on this subject providing guidance as to the criteria for the enforceability of ADR clauses in contracts.¹⁴

Judicial encouragement and orders

10-031 Over the years judges have encouraged parties to mediate or use other ADR procedures. There has also been a line of cases in which the courts have specifically referred to the need to use mediation or other forms of ADR, or have indeed recommended or directed the parties to attempt to do so.¹⁵

Preliminary meetings

- 10-032 A preliminary meeting with the mediator may sometimes be a good way to assist parties in deciding whether or not to engage in mediation. The mediator would meet with the parties or their lawyers and might discuss process and ground rules, and any queries can then be dealt with. It also affords the parties or lawyers an opportunity to assess whether or not they wish to appoint that mediator, and for the mediator to assess whether or not the matter is suitable for mediation.

This procedure is partly useful as a step in the pre-mediation process, and may be partly seen as an element of the mediator's marketing. Some lawyers may meet with a number of mediators before deciding whom to appoint.

- 10-033 This meeting would not yet ordinarily be covered by an Agreement to Mediate, so if substantive matters may be discussed, the confidential and "without prejudice" nature of the meeting should be made clear. This is particularly important if the parties or lawyers decide during the meeting that they wish to go ahead with the mediation, and convert the meeting into an initial discussion about actual process and arrangements. The opportunity can then be used to enter into an Agreement to Mediate, agree a timetable, agenda (if required), arrange for the submission of statements and documents and generally deal with venue, representation and any other practical matters.

Assessing suitability

- 10-034 While the issue of assessing suitability for mediation may be significant in some other fields such as family, restorative justice and neighbour disputes, it is less likely to be critical in commercial disputes and in most civil cases, on the principle that if it is capable of being discussed, negotiated and settled bilaterally as between the parties or their lawyers, then it is likely to be suitable for mediation.
- 10-035 However, there may nevertheless be individual circumstances that make a civil or commercial dispute inappropriate for mediation or other ADR processes. This would be more likely to relate to the parties rather than to the subject-matter of the dispute, since most substantive matters can be addressed in mediation. If a party lacks the capacity to negotiate and make decisions, whether through disability, addiction or any other reason that cannot be overcome through having an authorised representative or other support, or if for example it is clear that power imbalances are so great that mediation could not be effectively conducted, then mediation would not be appropriate.
- 10-036 The opportunities for assessing suitability before mediation commences are limited. A preliminary and minimal assessment would necessarily be done on the basis of limited information. If anything obvious suggests itself at that stage, the mediator or case manager dealing with preliminary matters would need to raise further questions as appropriate; but in practice, this issue is more likely to emerge during the substantive process rather than in advance.

Providing information

- 10-037 Preliminary enquiries about mediation may be made through a number of different sources, including an ADR organisation or panel, or directly to the mediator.

- 10-038** The following is quoted from Henry Brown's paper published by the Chartered Institute of Arbitrators for their 3rd Mediation Symposium 2010¹⁶:

"The civil-commercial model with which we are all familiar is an excellent way of working, and one which we can promote with confidence. However, we should not be satisfied with a 'one size fits all' approach nor should we expect parties and their lawyers to do so. Some people will want a purely facilitative and non-directive mediator, others may want and need a mediator who will help them firmly forward and nudge them (or their opponents) back on course if they are clearly following mistaken paths: this can be done in a way that facilitates their own decision-making and does not press them into any course favoured by the mediator, and hence would be perfectly proper for mediation."

- 10-039** There has not been any way of knowing in advance what approach a mediator takes. The International Mediation Institute (IMI) classifies mediators as "facilitative" or "evaluative" but in view of the range of activities that are perceived to fall within each category, and the extent of misperception as to what each involves, these categorisations, although potentially helpful, do not really add to a proper understanding of an individual approach.¹⁷ Large firms of solicitors with extensive experience of mediation and litigation will have useful records about mediation and mediators' particular styles and approaches.

- 10-040** Organisations and individual mediators need to be able to provide enquirers with information that helps to clarify the process generally, the individual mediator's qualifications and experience, and where appropriate, the mediator's approach. ADR organisations generally have case managers to deal with enquiries. This may be done on the telephone, by email or by correspondence. They may need to explain how mediation or other ADR forms work, generally or for a specific case, and may assist in putting forward names of suitable mediators for consideration. Where appropriate, and by arrangement with an inquiring party, they may engage the other party or parties to see whether ADR can be agreed upon.

- 10-041** Mediators approached individually rather than through ADR organisations will similarly need to provide relevant information. There is a potential difficulty, in that a mediator approached by only one party may be perceived as that party's choice, and for this reason, be unacceptable. In this respect, ADR organisations or mediation consortia have an advantage over individual practitioners, because their neutrality cannot generally be called into question.

- 10-042** Information may be provided in a number of ways:

- Perhaps the most used resource is the web with increasingly informative websites and links between related topics, people and organisations. ADR organisations typically may have details on their websites of their services, training (where applicable), panels of members, news and articles, specialist aspects, fees, terms and conditions and marketing information. Individual mediators' websites tend to vary between basic information through to highly sophisticated sites incorporating personal information about qualifications, testimonials, experience, articles and writing as well as information about process, relevant law and links.
- In response to individual enquiries, mediators may provide personal biographies, marketing information, details of availability and sometimes a draft Agreement to Mediate.
- Personal communications, on the phone or occasionally face to face, can be very helpful in enabling the mediator to address specific questions and situations rather than doing so on a generalised basis. It is also an initial step in establishing rapport that can be invaluable in the mediation process itself.
- Preliminary meetings, as outlined above, provide an opportunity for both or all parties or their lawyers to meet the mediator, address common questions, discuss and clarify procedures and allow the parties, without commitment, to decide whether they wish to go ahead with the mediation and the appointment of that mediator.

Trade and other associations

- 10-043 Trade associations with a code of practice that has been approved by the Office of Fair Trading must provide low-cost mediation. These include for example the motor trade, estate agents, debt management companies, car repair and servicing firms, the direct selling industry and home furnishing businesses. Professional associations that specifically provide mediation as a resource for the resolution of disputes include GAFTA (the Grain and Feed Trade Association), MMTA (the Minor Metals Trade Association) and OFGEM (the Office of the Gas and Electricity Markets). These are just examples, and the list of bodies providing for mediation is long and growing.

Agreement to mediate

- 10-044 Civil or commercial disputes can only be dealt with by way of mediation if the parties agree to use this process, either in general terms at the time that an original contract containing a dispute resolution clause was entered into or in specific terms after a dispute has arisen. All mediation organisations and individual mediators are likely to require this agreement to be explicitly recorded and signed by or on behalf of the parties.
- 10-045 Where mediation is undertaken as a consequence of court rules or procedures requiring it to be considered or tried, the need for an agreement to mediate remains: the terms and basis of the process need to be agreed and recorded. This may well be different from any form of mandatory court-attached process, which might in such event be regulated by court rules and implicitly or explicitly adopted.
- 10-046 Parties may contract to try mediation and if this fails to resolve the dispute, to refer it to arbitration, either retaining as arbitrator the same person who acted as mediator, or appointing someone else. In any event, the right to proceed to adjudication if the mediation is unsuccessful will invariably be reserved, implicitly or explicitly.¹⁸
- 10-047 The parties should agree to the procedural rules that will apply to the mediation. This would cover matters such as legal privilege and keeping discussions off the record, confidentiality, whether a written agreement is needed to create binding obligations, and other such matters. Mediation organisations and individual mediators are likely to have standard terms of agreement embodying these matters. It is good practice for that agreement to be based on the Code of Practice to which the mediator or organisation works, and to incorporate the Code by reference or by attaching it.

Almost invariably, the mediator will be a party to the agreement to mediate or will be identified in it.

- 10-048 There are no particular rules as to how or when the agreement should be executed. A common practice is to send a draft to the parties when they are considering mediation, and to inform them that the document will need to be signed before the substantive mediation starts. They may be invited to raise any queries or to propose any amendments in advance of the meeting, so that these can be considered and dealt with. Any proposed amendments would have to be acceptable to the mediator and the other party. Once the terms are agreed in advance, the document can be signed at the start of the mediation meeting. This can be a positive symbolic act to launch the process. However, it is essential to have the terms agreed before meeting so that the proceedings are covered right from the outset, even if the act of signature takes place at the meeting as a symbolic act.

Footnotes

- 9 For a review of relevant case law on cost sanctions, see [Ch.5](#).
- 10 Ministry of Justice, Consultation Paper CP6/2011, Solving disputes in the county courts: creating a simpler, quicker and more proportionate system—A consultation on reforming civil justice in England and Wales (MoJ, March 2011), Cm.8045.
- 11 See <https://www.cpradr.org/resource-center/adr-pledges> [accessed 16 May 2018].
- 12 In a speech at the [CMC](#) conference in May 2011, the Minister of Justice, Jonathan Djanogly, said that since the inception of the government's [ADR Pledge](#), the state had saved an estimated £360 million, and that he wanted to extend the benefits beyond central government to businesses and local government.
- 13 See "Contract clause stipulating for ADR" in [Ch.21, paras 21-007 to 21-019](#).
- 14 See [Ch.21, paras 21-025 to 21-038](#).
- 15 See for example [Ch.5, paras 5-054 to 5-066](#).
- 16 Henry Brown, "Creating Confidence in Mediators and the Process: An Exploration of the Issues" (2010) Chartered Institute of Arbitrators Symposium 2010.
- 17 For further discussion about the distinctions between facilitative and evaluative mediation, see [Ch.19](#).
- 18 For a discussion about med-arb, see [Ch.19](#). For a consideration of the implications of mediation on the right to a fair trial, for example under art.6 of the European Convention on Human Rights, see [Ch.5](#) under the heading "Mandatory ADR and human rights: the Article 6 argument" at paras [5-072 to 5-076](#).

Stage 1: Preliminary Communications and Preparation

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Mainwork

Chapter 10 - Civil and Commercial Mediation

Stage 1: Preliminary Communications and Preparation

Preliminary communications or meeting

- 10-049 Having engaged the parties in the mediation forum and agreed on the contract to mediate and the ground-rules, a number of preliminary communications may be necessary before the substantive mediation commences.
- 10-050 If the dispute is particularly complex or substantial, the mediator may wish to have a preliminary meeting with the parties, or more likely with their legal representatives, to discuss a framework for the process and the furnishing of information.¹⁹ These are distinct from “beauty parade” meetings, which may be held before the parties have even agreed to the use of mediation and certainly before they decide who to use as a mediator. At that preliminary meeting, a timetable can be agreed for the furnishing of documents and information, and in effect, “directions” for the mediation can be agreed. These may for example providing bundles of documents, who will attend the mediation, the nature of authority they will have, and whether each party will make an oral presentation and if so for how long and on what basis. This is a good opportunity to discuss and clarify the ground-rules, including principles of confidentiality and privilege. The parties may wish to discuss the extent to which the mediator may be evaluative, and whether and how rights arguments will be addressed.
- 10-051 There may also be ways in which preparation for the substantive meeting can be enhanced, for example, parties may agree that accountants or other experts will meet before the substantive meeting and try to narrow specified issues; or disagreements about applicable legal principles can be narrowed and perhaps agreed in part for the purpose of mediation. Anything that will help the substantive meeting to run more smoothly may be considered.
- 10-052 Lax and Sebenius, in their work 3D Negotiations, refer to three dimensions of deal strategy, one of which is to set up the right negotiation.²⁰ In commercial mediation, more attention may need to be given to the setting up of the mediation to ensure not only that the right parties attend and that the substantive meeting “hits the ground running”, but also that the mediator helps the parties consider their own and one another’s interests, and to prepare appropriately for the substantive mediation meeting. A preliminary meeting allows each party or their lawyers an initial opportunity to meet the other in a mediation context, and to have a constructive look at how the substantive mediation day might take place.
- 10-053 However, preliminary meetings tend to be the exception rather than the norm. The practice has developed of dealing with administrative preparation on the telephone, usually sequentially or occasionally by conference call, and by email or other communications.
- 10-054 The mediator is likely to require relevant information and documents in advance of the substantive mediation meeting. Commonly the documents will comprise a written statement of case from each party and a bundle of copy documents and correspondence relevant to the issues, which may include copy statements of case and other documents filed in the proceedings.²¹ If the statements, documents or information appear to be incomplete, or if supplementary information is needed,

the mediator can ask for amplification prior to the meeting. The mediator may prefer to do this during the mediation, but in such event, the required documents may not be readily available, and delay or frustration could result.

- 10-055 If there are technical issues in the case, and if experts have been engaged on both sides, the parties may wish the mediator to see the experts' reports. In some cases, valuation reports, accounts, illustrations, photographs or any other existing data may need to be produced in relation to specific issues.
- 10-056 Practical arrangements for the meeting will be made. The usual procedure is to allot a period of time for a substantive meeting, appropriate to the issues. This may vary between a few hours and a number of days.²² A balance needs to be struck between allowing sufficient time to mediate effectively and not allotting more time than is necessary and economic. The aim is usually to conclude the mediation within the allotted time; but sometimes an adjournment may be necessary and beneficial, for example where further information is essential to the outcome, or some interim action is needed, or ideas or proposals need to be developed.
- 10-057 However, as observed above, this "one size fits all" approach is not ideal for all cases, and a more thoughtful, bespoke process may sometimes be beneficial. There are cases where it is impracticable or inappropriate to try to resolve everything in one single meeting, and where a series of meetings is likely to be necessary; or cases involving high conflict where small steps over time may be necessary; or cases where longstanding commercial, professional or personal relationships are under strain or have broken down, which may not necessarily be amenable to resolution in one session. In such event, the initial meeting may deal with certain aspects and it may be agreed that subsequent meetings will deal with other aspects.
- 10-058 The main point about this approach is that it moves away from the automatic assumption that every case will be dealt with in the same way, that one block of time is appropriate and should be fixed for every dispute, and that if the matter is not resolved at the end of that block of time, the mediation has in some way failed. If parties know at the outset that there will be more than one meeting, expectations and attitudes are likely to be more realistic, which in turn allows for the process to be conducted in an environment that may feel less stressful—which in many situations may be more desirable and effective.
- 10-059 The automatic fixed period meeting assumption and set-up has been reinforced by the fact that mediation organisations cannot easily assess the needs of parties, and case managers cannot make the necessary enquiries and assessments that might emerge from a carefully conducted preliminary meeting. Lawyers representing parties have developed an expectation that this is how civil and commercial mediation must necessarily be conducted. Consequently fixing a block of time has become a default mechanism. This may well continue to be the case for the majority of civil and commercial disputes; but some alternative must be allowed for those matters that do not fit into this mould. This is further considered below.²³
- 10-060 The mediator may need to discuss other practical matters with the parties, together or separately. These may for example include guidance about the case summaries and the oral presentations at a joint meeting; discussing timing and checking availability to continue after hours if the matter is not resolved within the allotted time. Some mediators will continue into the night if required and appropriate, others would not be prepared to do so; mediators may wish to check that parties have arrangements with third parties or experts, tax advisers, or specialist consultants, to be able to contact them during the mediation or after hours, if needed. Where parties are attending without lawyers, particularly if they will be on their own, it is often prudent to prepare them for the fact that they may be sitting on their own for periods of time, while the mediator is engaged with the other, so they may be well advised to bring material to occupy themselves during the waiting periods.
- 10-061 These considerations militate in favour of a preliminary meeting, as it may not be practicable to address them in phone conversations. Preliminary meetings may not be viable or economic especially where parties and lawyers are based far apart, in separate cities or perhaps in different countries. However, with increasingly available technological resources such as video

conference facilities, internet voice and video resources, and the possibilities for virtual meetings, it should be possible for some of these logistical difficulties to be overcome.

Establishing the venue

- 10-062 The mediator or case manager where appropriate will ordinarily arrange the venue for the substantive meeting, in consultation with the parties. The venue will usually be neutral, such as the mediator's premises or hired rooms. The offices of one of the lawyers acting for a party may sometimes be used, provided that the mediator and all parties are agreeable.
- 10-063 Where there are two parties, or two groups of parties, three rooms should ordinarily be arranged: one for each party and one as a joint meeting room, which the mediator will use as his or her own, and which may also be used for special meetings, for example if the mediator wants to meet the lawyers or anyone else separately while the parties remain in their rooms. However, if this is impracticable, a minimum of two separate rooms may suffice.
- 10-064 In the latter event one room should be large enough to accommodate all the parties and their representatives as well as the mediator for joint sessions: it will be occupied by one party between joint sessions. The other room will be the base for the other party. An additional room is needed for each additional party or group of parties.
- 10-065 Parties' rooms should not be immediately adjoining one another, unless this is unavoidable and they are adequately soundproofed. It can be very inhibiting for parties to think that their confidential discussions might possibly be overheard.
- 10-066 The seating arrangements will be for the mediator to decide. To facilitate direct communication, the mediator may sometimes choose to have the parties, rather than their lawyers, seated nearest to him or her. Conventional wisdom dictates that hostile parties should not sit facing one another during the joint session. That creates unnecessary tensions. Seating arrangements will depend on the logistics of the situation, numbers of participants and available resources. Possibilities include having the mediator on one side of the table, and the parties and lawyers all on the other side (though this is a bit formal). Another option may be to have each opposing group on either side of the table, but to have parties sitting diagonally opposite one another rather than directly opposite.

Facilities at the venue

- 10-067 The mediator needs to ensure that there are adequate facilities at the venue to support the process as necessary. This might include, for example, flipcharts or other presentational material, photocopying and printing facilities, and any other resources that may be needed in specific cases such as projectors or scanning and electronic communication facilities.
- 10-068 The venue may need to be available after hours, in case the mediation should run on after regular business hours as it sometimes does. It should be able to provide meals as required—or the facilities for these to be delivered in—and refreshments during the day, so that the mediator can carry out the necessary function of hosting the proceedings.

Legal representation

- 10-069 Whether parties are legally represented in mediation will usually depend on the nature, substance and complexity of the issues, financial resources, and their preferences. In most commercial disputes, it is likely that parties will be legally represented, sometimes by teams of lawyers including, in substantial disputes, senior counsel. In smaller disputes or cases of a personal nature, such as partnership disagreements or family business disputes, legal representatives might not necessarily attend. They might though advise their clients, and if required attend at a later stage of the process, for example at an adjourned meeting.²⁴
- 10-070 Where they participate in the mediation, lawyers can have different kinds of roles. They might be actively involved, including making the presentation and leading the negotiations. Alternatively, they might attend in support of their clients, and allow the latter to deal primarily with the case. Much will depend on the individual client, the lawyer and their relationship. Some lawyers find it difficult to take a subsidiary role, but that may well be what is required. That is a matter for the party; but the mediator can help to influence this where appropriate, for example, by where he or she seats the lawyer in the joint session and by directing questions to the party rather than necessarily through the lawyer.

Authority of corporate representatives

- 10-071 The mediator needs to check in advance of any substantive meeting that all corporate parties have someone present with full authority to conclude a settlement at the meeting and to sign any necessary settlement documents. Individual parties attending in person will obviously be able to do so for themselves, but if they do not attend and are instead represented by a third party, that person will need to have the necessary authority to enter into a settlement agreement. This is essential to avoid the frustration and loss of goodwill that generally arises if parties work through the mediation, arrive at an agreed resolution and then find that one party does not have the authority to sign an agreement.
- 10-072 To anticipate this, many forms of Agreement to Mediate stipulate that the parties' representatives have the necessary authority to agree and sign settlement terms. There is an element of aspiration in relation to these clauses. In many cases organisations will send representatives who are given limited authority, to agree terms subject to certain limitations, rather than an open authority to agree anything in their discretion. In fact it is unlikely that a representative of a bank, an insurance company or any large corporate body will attend with a complete discretion either to accept no payment on a claim or as defendant to pay 100 per cent of the other side's claim together with interest and costs. This can make negotiations more difficult, as the representative may decline to shift in circumstances where it would seem sensible and appropriate to do so—and the reason may be that the proposal lies outside his or her authority. Hence it is generally helpful, where practicable, for the mediator to arrange for the representative to be able to get additional authority if possible.

Footnotes

- ¹⁹ Philip Naughton QC, "Mega mediation—a case history" [1996] A.D.R.L.J. 215, considers that in a substantial and complex mediation "a pre-mediation meeting is invaluable".
- ²⁰ D. Lax and J. Sebenius, 3-D Negotiation: Powerful Tools to Change the Game in Your Most Important Deals, (Boston: Harvard Business School Press, 2006). See Ch.4 on negotiation.
- ²¹ For details, see below under "Information gathering".

- 22 In court schemes, three hours is commonly allowed for the mediation, though in small claims mediation, the usual time frame is about an hour. In private mediation, it is more usual to set aside a day or so for the mediation, sometimes two days, and occasionally but rarely up to about a week.
- 23 See under Stage 4, “Arranging a series of meetings”.
- 24 See [Ch.17](#) for the role of the parties’ lawyers in representing their clients in ADR procedures.

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Stage 2: Commencement, Establishing the Issues and Setting the Agenda

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Chapter 10 - Civil and Commercial Mediation

Stage 2: Commencement, Establishing the Issues and Setting the Agenda

- 10-073 The mediator will ordinarily welcome the parties when they arrive for the substantive meeting, and show them to the separate rooms that they will each occupy during the mediation, where they will await the start of the process.
- 10-074 Some mediators take the opportunity to speak to each party in their separate rooms, putting them at ease, perhaps offering them tea or coffee, and outlining briefly the plan for the day and checking on any aspects, such as how they will make their oral presentations.

At the pre-arranged time the mediator will call the parties together and start the process.

Opening the mediation session

- 10-075 There is no set way to open a mediation session, which will commonly (but not invariably) be an initial joint meeting. The following is an example of how this might be conducted:
- The mediator would welcome the parties to the mediation.
 - There might be brief introductions round the table.
 - The next step might be to sign and exchange the Agreement to Mediate, which would have been approved in advance. The mediator may wish to draw attention to key terms, such as the without prejudice nature of the process, the rules relating to confidentiality and any other particular terms. Each party will usually receive a signed copy of the Agreement with one also being retained by the mediator.
 - The mediator might then outline the intended procedure for the mediation. The mediator explains that each party or their lawyer will be asked to make a presentation. They should expect that, having been forewarned to prepare for it. The mediator will explain that after the presentations and any discussion in joint session, the joint meeting will end and that the mediator will then meet the parties privately in their separate rooms. The mediator will outline (either at this stage or more usually after the presentations) how these separate, private meetings will be held, and what the confidentiality rules are.
 - The length and style of this opening stage will be a matter for the mediator's judgment. It will depend on the mediator's personality and style, the nature of the issues, the parties' requirements and their previous experience, if any, and the mediator's sense as to the pace and detail needed at this stage.
 - The mediator can now turn to the substantive mediation.
- 10-076 The mediator should try from the outset to be an effective manager of the process, a sensitive judge of the requirements of the parties and a competent facilitator; but ultimately, mediators can do no more than be themselves, albeit armed with the skills, techniques and strategies that they have learned.

Establishing the issues: oral presentations

- 10-077 The mediator establishes the issues between the parties in a number of ways. First, each party will submit a case summary outlining the issues and their comments on them. Secondly, the bundle of documents will usually clarify and amplify the issues. Thirdly, the parties will in many cases make an oral presentation to the mediator further clarifying their position and the issues as they see them.²⁵
- 10-078 The following may be noted with regard to the parties' oral presentations:
- The presentation can be made by the parties or by their lawyers. A personal presentation by a party can sometimes be more effective and powerful than a formal statement by the lawyer, because it can explain a person's views and feelings in a very personal way. Even if the lawyer presents the case, the mediator may ask the party personally whether he or she would like to add anything: the parties should be told in advance that this will happen, so that they can prepare appropriately.
 - The method of presentation is a matter for each presenter. It usually highlights relevant matters which may already have been mentioned in the written submissions. Other devices may also be used: for example, flipcharts, projectors, videos, maps, plans, photographs can be used or referred to, though this is rarely done.
 - The length of the presentations will depend on the complexity of the issues. In many cases five or 10 minutes may be sufficient for each presentation, especially where these are informal and the issues straightforward. Lengthy presentations may be counter-productive and should be avoided as far as possible. A 20-minute presentation on each side will generally be the most that can usefully be made.
 - In preliminary discussion with the parties' lawyers, when explaining what is required, the mediator can give guidance and, if appropriate, can indicate that the presentation should be explanatory rather than combative. In some cases, the mediator may suggest that the presenters not only outline their case, but also indicate in general terms what they hope the mediation might achieve (though obviously not so as to compromise their position).
 - It is not usual to have further responses to the presentations, though there is no reason why a mediator should not allow the parties to reply briefly in appropriate cases. In any event, they will be able to comment further in the separate meetings with the mediator.
 - Some clarifying questions may be allowed if the mediator thinks that they would be helpful. If the mediator is doubtful about their value, questions should be deferred until they can be raised in the separate sessions.
 - In some circumstances, presentations might not be appropriate, for example where they would inflame an already hostile situation and nothing would be added, or where there are severe time constraints, or where a party's sensitivities are so raw that presentations would just cause distress without serving any positive purpose.²⁶
- 10-079 Parties may have a need for their "day in court" and being heard, which can to some extent be met by putting their case to a neutral third party, even if that person has no power to make any determination. In any event, the parties are bound to want the mediator to understand their point of view, and will want to ensure that the case is forcefully and clearly put.
- The mediator needs to manage the presentations even-handedly and empathetically, and also firmly and fairly, not allowing interruptions.

Setting the agenda

- 10-080 Having established the issues, the mediator will need to construct an agenda. That may be done formally and explicitly, in discussion with the parties; or it may be implicit from the issues that have been raised. Where the issues are complex, and especially if the parties have each brought different issues, the mediator may need to identify and prioritise these.
- 10-081 As observed in Ch.9, the presenting facts sometimes conceal underlying issues that emerge as the mediation develops. For example, in a shareholders' dispute about a family business, arguments about company administration may disguise questions about parents' intentions and influence and unspoken issues of sibling rivalry and which child the parents had preferred.
- 10-082 A mediator will not necessarily be able to address the underlying issues in a mediation, but it may be necessary to understand them in order to help with the presenting issues. Underlying issues do not only exist in family disputes, but commonly also in other relationship disputes such as partnerships, shareholder disagreements, professional negligence claims and other working and personal relationships. In fact, they are likely also to be found in many other civil and commercial issues: commonly, what you see is not necessarily what you get. Some sensitive and skilled probing in private may elicit nuggets of relevant information that may help the mediator to address some of the real issues between the parties and help them reach a satisfactory resolution.

Footnotes

25 See also the section below on information gathering.

26 For example, where a claim against a health authority related to a traumatic death, a presentation of the allegations and the defence would have caused renewed and pointless distress. A short and general opening presentation by each lawyer was sufficient in those circumstances.

Stage 3: Information Gathering

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Stage 3: Information Gathering

- 10-083** Unlike family mediation, where information may be gathered over time, the usual practice in civil and commercial mediation is for the mediator to receive as much information as possible before embarking on a substantive meeting with the parties.
- 10-084** A mediator may acquire information in a number of different ways:
- an initial indication of the dispute and the issues may be obtained in discussions with the parties or their lawyers when they are considering mediation;
 - when setting up the arrangements for the mediation or at a preliminary meeting, the nature of the dispute, the issues and the differences between the parties are likely to emerge;
 - one of the main sources of substantive information will be a written summary of each party's case and submissions that is delivered to the mediator and the other party or parties prior to the substantive meeting;
 - this summary will usually be supported by a bundle of copy documents relevant to the dispute, which may be amplified by further documents during the mediation;
 - commonly the parties and/or their lawyers will make an oral presentation in joint meeting of their position and views;
 - in appropriate cases, the mediator may have private meetings with each party and will elicit their underlying views, concerns, interests and needs;
 - as the mediation progresses, further information may come to light as a result of disclosures made privately or jointly, questions raised by the parties or the mediator, data provided by experts or other third parties and through other developments;
 - throughout the process the mediator gleans additional information by observation of non-verbal cues and clues: body language, tone, and changes in dynamics and attitudes.
- 10-085** A number of specific considerations arise in relation to this process of information gathering:

The written case summaries

- 10-086** As part of the preparation for the substantive mediation meeting, each party is ordinarily required to provide the mediator and the other party with a written summary of his case.
- 10-087** There is no prescribed way of writing these case summaries, which vary in style, content and approach. Some are quite legalistic, others are more personally and informally drafted. Some combination, maintaining informality while ensuring that all aspects, personal, legal, factual and technical are all covered, can be effective. The purpose of the summary is to outline the position as the

parties each see it, explaining their position, sometimes by reference to the law, facts and/or technical and expert implications. Inevitably the summaries are likely to be contentious, since they reflect the different sides of a dispute; but bearing in mind that they are intended to lead into negotiations, the mediator might find it useful to remind parties that they should be explanatory rather than combative.

- 10-088 The mediator may also guide the parties as to the required length of the summaries. Much depends on the complexity of the issues. Rather than make rigid rules that are not observed (or are observed by only one party) some flexibility on this instruction may be preferable, for example:

“I am not specifying what length the summary should be, but for your guidance, I would expect something in the region of perhaps 10–20 pages or so.”

- 10-089 Summaries do not follow the litigation model of one party claiming and other responding and perhaps counter-claiming. It is more common for them each to reflect the position as they see it, independently of one another. So the usual practice is to have the summaries delivered to one another and to the mediator on the same day. It can be arranged for the parties to deliver the summaries to the mediator, who circulates them simultaneously.

- 10-090 Some organisations and mediators also allow supplementary summaries to be furnished to the mediator, and not to any other party, “for the mediator’s eyes only”. These presage the separate confidential meetings that the mediator will have with each party, and allow a party to provide some advance confidential information to the mediator that they do not wish the other party to share. These insights can be helpful, but are more commonly provided in the separate meetings rather than in the advance material.

The bundles of documents

- 10-091 At the same time as delivering case summaries, parties usually also provide the mediator and one another with a bundle of documents relevant to the dispute. Unlike the position in litigation, it is not necessary for this to comprise a comprehensive batch of all documents that might be relevant to the dispute, but will rather just contain those selected documents that the parties consider necessary or helpful for the purpose of the mediation.

- 10-092 Parties may sometimes select those documents that they think would be most helpful to explain and support their view of the case, hence each produces their own bundle. Wherever practicable, it will help if the parties can agree on one common bundle of documents. If they can agree on most documents, but if there are any that one party feels inappropriate to include, it may be possible to overcome this by having an agreed bundle that excludes the contentious items, which can either be provided by one party separately, or appended to the agreed bundle marked “Not agreed”.

- 10-093 If the case has already been commenced in the courts or by way of arbitration, the bundle commonly, but not necessarily, includes copy statements of case (pleadings), affidavits, orders, witness statements and other documents. If these are extensive, the parties may agree to select relevant extracts.²⁷

- 10-094 If the mediator thinks that any material documents are missing, for example, where replies are sent to letters but the letters themselves are missing, it would be sensible to seek the documents before the start of the mediation meeting. Once the meeting is under way, it may not always be possible to obtain further documents without an adjournment.

Establishing underlying views and concerns

- 10-095 Where time permits, it is very helpful for the mediator's first confidential separate meeting with each party to be largely devoted to getting a better understanding of the party's views, interests, needs and concerns, including the status of past negotiations and any underlying concerns, rather than embarking immediately on the process of negotiations and carrying messages, views and proposals from one party to the other.
- 10-096 It would be helpful if each party gave their true aspirations to the mediator, who could use that private knowledge to help them "design" settlement terms.²⁸ In practice, it seldom works that way because although some parties may disclose their true positions and aspirations to the mediator, most are reluctant to do so right away. That may be because they are not ready to move to what they may perceive as their worst outcomes right at the start, even though the mediator has undertaken to maintain that confidentially. They may, whether in hope or as a matter of strategy, prefer to hold as closely as they can to their public positions.
- 10-097 Consequently, the mediator would not expect to establish the true negotiating positions of the parties at that initial meeting, nor would that be the aim. The objective is a broader one of gaining more general insights, perceptions and understandings of each party's position. Moving towards achieving each party's aspirations may be a slow process that develops during the mediation, especially as trust develops and a negotiating pattern emerges. In any event, aspirations and positions tend to shift as negotiations develop, new perspectives emerge, differences narrow and solutions are formulated.

Other information required

- 10-098 Other information that the mediator will need to establish may include the following:
- The status of any pending litigation or arbitration: if proceedings are pending, the mediator should be informed of this, including whether any material court orders have been made, or hearings are due to take place. There is no reason why mediation should not take place parallel with pending proceedings. Indeed, the existence of a hearing date can act as a spur to negotiations. Sometimes though, if more time is needed or the parties prefer to lift the threat (and defer the cost) of a hearing, it may be preferable to adjourn proceedings either generally or to a fixed date while the mediation takes place.
 - The status of prior settlement negotiations: while some parties may include in their case summary the current status of settlement negotiations, or may reflect their proposals, that does not commonly happen. Consequently, the mediator needs to establish the position in order to place any negotiations in the mediation into a context of past negotiations.
 - The relationship between the parties: this will usually be clear from the submissions and documents. What can be more difficult, however, is to identify the nature and quality of any stated relationship, and how this affects the issues. Where, for example, there is a family business dispute between siblings or parent and child, or between business or professional partners, the presenting dispute may well just be "the tip of the iceberg". In such cases, and indeed sometimes in cases that do not overtly appear to have any emotional content, there may well be a history of conflict and emotional entanglement that could significantly affect the dispute and its possible resolution.²⁹
 - Whether third parties' views or decisions may affect the outcome of the mediation: if, for example, insurers or a governing board needs to approve settlement terms or to provide funds, the mediator should be aware of this as it may affect who attends the mediation or how it is to be approached.

- Whether there are significant disputes of fact: where there is a direct conflict of fact such that one or other party must be lying, with no possibility of misunderstanding or other explanation, it can be more difficult to reach a settlement. The mediator may have to work with both parties to find creative ways of dealing with that situation.
- Each case is likely to involve the mediator obtaining particular information, which will be a matter for the mediator's judgment, in consultation with the parties as appropriate.

Acquiring specialist information

10-099 A mediator may or may not be an expert in the subject-matter of the dispute. Where the mediator does not have substance expertise and needs this for a particular case, this can be achieved in a few different ways:

- The mediator can liaise with the parties' experts. If the experts differ in their respective views, however, the mediator may not be in a position to know which view should prevail. This may or may not matter, depending on the extent to which expertise is critical to the outcome of the mediation and to what extent the process is evaluative.
- By arrangement with the parties and at their shared cost, the mediator can consult an independent expert, introducing such expertise for the benefit of the parties jointly.
- In appropriate cases, the missing expertise can be furnished by using the co-mediation mode. For example, if the dispute involves complex legal, fiscal and accounting principles, it may be decided to have a lawyer and accountant as co-mediators, rather than either as a sole mediator consulting with the other.

Footnotes

- 27 To those not steeped in the culture of litigation, court pleadings and particulars were seen as opaque documents written in an obscure legal style that obfuscated rather than clarified the issues. Under revised [Civil Procedure Rules](#), "pleadings" became "statements of case" and should be simpler, more factual and less technical. That is a very welcome reform.
- 28 See de Bono's concept of third-party design in [Ch.3, para.3-025](#), and his "design idiom" at [fn.30](#) below.
- 29 For further consideration of this aspect, see Stage 2 in [Ch.9](#).

Stage 4: Conducting Substantive Negotiations

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Mainwork

Chapter 10 - Civil and Commercial Mediation

Stage 4: Conducting Substantive Negotiations

- 10-100 In this stage, the mediator assists the parties with their substantive discussions and negotiations towards settlement.
- 10-101 The mediator may ordinarily have started with a joint meeting with the parties, at which they will have made oral presentations and had some further discussions. The mediator must then decide whether and when to hold separate and private meetings (caucuses) with each party.
- 10-102 If the parties are communicating productively, explaining their positions and exchanging views, the joint session can continue: it may be a useful forum in which to explore options. Some mediators work extensively in this way, with excellent results.
- 10-103 However, at some point it may be better to end the joint meeting and move into separate meetings with each party, at which confidential exchanges may be more useful.

The first separate meetings

- 10-104 The mediator must decide whom to see first. This decision will be made on the basis of the mediator's judgment of the parties and the issues, and his or her sense as to who is more likely to get negotiations more productively under way. Some mediators decide to start by seeing the party who appears to be bursting to be heard. Others choose to see the claimant first, which is a sequence that can always be logically explained to the parties. Alternatively, where one party carries a key to the resolution, it may be sensible to meet that one first.
- 10-105 If there are tight time constraints, or if the mediator wishes to get directly into the negotiations, the first meeting will be used to start formulating settlement terms immediately. However, as indicated above, significant benefit can be obtained by using the initial meeting simply to acquaint the mediator with the parties and their thoughts generally. The mediator can tell the parties that the first separate meeting will be used to help get an understanding of respective positions, rather than to formulate specific terms. That will avoid the parties having unrealistic expectations of the initial session.
- 10-106 The mediator may have to ask questions thoughtfully and selectively, and be able to help each party to express his or her thoughts and feelings while being contained in time and content. It can be counter-productive to spend a long time with either party at this point.

Initiating discussions and negotiations

- 10-107 When the mediator has obtained a preliminary feeling for the parties' positions, it will be necessary to start the negotiating process with a view to constructing settlement terms.³⁰
- 10-108 The most usual way of getting the negotiations going is for one of the parties to submit proposals to the other, through the mediator. The mediator will carry these to the other party. Negotiations then take place sequentially, with the mediator shuttling between the parties carrying proposals and counter-proposals, trying to narrow and eliminate any differences.
- 10-109 An alternative, but less common, way of approaching the negotiations is to have both parties furnish their proposals to the mediator who formulates terms to put to both parties for consideration, discussion and negotiation. This has the benefit of ensuring that neither party gets an advantage from seeing the other's proposals before formulating their own; and it gives the mediator greater scope to create a framework of composite terms. On the other hand, it can be difficult for the mediator to reflect the differences that inevitably exist, bearing in mind that the mediator's function is to help the parties with their negotiations rather than to become a personal principal in the negotiations. It also runs the risk of the mediator inadvertently favouring one party or the other in constructing the proposals.

Option development and reality testing

- 10-110 Where parties are not able to formulate settlement terms, or where a fresh approach is desirable, the mediator is likely to encourage the parties to explore possible options for settling the issues. The mediator should help the parties to develop as many options as they can, and to examine them to see which are realistic and which are not.
- 10-111 In a problem-solving mode, the mediator would help the parties seek creative solutions to what they accept is a problem that they need to address jointly and individually, and not antagonistically. This is the mode that mediators try to encourage, though in practice it may be difficult to shift parties to this mode to any substantial degree (though they can benefit from edging towards it).
- 10-112 The parties usually develop the options, but there is no reason why the mediator should not help them to do so and put forward some of his or her own, provided that any options that the mediator puts forward are not presented as "the mediator's solution". One way to assist with option development is through brainstorming, where all ideas are noted without initially rejecting or commenting on any, for later evaluation.
- 10-113 Options can be discussed, narrowed and converted into concrete proposals; or they can be put to the other party more generally to encourage a response in a similar mode. Eventually, of course, terms will have to be extracted from them.
- 10-114 The mediator serves a reality-testing function at various stages. One of these is to help parties to appreciate the factual situation, rather than the misconceptions that can often arise when conflict exists. Another is to help them to consider whether options that they are exploring, and proposals into which these may translate, are realistic. In this way, they can act as a sounding board for ideas and possible solutions which each side may be considering putting to the other, indicating ways in which this could most effectively be done and encouraging movement.

Shuttle mediation

- 10-115 As previously indicated, the mediator commonly uses a form of shuttle mediation to move between the parties, carrying messages and proposals from one side to the other, trying to assess how proposals could be varied or amplified to make them more mutually acceptable.
- 10-116 While the mediator is engaged in meeting one party, it can be helpful if there is a genuine task for the mediator to ask the other party to undertake. That uses time effectively, and lessens the opportunity for the party who is left alone to become too anxious about what is happening in the other room. Parties left alone often comment on how long the mediator has been away. Mediators should be aware of this, so that if they find that they are spending longer with one party than they expected, they can pop into the other and briefly indicate how long they expect to be. If a session is likely to take a long time, the mediator may wish to indicate this in advance to the other party, who can take an agreed break.

Shuttle mediation can continue as long as it is proving to be useful in narrowing differences.

- 10-117 Although it is usual to shuttle between parties during the course of the mediation day, this can take place over a more extended period. In one case, the day fixed for the mediation had ended without a settlement, but with terms still being discussed. Instead of adjourning to another fixed date (which would not have been practicable for some time), arrangements were made for the mediator to shuttle between the parties at their respective lawyers' offices from time to time over the following week. This resulted in a settlement.

Working with parties' lawyers and other professionals

- 10-118 Although parties may be unrepresented in the mediation process, it is usual for them to have their solicitors, and not uncommonly also barristers, with them at commercial mediation sessions, especially where litigation is pending or threatened. Parties may also bring other advisers such as accountants to mediation sessions.
- 10-119 It is a matter for the parties as to whether they wish to deal with the negotiations themselves or through their lawyers. Mediators should respect the parties' decision, but should also be aware that they do not need to be hidebound by the convention of communicating through representatives. To the contrary, the mediator is likely to address the party directly, or the party and representative jointly, rather than just the lawyer.
- 10-120 In some situations, the mediator may wish to meet both parties' lawyers together without the parties present. This can speed up the process, rather than shuttling, and can help to ensure that the same message is taken simultaneously to both parties, where necessary. Also, if lawyers are posturing for their clients, the mediator may want to separate them briefly to enable them to deal more candidly with issues that need to be straightforwardly addressed.
- 10-121 Sometimes it can help for the mediator to arrange for each party's professional advisers to meet separately, either during the mediation or during any adjourned period. For example, where the issues relate to accounting matters, the mediator may propose that the accountants meet together to consider and identify their differences, and to consider ways of resolving these (for example, asking them to try to agree conflicting records, accounts or valuations). They may not be able to resolve the differences themselves, but they may for example suggest machinery for doing so. Similarly, other experts or valuers may be able to find ways of narrowing their differences.

- 10-122 Professionals accompanying their clients in the mediation are there to support not to undermine a negotiated outcome. If they seem not to appreciate the adverse effects of negative interventions, the mediator may wish to discuss this with them (though respectful of the fact that the representative is there to protect the client's interests).

Arranging a series of meetings

- 10-123 As previously indicated, there are some situations in which the default procedure of expecting matters to be resolved in a single block of time would be inappropriate. In such cases, parties and lawyers would know at the outset that the initial substantive meeting was not intended to be final or definitive, and the expectation would be that it would serve a limited purpose and that one or more further meetings would follow.

- 10-124 Generally, the procedures outlined above, and the principles set out in relation to this stage would all nevertheless be applicable, including for example, having an opening joint meeting and oral presentations, using the initial session to establish the parties' views and any underlying issues and concerns, and commencing negotiations. However, these suggested procedures could be varied to meet the needs of the particular situation. The essence of the process should be an ability and readiness to adapt procedures flexibly to the needs of each individual situation.

- 10-125 An example of a situation in which a series of meetings was necessary was a complex inheritance dispute, in which the initial meeting was fixed to provide an introduction to the issues and a preliminary exploration of available options and their implications. The parties then met on a later occasion to explore and develop a particular option and to consider whether it was viable. Further time was needed to consider ancillary aspects and to prepare draft documents that would be needed as part of any final terms. Some of the negotiation was done by way of email communications. Everyone knew at the outset that matters would be dealt with over time, and had realistic expectations of each meeting and of the process.

Another example was a fundamental disagreement and falling out between shareholders in a company that provided specialised property services in a particular region.

- 10-126 In that case, an initial meeting, again, allowed the parties to explain their respective positions, wishes and concerns and to explore and narrow a range of available options, which included (among others) either one buying out the other; splitting the company and each continuing to run the business in different parts of the territory; splitting the company's functions and each providing different, non-competitive elements of the business within the whole territory; and splitting the company's assets and each running a competitive business. The parties needed time to consider options and check with accountants and bankers which options were viable. Following some interim communications and exchanges of ideas, the second meeting explored and developed one particular (buy-out) option, which then received much of the focus of attention. A later, final meeting was necessary to deal with all the details and formalities of the deal, which was amicably concluded.

If arrangements have not been fixed in advance for a series of meetings, they can nevertheless be arranged at the initial meeting, once it becomes clear that this would be a beneficial way to proceed.

Dealing with emotions: the myth of rationality in civil and commercial disputes

- 10-127

There is a widespread notion that, unlike parties in family disputes, commercial disputants tend to deal with matters in a reasonable, business-like and rational way without what is seen as the diversion of emotions. While sometimes true, this is in many cases a myth.

- 10-128 Many civil and commercial disputes involve strong feelings. In some kinds of cases, this may be obvious. For example, family business or partnership disputes are highly likely to be emotional. This may be extended to most situations in which a working relationship existed but has broken down, such as disputes between former principals and their agents, franchisors and franchisees, manufacturers and their former distributors or employers and former employees.
- 10-129 Where the relationship breakdown arose because of an alleged breach of duty such as negligence, the sense of grievance and distress can be great. So, for example, a clinical negligence dispute commonly contains elements of patient anger, distress, anxiety and blaming. The medical practitioner in turn may experience other possible emotions including anger and disappointment at the patient's apparent disloyalty, indignation at being accused of error in often difficult circumstances, fear, regret and distress. Similar feelings may arise in negligence actions against other professionals, and perhaps in most fields of activity.
- 10-130 There may similarly be strong feelings where contractual relationships have ended in dispute. An apparently straightforward construction dispute may involve disagreement, anger, frustration and ill will between, for example, a contractor's manager and an employer's representative. What appears to be a straightforward disagreement about a technical matter may disguise an element of personal blaming and conflict between individuals.
- 10-131 Even if a disagreement itself might initially have been a straightforward issue capable of rational disposal, the way in which it developed can have created antagonism and distress. For example, excuses and attempts by parties to exculpate themselves and avoid liability may create hostility that did not initially exist. Factual disputes can cause anger (and denials in statements of case, though perhaps technically justified in a narrow sense, can exacerbate antagonism). The challenging tone adopted by some insurers and litigation lawyers can result in reasonable people becoming entrenched in their adversarial positions.
- 10-132 Parties who hold strong feelings may or may not demonstrate these in the mediation and may not necessarily even be aware of their existence. Whereas overt anger can be addressed, suppressed anger is far more difficult to deal with, especially if the party concerned does not acknowledge its existence. Yet suppressed anger can sabotage deals. The anger may manifest itself indirectly, surfacing unexpectedly and in disguise. It may come out in snide comments, unwillingness to co-operate with the mediation, criticism of the mediator or the process, or resistance to agreeing terms.
- 10-133 Sometimes the emotional responses that occur in a civil dispute can mirror those in family disputes. Some of the same factors that arise in the breakdown of a commercial relationship are similar to those in the breakdown of a couple's relationship. This is especially so where one party or both (or all) remain emotionally entangled in the continuation of the relationship.
- 10-134 Mediators need to be aware of how parties' emotions can be a block to resolution of their issues. Mediators should be sensitive to these as far as they can. Every individual copes differently with the expression of feelings, or with managing certain kinds of feelings, such as anger. A few guidelines may be helpful:
- It may not help to try to contain the expression of emotions. This may just bottle up the problem, which then surfaces in some other form and inhibits resolution. However, expressing the emotions can rekindle and reinforce them rather than releasing them, so this needs to be handled with care and sensitivity.
 - If emotional issues arise in a joint meeting, it can sometimes be important for the other party to experience the strength of feeling that exists. However, the other party may not wish to experience this in the mediation forum. The mediator must

use his or her discretion in deciding how far to allow these feelings to be expressed in the joint meeting. Up to a point, it may be important to allow: beyond that it may become unhelpful to everyone.

- The mediator can give sympathetic acknowledgment of the emotions (though not necessarily of the factors causing it), taking care not to compromise his or her neutrality. The mediator may need to mutualise by acknowledging the emotional effect on both the parties, if indeed this is the case.
- If, however, the expression of emotions is causing undue distress or looks likely to destabilise the process, the mediator should try, with the necessary sensitivity, to bring the more emotional party back to task.
- In any event, when strong emotions have been expressed, it is commonly a relief if the mediator gently and non-judgmentally brings the parties back to the task of seeking a solution to their substantive issues.
- It is often easier to manage strong feelings when these are expressed in the separate meeting with a party. For this reason, it may be better to defer issues likely to arouse strong feelings until the separate sessions. Mediators must take care not to be drawn into the emotional maelstrom, or to overreact in empathising with either party.
- The mediator may perhaps meet the parties without their professional advisers, for example, where personal or emotional aspects need to be privately aired. This should, however, be undertaken with the greatest caution, if at all.
- Where emotional aspects have clearly affected the dispute and seem likely to affect the mediation, the mediator may consider touching on this in a joint meeting, perhaps at the outset. Where sensitively delivered, and where everyone realises that it is a factor, it can help to normalise this, for example:

“It is clear from reading the papers that there are some strong feelings on both sides. That is not surprising, given that this dispute has been running for the last x years. Indeed, it would be surprising if that were not the case. I am just mentioning this, because in my experience strong feelings can sometimes block settlements and I would like to be able to come back to this if necessary.”

- There are however risks in the mediator airing emotional aspects. Parties may wish to avoid their usual patterns of emotional response in the mediation, and an introduction referring to their feelings may be inappropriate. It may be safer to hold such observations until they become obviously appropriate in the separate meetings, when the mediator can decide whether and to what extent to touch on them.
- Sometimes inter-personal conflict may be resolved as a by-product of the mediation, either within the process or in the fullness of time after the dispute has ended. Mediators cannot resolve parties’ underlying emotional issues, which may well be complex and seldom exclusively related to the dispute. If their contract with the parties is to help them resolve the dispute, that is what their role should be. If strong feelings get in the way of this, the mediator can acknowledge the feelings and can sometimes cautiously help parties to an awareness of the effect of their feelings on negotiations. With empathy and sensitivity, the mediator can help bring parties back into the process of business-like negotiation.

Other permutations of meetings and ways of working

10-135 Joint meetings and separate confidential meetings on a shuttle basis are by no means the only strategies that a mediator might employ during the negotiation phase. Other ways of working may include the following:

- As indicated above, the mediator may meet with the lawyers without their clients present. This is especially useful when the mediator wants the same message carried to both or all parties.
- Alternatively, the mediator may meet with the parties, jointly or individually, without the lawyers present, for example, when discussing personal matters.

- Sometimes parties may benefit from meeting with one another alone, without the mediator or lawyers present. Some mediators are anxious about doing this, others regard it as a useful strategy to use, where appropriate—but remaining nearby in case needed.
- Where experts are in attendance, the mediator may meet with them, jointly or individually, and may arrange for them to meet one another to see whether they can narrow technical issues or agree on any of the aspects under discussion. Experts can sometimes be less than helpful in relation to overall settlement, as they can have a narrow, specialist view and cannot necessarily see the bigger picture that the parties may need to have.
- Joint meetings can be reconvened between separate sessions as necessary.
- The mediator may liaise with third parties, for example, a party's accountant or other professional advisers, by arrangement with the relevant party.
- Between mediation meetings, the mediator may continue to liaise with the parties and/or their lawyers by telephone, email or in any other way, and may continue negotiations between meetings. Indeed, sometimes it may be difficult to set up meetings and once the parties have had an initial meeting or two, and are familiar with the process and with the mediator, negotiations and other communications can be conducted in this way.
- Any other permutation, meeting or communication that the mediator considers helpful can be flexibly used.
- Where agreement has been reached, the joint meeting can serve as an opportunity to summarise and check the terms and to discuss the formalities that will be followed to record and implement the agreement.

Using facilitation and communication skills

- 10-136 The mediator will facilitate communication and negotiation between the parties and the formulation of concrete proposals that reflect their interests, concerns and requirements, and will assist them in maintaining a practical, business-like approach.
- 10-137 Throughout the process the mediator will use communication and other mediation skills. This will include listening carefully to the parties, reframing their communications to enhance constructive dialogue, acknowledging movement, mutualising concerns and interests, questioning each to clarify, probe and test how realistic their ideas are, helping to develop options and generally facilitating negotiations.³¹
- 10-138 As the mediator demonstrates an authentic involvement in the process and a patient commitment to helping the parties, they are likely to develop increasing trust in the mediator and the process. This in turn can have a positive effect on the movement towards resolution.

Adopting an evaluative mode³²

- 10-139 Sometimes the facilitative procedures outlined above do not prove to be sufficient, especially where parties have different perceptions of the strengths of their case, and make different assessments as to the likely outcome. In such cases, some models of civil and commercial mediation provide for an element of evaluation to be used.
- 10-140

Many mediators do not introduce evaluation at all, while others might perhaps do so unwittingly. There are many misconceptions about what evaluation involves. It seldom involves a formal declaration by the mediator as to the likely outcome of the case if it were to be taken to trial. Rather, it may (and commonly does) involve a questioning of parties' certainties, or a reference to relevant case law or precedent, or an informed challenge to assumptions of outcome.

- 10-141** Mediators who are willing to introduce an element of evaluation into their mediation are well aware that this could potentially antagonise one of the parties and compromise the mediator's role, though if done thoughtfully, skilfully and with appropriate expertise, it should be regarded as a facilitative step, supporting both parties in reaching an appropriate outcome. Evaluation is accordingly not lightly undertaken.

Footnotes

- 30** Edward de Bono refers in his book *Conflicts: A Better Way to Resolve Them* (Harmondsworth: Penguin, 1986) to a constructive "design idiom" through which the neutral can help the parties to design their own outcome to the problem. This may be seen as helping the parties to "craft" settlement terms out of the material that they provide but cannot themselves manage.
- 31** See [Ch.14](#) for the mediator's skills and attributes.
- 32** For a more detailed consideration of evaluation, including specifically evaluative models of mediation, see [Ch.19](#).

Stage 5: Dealing with Impasse

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Mainwork

Chapter 10 - Civil and Commercial Mediation

Stage 5: Dealing with Impasse

- 10-142 Where progress comes to a halt and the parties are deadlocked, the mediator may need to use impasse strategies to help regain movement. The following may be particularly relevant:

Addressing risk perception

- 10-143 An impasse can sometimes arise or be perpetuated by the nature of the advice or support being given to a party by his lawyer, accountant or other professional adviser. It is entirely proper and appropriate for the adviser to have a supportive role that is partisan.³³ However, in some cases, the adviser may have difficulty in confronting his or her client with options or views that the client is set against wanting to hear. The adviser may need support in dealing with this issue, and the mediator may need to accept the role of a scapegoat in helping to achieve a necessary shift.³⁴
- 10-144 There is also another aspect to this, which relates to the fact that people's risk intuition may commonly be skewed by innate biases and heuristics, or mental "shortcuts" that everyone takes in arriving at decisions. These biases can influence parties and lawyers in the way that they view the strength of their case.³⁵
- 10-145 Research in the US has indicated that in cases where predictions were compared with actual outcomes, "lawyers frequently made substantial judgmental errors, showing a proclivity to over-optimism".³⁶ There is, it appears, an element of wishful thinking and a consistency with findings in previous studies in which judgments about probability and likelihood were significantly influenced by whatever side of the issue individuals thought about first. The authors of this research suggest that lawyers should consider obtaining third-party views on their litigation goals on behalf of their clients and how realistic these are to be achieved.
- 10-146 Although it is not clear how far this particular research would apply in other countries and legal traditions, there is some consistency with other studies, and with the broad principles of risk intuition. Viewed pragmatically, it is self-evident that where two lawyers assessing the same set of facts against the same legal principles can arrive at opposite conclusions, one or the other—or perhaps in some respects both—must be working on some mistaken element, whether of fact, law, judgment or intuition.
- 10-147 One question for mediators is how far to challenge these perceptions. Mediators who are purely facilitative may raise questions that challenge the party's perceptions (though this itself may be a form of evaluation); but this may not necessarily resolve the impasse. Indeed, merely drawing attention to the risks and costs of litigation is unlikely to have any real impact and may be perceived as patronising. In a report on court mediation, Professor Hazel Genn refers to one respondent as saying:

"... the mediator kept banging on about the dangers of going on to appeal, asking 'has your solicitor advised you about the costs consequences?' Well frankly that's insulting. Of course we had considered the consequences...."³⁷

- 10-148

It can be more helpful, and may sometimes be necessary, to challenge perceptions more directly, for example by asking how they reconcile their views with particular legal provisions or judicial precedents, or by considering aspects of the case that do not stand up well to scrutiny. The mediator can raise questions and challenge perceptions that may help the party and the adviser to reassess their views and to shift stuck positions. The mediator will not want to undermine the lawyer, but may facilitate the party and lawyer reviewing their views and certainties.

10-149 Sometimes when a mediator raises such a challenge in a private meeting, the lawyer is quite relieved and even supportive of the mediator. The lawyer may well have issued cautions to his or her client, but might not have wanted to press these too strongly. The lawyer may not want to have been perceived as being too negative or may have wanted to support the client in maximising the client's position, while looking for settlement opportunities.

10-150 Another useful device is to provide material that will help parties to focus more specifically on risk, cost and the implications of proceeding to trial in those cases where court proceedings have started or are in prospect. The mediator may prepare a risk analysis form for parties to consider with their lawyers and complete.³⁸ There are many possible forms and versions of this, and it can either be provided in a general form or adapted for the specific case by inserting for consideration a list of the key issues that would need to be decided in the event of a trial, for example, by following a sequential analysis of issues, broadly along the lines of a decision-tree analysis in part of it.³⁹ It can be useful to prepare this document in advance of the substantive meeting, and keep copies in reserve in case ever needed. They can then be produced and handed to the parties and their lawyers in the event of impasse.

10-151 It is not necessary for the parties and their lawyers to return the completed document to the mediator, though if they do, this can provide useful insights and provide a basis for further discussion. The point of the document is rather to help the parties focus on the implications of not resolving the dispute and of having to continue with court proceedings. Sometimes the mediator may find that the form has not been completed, but the parties, having reflected on the issues raised in it, are readier to engage further with the process.

BATNA and WATNA⁴⁰

10-152 Flowing from the question of risk assessment, a useful strategy is to help the parties to examine their best and worst alternatives to reaching a negotiated agreement. This involves:

- Facilitating the examination by each party of the realistic best outcome they might achieve in any other forum such as litigation. In assessing this, positive and negative factors need to be taken into account, for example, the additional costs that would be incurred including those which would be irrecoverable. Delay and publicity factors, and any other relevant considerations, would be taken into account. Each party will then have some idea of the best result that could be achieved if agreement is not reached.
- Similarly, facilitating the examination of the worst alternative to an agreement, assuming the realistic worst outcome in any other forum such as litigation. Here again, all relevant factors must be taken into account, including total costs payable by the losing party to his own solicitor, and any likely costs payable to the winner. Delay and publicity factors, and other relevant considerations, are again taken into account. Each party will then have some idea of the worst result that might follow if agreement is not reached.
- Facilitating the parties and their lawyers assessing the likelihood of winning or losing in the event of adjudication.
- Helping the parties to review the negotiations with the benefit of knowing their best and worst alternatives and having a better idea of their prospects of success.

- 10-153 The BATNA/WATNA exercise is potentially useful for each party (rather than the mediator) to undertake. It makes it clearer whether determination in another forum is a better option; if not, then a negotiated agreement should be pursued. Clearly this cannot ordinarily be undertaken by the parties jointly.

Examining underlying issues

- 10-154 If it is not apparent what is causing the deadlock, the mediator may wish to consider what underlying issues may be inhibiting resolution. For example, in a clinical negligence case, the claimant may not be satisfied merely with financial proposals. There may also be a need for some form of acknowledgment, explanation, apology or accountability.

- 10-155 The mediator may need to probe gently with each party to establish the underlying issues and requirements. Once these are identified, the mediator can try to consider with the parties what would need to be done or said that would satisfy those underlying issues and concerns. This can sometimes help to unblock stuck attitudes.

Exploring creative options

- 10-156 The mediator can help the parties explore creative ways of overcoming the impasse. These may be put forward by the parties themselves, encouraged by strategies such as brainstorming; or they may be suggested by the mediator—though this should be done with care so that the parties do not perceive this as the mediator's recommendation.

- 10-157 For example, in a case in which parties were considering terms for a settlement of a farming dispute, one particular farm was on offer but the person considering accepting it as part of a comprehensive deal (M) was uncertain whether the lie of the land would be really suitable for his farming plans. A stalemate arose on this, until the mediator suggested to both parties the possibility that M should take the land, farm it for a year and see if it suited him, and have the option at the end of the year to sell the farm, with an agreed adjustment of certain other payments in the event of such sale. This broke the deadlock and a formula was found along these lines. In the event, the farm did suit M, and he retained it after a year.

Symbolism

- 10-158 The mediator may need to consider whether a deadlock is caused by some symbolic issue, or whether perhaps some symbolic solution may be found to an impasse.

- 10-159 In a clinical negligence claim arising from the death of a baby in childbirth, an important element in moving towards resolution was addressed when the defendants offered to provide a headstone for the baby. In a commercial dispute, a deadlock about a residual payment was resolved when the parties agreed that it should be paid to a charity chosen by the parties.

Brackets

- 10-160 Increasingly in mediations held in the US parties and mediators find it useful to offer each other brackets. The party offering the bracket is effectively offering to move to a particular figure on condition that the other party responds by moving to the other end of the bracket. Thus a claimant might suggest a bracket of \$15 million to \$20 million. He is thereby offering to accept \$20 million but his offer is conditional on the paying party lifting his offer to \$15 million. The response may be by means of a different bracket or simple agreement. This technique and approach has not found particular favour in the UK as yet.
- 10-161 Where parties are deadlocked, it can help for the mediator to prepare written notes for the parties to consider:
- This may be a summarised analysis of the issues, reflecting those aspects on which there is some measure of agreement and those where there are differences, with the range of solutions put forward by each party.
 - The mediator may add his or her own thoughts on the possible ways in which stuck issues can be approached consistently with the aspirations of each of the parties. This can be done non-judgmentally, merely by outlining available options; or if the circumstances necessitate, the mediator could add his or her views as to possible directions which the negotiations could take to become more effective.
 - Depending on the specifics of the situation, the mediator may create a written note that creatively assesses the stuck aspects. The key requirements of such a strategy would be, first to bring a greater awareness of the issues to the parties, and secondly to offer some constructive ways to overcome the deadlock.

Adjournment for non-binding third-party evaluation of an issue

- 10-162 If the sticking point relates to a dispute about a legal or technical aspect, one possible strategy is to adjourn the mediation and arrange to obtain a non-binding evaluative opinion from some agreed authoritative third party. In such event, the parties or their lawyers may liaise with the mediator in preparing joint instructions to the third party, for example a specialist barrister; and if required, each party may be given the opportunity to attach an addendum outlining their respective views and contentions.
- 10-163 The third party's non-binding opinion can help to guide the parties in the mediation. It could be discussed at the next mediation session, and might help matters to move forward, even if it is not accepted by both or all the parties.

Making non-binding settlement proposals

- 10-164 A procedure that can be effective in helping to overcome deadlock is for the mediator to offer the parties the following option:
- 10-165 The mediator will meet the lawyers or the parties together, and will suggest terms that he or she thinks may be mutually acceptable as a way of resolving the dispute. Those terms will not be based on the merits or endeavour to anticipate the outcome if the matter were to go to court, nor are they an evaluation or non-binding determination. Rather they will just be proposed terms that the mediator thinks may pragmatically settle the issues.

- 10-166 The parties or their lawyers will be invited to consider these proposals and to revert to the mediator individually and confidentially. If both accept, the mediator will announce that the matter is settled. If both reject the proposals, the mediator will announce that there is no settlement. If one accepts and the other does not, the mediator will similarly announce that there is no settlement. This means that if one party accepts and the other does not, the refusing party will not know that the other was willing to agree, leaving the latter in no way compromised by agreeing.
- 10-167 If the parties agree to this procedure, the mediator will make his or her proposals. These will need to be thoughtfully crafted, based on an understanding of the parties' contentions, needs and views. It is certainly not just a matter of "splitting the difference" although there may sometimes be occasions when that might be appropriate. If the proposals are complex, it may be that composite terms will be set out in writing and provided to the parties.
- 10-168 There is experience of this procedure working in one of two ways. In some cases, the terms are accepted by both parties. In some other cases, one party may accept and the other may reject, but confidentially tell the mediator that while the mediator's proposals are not acceptable, he would agree to some alternative specified compromise. In that event, the mediator, as promised, announces that there is no settlement; but then suggests that negotiations might nevertheless continue, as he has another aspect he would like to explore. In this context, the mediator can discreetly test whether the alternative proposals might form the basis for a settlement, which may well be the case. The main point, however, is that the impasse strategy has been effective in ending the stalemate and getting discussions going again, on a basis that might potentially resolve the matter.

Other strategies

- 10-169 Deadlock can arise for other reasons, such as differing perceptions of fairness. In such event it can help for each party to have an opportunity to address this issue. Although unlikely to persuade the other, this sometimes allows each to see that there are different perspectives, and that the matter needs to be dealt with pragmatically.
- 10-170 A basic impasse strategy is simply to pause and reflect. The mediator may need time to reflect on the cause of the deadlock. Self-examination is part of this process: the mediator may find that his or her own attitudes and assumptions are contributing to the problem, rather than helping to overcome it. This may, for example, concern the way the mediator relates to one of the parties. The mediator may have to change his or her approach or attitudes to create a new dynamic. Or the parties may need more time to reflect on matters themselves. Sometimes things take on a different hue after a few days of reflection.
- 10-171 As an adjunct to this, if the substantive mediation ends with the issues unresolved, the mediator may arrange for the parties to leave their respective proposals open for an agreed period, say 72 hours, with the opportunity for either to accept the other's proposals within this time. If this is done, it is important for the respective proposals and the terms of the extended time to be clearly noted, so that there is no room for misunderstanding. It should also be specified that this is part of the mediation process, and that the terms of the Agreement to Mediate continue to apply. The mediator may, before the end of the agreed period, contact each party to see if there is any interest in accepting the proposals. This provides an opportunity to check whether, with the benefit of reflection, either party may perhaps find some way to close the gap even if the other's proposals are not accepted.
- 10-172 Wade refers to a number of strategies for "crossing the last gap".⁴¹ These include some of those mentioned above, and also simply splitting the difference; resolving matters by chance, such as spinning a coin, which saves face, or drawing a range of options from a hat; placating the fear of incremental increases by arranging that a proposal will only be considered if a party can be sure that it will be final and accepted; sub-dividing the last gap—as where for example one person makes a payment and

the other pays the delivery and insurance costs; deferring the deadlocked item and implementing the rest of the settlement; and fixing a time for final discussions with limited and specific proposals.

Preparing for adjudication

- 10-173 If attempts to resolve the impasse are not successful, the parties will have reserved their right to proceed to adjudication. Sometimes coming face to face with that serves as an effective impasse strategy itself, and brings parties back into negotiation. However, a mediator should not use this as a strategy unless genuinely intending to end the mediation if there is no further movement: this should not be used by way of brinkmanship, but rather as a genuine last resort.
- 10-174 In this event, the mediator can help the parties to prepare for adjudication in as constructive a way as possible. Issues and formal arguments can be addressed and simplified, and the parties can be encouraged to view the adjudication as a way of resolving the dispute by getting a third party to make a determination, rather than as an act of hostility.

Adjournment and “after-care”

- 10-175 When mediations do not result in settlement on the day there is increasingly an expectation that the mediator will remain involved. Mediations often continue through a mixture of written communication, telephone calls and face to face meetings for weeks, even months after the mediation day. The parties and the mediator always have the option of reconvening for a full further day of mediation.

Footnotes

- 33 See the value of the partisan role in Gwynn Davis, *Partisans and Mediators: Resolution of Divorce* (Oxford: Clarendon Press, 1988).
- 34 One role of the mediator is sometimes to be a scapegoat for the decisions that the parties need to make. If a party can “blame” the mediator for having to reach a particular decision, the mediator will need to have sufficiently broad shoulders to accept that as part of his or her function.
- 35 See, for example David G Myers, *Intuition: Its powers and perils* (Yale University Press, 2002).
- 36 Jane Goodman-Delahunty, Pär Anders Granhag, Maria Hartwig and Elizabeth F. Loftus, “Insightful or wishful: Lawyers’ Ability to Predict Case Outcomes” (2010) 16(2) *Psychology, Public Policy, and Law* 133.
- 37 Professor Hazel Genn, *Court-based ADR Initiatives for Non-Family Civil Disputes: The Commercial Court and the Court of Appeal* (London: Lord Chancellor’s Department, 2002), p.94.
- 38 An example of such a form is set out in the Appendix at A1-047. Mediators can vary this however they see fit, or may obviously use their own version of this—simplified or amplified.
- 39 A decision tree graphically examines alternative options with uncertain consequences, by developing and exploring its different branches and sub-branches, and assigning subjective probabilities to each of the items listed on the branches. Decision trees can be helpful in focusing on individual issues, but can be misleading: ultimately they involve subjective judgments that can give the illusion of being scientific, and the process does need great care to avoid flaws of logic creeping into it.
- 40 BATNA is the best alternative to a negotiated agreement. The term arises from Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (Boston: Houghton Mifflin, 1981); Lax and Sebenius prefer the term “no-deal option” for the same concept: see their *3-D Negotiation: Powerful Tools to Change the Game in Your Most*

Important Deals (2006). WATNA is the worst alternative to a negotiated agreement. For further discussion of the BATNA and WATNA concepts, see [Ch.4, paras 4-006 to 4-008](#).

- 41 John H. Wade, "Crossing the Last Gap" in Andrea Kupfer Schneider and Christopher Honeyman, *The Negotiator's Fieldbook: The Desk Reference for the Experienced Negotiator* (Washington DC: American Bar Association, 2006), Ch.54, pp.467–474.

Stage 6: Concluding Mediation and Recording the Outcome

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Chapter 10 - Civil and Commercial Mediation

Stage 6: Concluding Mediation and Recording the Outcome

- 10-176 As in all other fields of mediation, the process will end either when an agreement has been reached, or when the parties or the mediator conclude that, although resolution may not have been reached, nothing further can be achieved in the mediation process.
- 10-177 The mediator will have to consider and perhaps discuss with the parties whether a written record of the outcome is needed, and if so, in what form and by whom it should be prepared.
- 10-178 It is standard practice in civil and commercial mediation that if agreement is reached, a written memorandum of settlement terms should immediately be prepared and signed by the parties before they leave, if at all practicable. It will ordinarily be immediately binding, and this should be clear and explicit. If it is only to become binding after some further stage has been reached, such as after ratification by a board of directors or confirmation by an insurer, this must be clearly stated. It must also reflect any conditions in the case of a conditional agreement.
- 10-179 The memorandum should contain all the material terms of settlement, with no missing or vague essential elements, however complex this makes the memorandum and however long it takes.
- 10-180 Lawyers representing the parties may undertake or help with the necessary drafting. The mediator's role may be to undertake the drafting, to lead or support it, to review it or perhaps just to receive a copy of the agreement.
- 10-181 Where the parties are not legally represented in the mediation, or where for any other reason the mediator needs to be more closely involved in drafting, for example, where the mediator has kept notes that will facilitate drafting, the mediator may prepare an initial draft of the agreement. If only partial resolution has been achieved, the mediator might prepare a non-binding without prejudice summary of the position for the parties, which could usefully indicate the common ground and the differences between the parties, to facilitate further discussion in the future.
- 10-182 Where court orders or arbitration awards are required as part of the settlement, the mediator would not be expected to draft the relevant order or award. Indeed, it would generally be inappropriate to do so. This would be the responsibility of the parties' lawyers.
- 10-183 The memorandum might, however, need to record in clear terms what kind of order is needed and what time-scale, formalities and procedures are envisaged for obtaining and implementing the agreement.

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Addressing Post-Mediation Issues

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Chapter 10 - Civil and Commercial Mediation

Addressing Post-Mediation Issues

- 10-184 The mediator can assist in various ways with any settlement the parties may enter into. For example, the mediator may supervise implementation of the settlement terms, although this would be very uncommon, act as stakeholder, mediate any issues that may arise, or perhaps even act in an adjudicatory capacity in relation to the implementation of the settlement.⁴² Some of these functions may be undertaken by the ADR organisation that arranged the mediation.
- 10-185 The extent to which the mediator or the ADR organisation that arranged the mediation can have a post-settlement role in relation to civil and commercial mediation will depend on a number of considerations, including for example:
- the settlement terms, and whether and to what extent they involve a deferred implementation, or one that would benefit from neutral supervision or involvement;
 - the relationship between the mediator and the parties including the level of trust established and the readiness of the parties to allow a third party a supervisory role in the implementation of their settlement;
 - the additional cost factor of having further neutral involvement, balanced against the perceived benefits of such involvement.
- 10-186 A supervisory function could be useful, for example, in the implementation of a construction industry dispute where the work is continuing, or in the supervision of some physical activity which forms part of a settlement, such as the stocktaking of a business. The mediator might retain documents in escrow or care for physical items pending the payment of funds payable on completion of a transaction, to be released on specified terms.⁴³
- 10-187 The mediator's post-settlement functions may either be contained in the written terms of settlement or can be arranged on an ad hoc basis if and when the need arises.

Footnotes

- 42 This would though be unusual. It would not be med-arb, as the adjudicatory function would relate to the settlement terms and not the dispute. It changes the nature of the neutral's role, and care would be needed in agreeing these provisions, drafting the terms of adjudication and implementing them.
- 43 For example, it was a term of settlement in one case that confidential documents held by a party had to be lodged with the mediation organisation that arranged the mediation, for destruction after the terms of settlement had been fully implemented (but not before).

Deal Mediation

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Chapter 10 - Civil and Commercial Mediation

Deal Mediation

- 10-188 This chapter has dealt with the resolution of civil and commercial disputes, but mediation has the capacity to facilitate the creation of contractual arrangements, where there is no dispute at all, but rather where parties seek third-party support in negotiating contractual terms at the start of a relationship. This is particularly applicable where the proposed transaction is complex and global; but the principle is equally applicable in any domestic commercial contract where a flexible, creative and problem-solving approach by a third party would help them address a range of matters that might otherwise be difficult to resolve.
- 10-189 A number of mediators, in particular those with a commercial background, whether or not also legal, have been offering deal mediation. CEDR Solve offers third-party assistance in the negotiation of a deal, as well as other forms of assisted negotiation.⁴⁴ The International Mediation Institute, IMI, supports the concept and has published material relevant to the process.⁴⁵ It points out that mediation has far wider values in terms of enabling negotiators to do their job on a collaborative rather than confrontational or positional basis.

Footnotes

- 44 See for example Graham Massie's 2016 article "Deal mediation—Neutral chairing for contract negotiation" at <https://www.cedr.com/blog/deal-mediation/> [accessed 16 May 2018].
- 45 See <http://imimediation.org/deal-mediation> [accessed 16 May 2018].

Introduction

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Chapter 16 - Ethics, Values, Fairness and Power

Introduction

- 16-001 The matters introduced and discussed in this chapter relate primarily to mediation. Providing impartial third-party assistance in the field of dispute resolution or management raises a number of ethical and practical questions for practitioners, which will be addressed under the following heads:
- 16-002 *Rules of underlying professional bodies*: professional issues concerning dispute resolution practice may arise from the rules of a practitioner's traditional practice.
- 16-003 *ADR ethics and Codes of Practice*: professional questions may arise in relation to the practitioner's ADR practice, whether arising from a code of practice or from ethical standards that should be inherent in any neutral dispute resolution practice.
- 16-004 *The practitioner's values, attitudes and beliefs*: these could affect issues of fairness, practice and ethical responsibility. What does "neutrality" or "impartiality" mean in this context?
- 16-005 *Fairness*: the question arises to what extent a practitioner has responsibility for the fairness of any agreement reached and for fairness of the process.
- 16-006 *Conflicts of interest*: the impartiality and the parties' perceptions of the impartiality of mediators and other practitioners are critical to the mediation process. Conflicts of interest, imputed bias and situations that suggest a lack of impartiality need to be avoided.
- 16-007 *Ethics of confidentiality*: this relates to the issues and dilemmas facing practitioners in dealing with sensitive information received on a confidential basis.
- 16-008 *Power imbalances*: this relates to the question whether, to what extent and how a practitioner can and should deal with the question of power imbalances between the parties.
- 16-009 *Mediator cautions*: this considers the circumstances in which a mediator should not act, or should do so with caution.

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Rules of Underlying Professional Bodies

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Chapter 16 - Ethics, Fairness and Power

Rules of Underlying Professional Bodies

- 16-010** Professional organisations have rules regulating the conduct of their members in their professional capacities. Insofar as any dispute resolution practice may overlap the traditional practice of the practitioner, consideration may have to be given to ensuring that there is no conflict between the two sets of practices.
- 16-011** The legal profession is the main profession whose members engage in dispute resolution, and the rules applicable to solicitors and barristers will be considered. Other professional bodies may also regulate their members who engage in dispute resolution, and this may need to be individually checked.

The Law Society of England and Wales and the Solicitors Regulation Authority

General provisions

- 16-012** The professional body for solicitors in England and Wales is the Law Society, which maintains specialist accreditation schemes, including the Family Mediation Accreditation Scheme and the Civil and Commercial Mediation Accreditation Scheme, with approved panels of mediators in each scheme.
- 16-013** The Law Society delegated its regulatory powers in 2007 to the Solicitors Regulation Authority (SRA), which is part of the Law Society, but operates separately from it.
- 16-014** Before considering specific rules that relate to mediation, reference should be made to SRA Principle 1, which effectively replaces r.1 of the Solicitors' Practice Rules 1990. This mandatory principle provides, among other things, that a solicitor must:

- “1.uphold the rule of law and the proper administration of justice;
- 2.act with integrity;
- 3.not allow your independence to be compromised;
- 4.act in the best interests of each client;
- 5.provide a proper standard of service to your clients...”

16-015

Like the rules that these principles replace, these provisions may apply in a number of ways. A solicitor has a duty to ensure that any dispute resolution activities undertaken comply with the requirements as to integrity, independence and standards. When representing a client in traditional practice, he or she must also act in the best interests of that client, by being aware of all appropriate processes available and properly advising the client about them so that an informed choice can be made.

- 16-016** Given especially the sanctions against failing to explore and possibly use alternative processes before embarking on litigation, as summarised in the *Halsey* case,¹ it would be remiss, and possibly negligent, for a solicitor not to advise a client about all relevant dispute resolution processes. An analogy might be the failure of a solicitor to advise a client about the availability of public funding in circumstances where it is available and could be appropriate.

Specific mediation provisions

- 16-017** Solicitors who mediate need to decide and make clear whether they are mediating in their legal professional role—"as solicitors"—or outside that role, hence "not as solicitors". In the latter event, they should not refer to themselves in this context as "solicitors" and are not covered by their solicitors' professional indemnity insurance. The SRA does not regulate them in their mediation practices, though it retains control over solicitors who fundamentally breach professional rules, for example, by committing a crime.
- 16-018** The Law Society/SRA have specific requirements for solicitors who mediate as such. They will be expected to undertake specific training in mediation in accordance with prescribed training standards, and they will be expected to observe the Society's Mediation Codes of Practice.

The Law Society's Mediation Panels

- 16-019** The Law Society has established specialist panels of family mediators and civil-commercial mediators, each with a Chief Assessor, with the power to appoint supporting assessors. The panels have two-tier membership. The first tier is intended to provide for those who work and have experience in the relevant practice and who have completed the designated training (General Members). The second tier covers those who have completed an accreditation process involving prescribed practice, consultancy, peer group, and further education requirements (Practitioner Members).

The Bar

- 16-020** The General Council of the Bar has not published any ethical standards specifically for barristers acting as mediators. Its view was that the standards applicable to barristers contained in the Bar's Code of Conduct would apply whatever their function, be it as barristers in practice or barristers acting in any part-time judicial function. If they breach the fundamental principles set out in para.301 of the Code, which relates to discreditable conduct or conduct likely to bring the profession into disrepute a complaint can be made.

The Bar Council website includes a list of barrister mediators who have all completed training with a mediation provider which adheres to prescribed standards.

Footnotes

- 1 See [Ch.17](#) for the *Halsey* criteria.

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ADR Ethics and Codes of Practice

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Chapter 16 - Ethics, Values, Fairness and Power

ADR Ethics and Codes of Practice

- 16-021 Acting as an impartial practitioner in a dispute resolution process carries with it a substantial ethical obligation to act in a responsible, competent and effective way with principle and integrity. It is possible for practitioners to influence the course of proceedings by the way in which they conduct the process, the questions they ask and the options they help the parties to examine.² However, they must not, directly or indirectly, try to impose their own views or settlement terms on the parties. Abusing this ethical rule could be harmful to the practitioner's reputation and that of the process.
- 16-022 The high ethical standards that a practitioner should observe have a number of sources:
- As observed above, the practitioner's traditional occupation may stipulate standards and requirements.
 - Mediation and other dispute resolution organisations generally stipulate the standards of conduct required of their members, which may be informally regulated, or may be in the form of a Code of Practice or Model Procedure.
 - Individual practitioners may subscribe to their own practice and ethical rules, either informally or as part of an agreement with the parties.
 - Properly trained practitioners should be aware of the ethical considerations and the need to work with integrity and should do so as part of a personal ethos irrespective of any formal document regulating these activities. They should be imbued with a sense of the need to conduct the process in a fair, effective and even-handed way.
- 16-023 A Code of Practice is likely to reflect an organisation's ethical values and practical ground rules. It may outline the organisation's policy or guidelines on various matters such as mediator qualification, mediation practice, values and principles underlying practice, confidentiality and privilege. It is likely to address other ethical issues such as conflicts of interest and circumstances in which the mediation should be ended as well as practical matters including payment of fees and mediator indemnity insurance.
- 16-024 Ethics constitute a cornerstone of ADR practice. A third party is given substantial power to influence the resolution of disputes, in many cases affecting the lives of the people concerned. That practice is carried out largely privately, out of the public gaze, and without the same kind of protections provided by the court system, such as the possibility of getting reasoned judgments or appealing. Practitioners owe it to the public and to their profession to observe a strong sense of ethical awareness.
- 16-025 Given the range of fields within which ADR is practised and the variety of skills, styles, cultures and approaches that it encompasses, some controls are desirable in the public interest. In the interests of diversity, however, those controls should not be rigid. That would replicate the rigidities and problems of the legal system that ADR intends to avoid. Rather, the controls should be maintained by a keen and clear sense of ethical propriety. If an ethical framework is in place, practitioners have a sound theoretical understanding, and are practised in facilitative skills, there should be scope for creativity and flexibility.

Footnotes

- 2 Cobb and Rifkin have pointed out that the way in which the facilitator frames questions may significantly impact the dominant discourse of the process: *S. Cobb & J. Rifkin, “Practice and Paradox: Deconstructing Neutrality in Mediation” (1991) 16 Law & Social Inquiry 35-62*: This is discussed in some depth in S. Shipman, L. McGregor and R. Murray “Human Rights Claims, Process Standards and Agreement-Based ADR”, Human Rights Quarterly (forthcoming).

The Practitioner's Values, Attitudes and Beliefs

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Chapter 16 - Ethics, Values, Fairness and Power

The Practitioner's Values, Attitudes and Beliefs

The concept of neutrality

- 16-026 The term “neutral” runs through the literature on ADR. It is extensively used both as a noun, to refer to the impartial practitioner (“the neutral”) who works in ADR, and as an adjective, to refer to the “neutral” quality of the practitioner or as a part of the process, as in “early neutral evaluation”. However, there is a view that nobody can be strictly “neutral” because they cannot function in any way as human beings without bringing their own personal values, attitudes and beliefs into what they do, whether consciously or not. Hence they cannot truly operate strictly “neutrally”.³
- 16-027 For this reason, instead of referring to “neutrality” in relation to the ADR practitioner’s role, many people prefer to use the terms “impartiality” and “even-handedness”, which refer to an absence of bias or partiality and do not imply any reference to the presence or absence of the practitioner’s values.⁴

Personal values, attitudes and beliefs

- 16-028 Mediators and other dispute resolution practitioners working in a neutral role will inevitably have values,⁵ attitudes and beliefs that affect how they approach their work. Rather than imagining that they can abandon all of these, it is probably more useful for practitioners to be fully aware and conscious of them. With that awareness, they can try to ensure that these do not impinge on the process and unconsciously affect what they do and how they work.
- 16-029 Various aspects can usefully be brought into awareness:

Attitude to conflict

- 16-030 Dispute resolution practitioners bring into the dispute their underlying views and responses to conflictual situations. These will generally have been formed in their families of origin, based on early experiences. If family conflict was well managed, the practitioner may be able to address conflict in later life more easily. If conflict was avoided, commonly by one member of the family (perhaps even the practitioner) being the peace-maker, the practitioner may in later life tend towards adopting a conflict-avoidance approach to conflict management and resolution.

These and other related attitudes, developed over years, will invariably affect the practitioner’s approach to particular disputes.

- 16-031

A practitioner does not need to formalise this self-enquiry, but may consider his or her attitude to conflict on a reflective basis. Formal tests do exist. For example, the Myers-Briggs Type Indicator (MBTI) classifies sixteen psychological types, which it identifies through a specific questionnaire. Some people find that this typology helps towards self-understanding and to identify sources of conflict. Less formal self-analysis generally suffices, though guidance in undertaking it can always be helpful.⁶ With the benefit of these insights, a practitioner's ability to address conflictual situations can be improved. Also, practitioners may remind themselves that their attitudes and responses are not universal, and that each party may be better able, or less able, to cope with the conflict than the practitioner.

Rationality-emotionality

- 16-032** Dispute resolution practitioners may also find it helpful to have an understanding of their broad positioning between rational and emotional responses, on a notional continuum, though there are inherent risks in referring to rationality-emotionality on this basis. First, people are more complex than this, and may at times be rational and at other times emotional (and sometimes both). Secondly, people may make inappropriate and generalised gender assumptions and identify general principles of emotionality with women and rationality with men.⁷ Social conditioning and other factors may result in patterns that have observable gender similarities; but it is risky and unsustainable to create theories or generalisations based on any such patterns. Thirdly, there is no real continuum between rationality and emotionality.
- 16-033** Parties, especially in inter-personal disputes including marital issues, but also in a range of other conflicts, may well have their own different positions on this notional divide. One party may seek a calm, logical and ordered approach to resolving the issues, whereas the other party may be more emotional and unready to resolve matters purely on the basis of a business-like approach, preferring to deal with personal issues. A mediator in such a situation who adopts a rational, business-like approach is in some respect failing to acknowledge the party who is more emotional. Correspondingly, if the mediator resonates with the more emotional approach, the “rational” party may be troubled. Practitioners (not just in the family field) need to be aware of this division and of their own natural inclinations in response.⁸ They may need to find an approach that recognises and acknowledges the validity of both ways of functioning.
- 16-034** Practitioners also need to be aware of their own individual capacities to cope with the emotions of the parties. Some people can tolerate parties' anger, distress or frustration more easily than others. They should have this awareness when entering the field of conflict. They should also remember that the parties themselves may well have different tolerances from one another and from the practitioner. These limitations need to be borne in mind when following the skills process of “allowing parties to express their emotions”.⁹
- 16-035** Much that practitioners do in conflict and dispute resolution is intuitive. Many lawyers and other professionals tend to place a premium on logic and rationality, but in fact have well-developed intuitive responses that are not readily acknowledged. They may have a sense that something is not quite right or a feeling about what they are being told. Skilled questioning relies on this sense about what to pursue and what to leave unasked. Similarly, skilled mediation involves intuitive as well as reasoned responses. There is a balance to be struck, which the mediator hopes to achieve.

Values, beliefs and assumptions

- 16-036** All people have their own individual values and belief systems, on which their assumptions about behaviour are based. It is impossible to divorce ethical awareness from individual beliefs, if ethics are to be observed at a fundamental level.
- 16-037**

People start forming their values and beliefs from the earliest age and develop them as they grow older. Many factors will shape these. They include, of course, individual experience, the culture of one's nuclear and extended family, community and religion, the influence of schools and teachers, and the media. Practitioners enter the conflict arena with an array of beliefs, assumptions, biases and in some cases prejudices. It will not be easy to identify these with particularity, but at least the practitioner should understand that they exist, to be ready to guard against the effect that they may have if they intrude on the dispute resolution process.

16-038

Crawley says:

"belief systems are sensitive, personal and absolutely necessary. They provide us with a basic framework from which to relate to the people and situations we encounter. An effective conflict manager possesses a strong set of positive values about other people, but also needs to examine and be in control of his or her own beliefs, assumptions, stereotypes and prejudices".¹⁰

Footnotes

- 3 For further discussion of neutrality see Christopher W. Moore, *The Mediation Process, Practical Strategies For Resolving Conflict*, (New Jersey: John Wiley & Sons, 2014), p.9 and pp.21–22.
- 4 See for example: *L. Mulcahy, "The Possibilities and Desirability of Mediator Neutrality: Towards an Ethisc of Partiality"* (2001) 10(4) *Social and Legal Studies* 505-527. See also S. Shipman, L. McGregor and R. Murray, "Human Rights Claims, Process Standards and Agreement-Based ADR", [fn.2](#).
- 5 See for example: *R. Goldberg, "How our Worldviews Shape our Practices"* (2009) 26(4) *Conflict Resolution Quarterly* 405-431, 427. See also S. Shipman, L. McGregor and R. Murray, "Human Rights Claims, Process Standards and Agreement-Based ADR", [fn.2](#).
- 6 A useful self-analysis exercise in assessing one's attitudes to conflict is the Conflict Mode Exercise developed by Thomas and Kilmann, see: *R.H. Kilmann and K.W. Thomas, "Developing a Forced-Choice Measure of Conflict-Handling Behavior: The Mode Instrument"* (1977) 37(2) *Educational and Psychological Measurement* 309-325. For sources of conflict, see Bernie Mayer, *The Dynamics of Conflict: A Guide to Engagement and Intervention*, 2nd edn (Jossey-Bass, 2012) Ch.1, pp.1-33 and the wheel/circle of conflict hypothesis which he developed in conjunction with Christopher Moore.
- 7 Writers such as John Gray have commented on gender differences along similar lines to these, for example in his book, *Men are from Mars, Women are from Venus* (London: Element, 1993). Works such as his offer insights into gender differences, but run the risk of all generalisations, namely that they do not apply universally.
- 8 The authors wish to acknowledge Neil Dawson and Brenda McHugh, family therapists and mediators, for their contributions to these insights. See also Benjamin on the "Myth of Rationality" at [Ch.19 fn.36](#).
- 9 The term "venting" emotions is commonly used in dispute resolution literature. Although not intended to be disrespectful to the parties, it could have that connotation. The "expression" of emotions does not just happen in family and interpersonal issues. Underlying emotions can be strong in many civil and even commercial disputes. Practitioners should also be aware of the risk that when people express their emotions, this may rekindle underlying feelings, which will need to be handled with care and sensitivity.
- 10 John Crawley, *Constructive Conflict: Managing to Make a Difference* (London: Nichols Brealey, 1992), p.31.

Fairness

Brown & Marriott's ADR Principles and Practice, 4th Ed.

Mainwork

Chapter 16 - Ethics, Values, Fairness and Power

Fairness

Fairness of process or fairness of outcome

- 16-039 An issue that sometimes arises is whether and to what extent the mediator is responsible for fairness in mediation. The principles that apply to mediation will generally also apply to other forms of consensual dispute resolution.
- 16-040 It is a fundamental principle of mediation that the parties are the negotiators and that the mediator serves as a facilitator. The parties are responsible for all their decisions including their settlement terms. In arriving at their decisions, the parties may have regard to any considerations they may consider relevant. The mediator may provide information and may in some models help with evaluation; but none of this allows a mediator to impose his or her decisions or preferences on the parties or to influence them unduly in their decision-making.
- 16-041 In these circumstances, given that parties make their own decisions however much the mediator may have a different view, it is clear that mediators cannot be responsible for the fairness of the outcome agreed between the parties. This is not always understood. Ensuring that parties enter into a fair agreement is not within the power or function of the mediator.
- 16-042 What mediators can do and need to do, however, is to establish fairness of process. This means that they should manage the mediation process in such a way that the procedure is as fair as possible to both or all parties. When people refer to mediation being a “fair” process, it is this quality of procedural fairness to which they refer and not necessarily fairness of substantive outcome.
- 16-043 Fairness of process implies certain requirements:
- Even if they are required to attempt mediation, as some mandatory schemes may require, there should be no coercion on parties to settle, but merely a requirement to try using the process. Parties should not be penalised for example by the withholding of public funding if they try to use mediation and do not find it helpful.
 - Mediators must be even-handed and impartial in their dealings with parties. This does not mean that the mediator may never say anything that one or other party may not like to hear. At times a mediator may need to challenge one party or the other. This does not imply partiality, which should be viewed in the round.
 - Mediators should create conditions in which both or all parties can be properly heard. If one party dominates the process, that would ordinarily create a sense of unfairness. In some situations, more attention may need to be given to one of the parties than to another, but that may be necessary, and should be carefully explained as appropriate.¹¹
 - Power imbalances exist in most situations, and are likely to continue in all forms of dispute resolution. Mediation cannot and does not pretend to eliminate power imbalances, but mediators may have strategies to help prevent these from distorting

the process. Mediators may address power imbalances where appropriate, but should decline to mediate where the power imbalances are so severe that the mediation process cannot be fairly or effectively conducted.¹²

- The mediator needs to ensure that as far as practicable parties negotiate and decide freely. If there is any harassment, abuse or violence, the mediator must take steps to deal with that to ensure that negotiations are not induced by fear or made under duress, otherwise the mediation will have to be ended. In a contentious situation, many people may be influenced by fears and concerns. They may be afraid of the risks and costs of litigation, or of the animosity that proceedings may cause. They may fear that their losses will be even greater if they do not concede during negotiations. These and other concerns may be inherent in the situation and would arise in any forum. The mediator's task is to try to ensure that a party is not forced into a decision by improper pressure or duress.

- Mediators should not unduly influence the parties in their decision-making. Mediators sometimes say that they do not influence the parties because they do not make statements, but primarily work through questions. However, the way in which questions are used and their choice can be very influential. Mediators should not seek to escape responsibility by suggesting that questions are neutral.

- Parties must be capable of decision-making and of understanding the issues. If any party, through illness, mental incapacity or for any other reason cannot properly participate in the process, it should not take place.

- A sense of fairness and respect should permeate the whole process. The mediator should be aware of this in his or her interventions, questions and comments; in any information provided; in the procedures used; in the arrangements made for meetings; and in the conduct of the process generally.

In whatever model may be used, the mediator needs to be able to control the process sufficiently to ensure that fairness of process prevails.

What constitutes fairness?

The parties' views guiding fairness

16-044 The fairness that applies in mediation is the parties' sense of fairness and not the mediator's. This means that if the parties regard a resolution as fair, the mediator should not be troubled by the fact that it does not accord with his or her sense of fairness. The mediator may wish to check that the terms and their implications are fully understood by the parties; but subject to doing this, the mediator's views as to their fairness would not be relevant.

16-045 This is not a difficult proposition for mediators to accept. The problem, however, is that parties in dispute often find it difficult to agree on a mutual definition of fairness in their circumstances. They may have different perceptions of fairness. How, then, does a mediator address fairness? What are the criteria or factors that apply?

Legal principles guiding fairness

16-046 The legal system is concerned with justice and fairness. Unfortunately, two problems exist in this connection. First, while these principles constitute an ideal, the system is not always able to deliver on its promise of these principles. Secondly, the principles of fairness adopted by the law are not necessarily the principles adopted by people generally. Lawyers tend to use legal principles of fairness as their starting point for testing fairness; yet many agree that this is an inadequate measure.

16-047 As mediation is conducted “in the shadow of the law”¹³ and parties can generally turn to the court system for redress if they are not satisfied with the mediated outcome, legal principles and rights tend to guide parties in deciding what they think is fair. Yet this may not meet people’s needs. So, for example, in a financial dispute on divorce, it is quite common for each party to have a different perception of the guiding principles and factors as to how the finances should be divided. Each may seek to draw on different legal principles to support their position. Or in dealing with residential arrangements for children, one may draw on the law to support equality of residential time as being fair, while the other may contend that the children need a solid base and that it is unfair to require them to move about to meet the needs of a parent wanting equality. These examples are drawn from family situations, but the need for fairness permeates all fields of activity and dispute.

Workability guiding fairness

16-048 Mediators sometimes take the view that fairness is an elusive concept, and that if the parties cannot agree on it, all that they can do is to test the workability of proposals. If proposals are viable and workable in practice, that is as close to fairness as mediators may feel that they can take matters. Mediators would test workability by asking the parties questions about implementation, in the form of “reality-testing”.

Legal representation guiding fairness

16-049 Where parties are both or all represented by lawyers in the mediation process, a mediator may perhaps consider it less necessary to be concerned about the fairness or otherwise of the terms of the settlement. There is a view that lawyers create an equality of bargaining power, and can help their client to assess all relevant factors in deciding whether or not to accept settlement terms. It is true that legal representation for all parties tends to help reduce certain kinds of power imbalances, but it cannot achieve full equality of power nor can it guarantee fairness.

Other fairness considerations

16-050 Other attempts are sometimes made to devise fair principles to guide dispute resolution negotiations. An example is the mathematical formula devised by Brams and Taylor.¹⁴ The authors have adapted the cake-cutting procedure of “I cut, you choose” with mathematical formulae to try to create what they call “envy-free” allocations.

Sometimes practitioners can do no more than allow parties to express their views of fairness, try to help them to hear and understand one another, and then, if necessary, to agree to differ.

Manifest unfairness

16-051 Many mediators take the view that however unfair the settlement of the issues might seem, that is a matter for the parties. Others would not wish to participate in a resolution that they felt to be manifestly and fundamentally unfair and unconscionable, even if both parties agreed to it.¹⁵ In the absence of any specific provision in a Code of Practice, this must ultimately be a matter for the mediator’s individual conscience.

Footnotes

- 11 See L. Wing, “*Mediation and Inequality Reconsidered: Bringing the Discussion to the Table*” (2009) 26(4) *Conflict Resolution Quarterly* 383-404 for a discussion that symmetry in terms of aspects such as equal time for caucuses for each party may impact negatively on parties. This may occur, for example, where there is dissonance between one party’s story and a dominant cultural narrative. See also S. Shipman, L. McGregor and R. Murray, “Human Rights Claims, Process Standards and Agreement-Based ADR”, [fn.2](#).
- 12 A fascinating portrayal of two different approaches by experienced mediators to a hypothetical case study relating to this question is set out in C. Menkel-Meadow and H. Abramson, “Mediating Multiculturally: Culture and the Ethical Mediator” in E. Waldman (ed), *Mediation Ethics: Cases and Commentaries* (San Francisco: Jossey Bass, 2011), pp.305-338.
- 13 See [Ch.19, para.19-006](#) and [fn.1](#) of that chapter.
- 14 Steven J. Brams and Alan D. Taylor, *Fair Division: From cake-cutting to dispute resolution* (Cambridge: Cambridge University Press, 1996). For a brief outline, see [Ch.4](#), under “Other theories and models”.
- 15 For an account of two very different approaches to this type of situation refer to [fn.12](#).

Conflicts of Interest

Brown & Marriott's ADR Principles and Practice, 4th Ed.

Mainwork

Chapter 16 - Ethics, Values, Fairness and Power

Conflicts of Interest

- 16-052 Impartiality, even-handedness and the mediator's neutrality to the outcome of the mediation are essential components of mediation. It is vital to the integrity of the process that mediators should neither have any conflict of interest, nor should they be perceived as having any interest or potential bias, even if no actual conflict of interest exists.
- 16-053 Three aspects need to concern mediators. Similar principles will apply to practitioners in other kinds of consensual processes:
- actual conflicts of interest*, where the mediator has or has previously had another role, relationship or interest that is inconsistent with his or her impartial, even-handed and neutral function as mediator;
 - potential conflicts of interest*, where a conflict does not yet exist but the possibility of it arising is inherent in the situation;
 - perceived conflicts of interest*, where there is no actual or potential conflict of interest as such, but where the situation or circumstances nevertheless may cast doubt on the mediator's ability to act impartially and may give rise to imputed bias.

Regulating conflicts of interest and perceived conflicts

- 16-054 Mediators need to have rules regulating whether or not they can mediate where a conflict of interest exists. Generally, subject to the possibility of obtaining informed consent, they should not do so; and they should carefully observe the restrictions and qualifications on mediating in situations where perceived conflict exists.
- 16-055 Mediation Codes of Conduct usually make provision for mediators to disclose any conflict of interest, which will preclude a practitioner from being appointed or continuing with an existing appointment, save for some where parties may agree to the appointment continuing notwithstanding the conflict—depending on its nature.
- 16-056 In addition, professional bodies such as the Solicitors Regulation Authority, the Bar Council and the British Association of Counselling and Psychotherapy may have their own stipulations regulating conflicts of interest in their professions. The Legal Services Commission also has conflict rules that need to be observed where appropriate.

The wider net covering conflicts and perceived conflicts

- 16-057 Rules that regulate actual and potential conflicts and perceived conflicts may also affect other people who are, or are perceived to be, in certain kinds of close relationships with the mediator, including those that involve a sharing of information. In certain situations, information known by one person is deemed to be known by others who have an actual or potential information-sharing relationship with that person. For example, all members of a law firm or other partnership are deemed to have knowledge

that one member of that firm or partnership acquires, notwithstanding that the person with actual knowledge may be at pains to keep it confidential from others within the firm or partnership. The principle that applies is that “Chinese walls” to keep information confidential cannot ordinarily be erected within a relationship where there are possibilities or duties of information-sharing.¹⁶

16-058 Similarly, there will be other working relationships, such as mediation services and certain kinds of consortia, where knowledge of facts by one person may create the presumption that all other members of that service or consortium similarly have that knowledge. The effect of this is that if one member of the firm, service or consortium is precluded from acting as a mediator because he or she has relevant information about the parties, then all other members of the firm, service or consortium will be similarly precluded.

16-059 The term “firm, service or consortium” includes the following:

- all partnerships, associations or consortia in which people hold themselves out as partners (but not generally including a consortium of practitioners who are clearly independent of one another but who merely join together in a loose association for mutual marketing or support);
- any other association or relationship which involves people working or co-operating with one another in a way that includes actual or potential sharing of profits and/or access to one another’s confidential information.

Absolute and relative bars to mediating by reason of conflicts and perceived conflicts

16-060 In some situations, mediators will be absolutely barred from mediating even if the parties wish to release the mediator from that bar. In other situations, it may be possible for the parties to decide that they do want the mediator to mediate for them notwithstanding the existence of a perceived conflict. In the latter case, however, consent to mediate can only be effectively given by parties who are fully aware of the circumstances of the perceived conflict. Consent can only be effective if it is informed consent.

16-061 Each organisation or regulatory body needs to formulate applicable rules. The following are examples of how such rules might be adopted, but are not intended to be definitive:

Absolute bar to mediating

16-062 It is suggested that a mediator ought not to mediate for parties in the following circumstances even if the parties specifically request him or her to do so and are willing to give consent:

- where the mediator or member of his or her firm, service or consortium has a personal or financial interest in the outcome of the mediation;
- where the mediator or a member of his or her firm, service or consortium has at any time provided legal, counselling or any other professional advice, support or representation for any party in relation to issues that may arise in the mediation;
- where the mediator has or at any time has had a therapist/client or counsellor/client relationship with any of the parties;

- where the mediator or a member of his or her firm, service or consortium advises or acts for or has previously advised or acted for either party on a matter unrelated to the likely issues in the mediation, as long as the other party is unaware of this;
- where the mediator or a member of his or her firm, service or consortium advises, acts for or counsels or has previously advised or acted for any third party whose interests may conflict with those of either party to the mediation (such as the trustees of a family trust of which either party is a beneficiary, discretionary or otherwise);
- where the mediator is aware that for personal or other reasons he or she will not be able to mediate in an impartial way, or notwithstanding informed consent is likely to be perceived as being unable to do so.

16-063 This last category covers situations in which the mediator is in a position where his or her duties and responsibilities to the parties are or may potentially be compromised. Or a mediator may have such strong feelings or views about a situation that he or she feels unable to be impartial and neutral. Mediators may feel able to overcome personal blocks of this nature; but there may well be times when this is not the case, and in such event the mediator will be acting properly in declining to mediate.

16-064 In such a case, even if the mediator felt that he or she would be impartial and even if the parties agreed, the mediator might well decline to act. The test for the mediator would be whether the perception is likely to continue that he or she will not be able to be impartial.

Qualified bar to mediating

16-065 It is suggested that in the following circumstances, a mediator ought not to mediate for parties unless they specifically request him or her to do so and give informed consent:

- Where the mediator or a member of his or her firm, service or consortium advises or acts for or has previously advised or acted for either party on a matter unrelated to the likely issues in the mediation and the other party is aware of this.
- Where the mediator or a member of his or her firm, service or consortium has acquired information, not in the public domain, relevant to any issue likely to arise in the mediation, then the mediator should not act unless the nature and source of such information is known to all parties and they consent to the mediator acting.
- Where the mediator or a member of his or her firm, service or consortium advises, acts for or counsels or has previously advised, acted for or counselled any third party on a matter related to the likely issues in the mediation and the parties are aware of this. (However, where the third party's interests may conflict with those of either party to the mediation, it is suggested that there should be an absolute bar on mediating.)
- Where the mediator has a social or other personal relationship with either party or with any third party materially affected by the mediation, the mediator should not act unless full disclosure is made to the parties and they consent to the mediator acting.
- Where circumstances exist and are known to the mediator in which a party aware of such circumstances might reasonably be concerned about the mediator's ability to act impartially as a mediator, but which do not constitute an actual or potential conflict of interest. In such event, if full disclosure of the circumstances is made to both parties and they give informed consent, the mediator should be able to act as such.

16-066 The distinction between the absolute bar and the qualified bar to mediate is clear. In the case of an absolute bar, the conflict of interest or perceived conflict is so fundamental that it cannot be overcome, even with the consent of the parties. In the case of a qualified bar, however, the conflict, potential conflict or perceived conflict, while serious enough to raise concerns, is capable of being accepted where all parties agree to do so, with full knowledge of all relevant facts and concerns. This

allows parties proper freedom of choice, where a mediator might be entirely suitable and is not conflicted out, but where circumstances exist that the parties can properly overlook if they choose to do so.

Conflicts or perceived conflicts arising or identified after mediation has started

- 16-067 If a mediator starts to mediate in the good faith belief that no conflict or perceived conflict exists, and either of these subsequently arises or is identified, the mediator must be guided by his or her organisation's rules as to whether he or she can continue to act.
- 16-068 Where there is an absolute bar, the mediator must withdraw from the mediation. Where there is a qualified bar, the mediator must either withdraw or inform the parties of all relevant facts and circumstances and should establish whether the parties wish him or her to continue. In some circumstances, the mediator may consider that even where a qualified bar exists, he or she should not continue to act as mediator. In such event, the mediator should withdraw from the mediation. Mediators should not lightly withdraw where there is only a qualified bar and the parties wish him or her to continue, especially if they have already spent significant time or made significant progress in the mediation.

Changing roles after the conclusion of mediation

- 16-069 Organisations and regulatory bodies need to make it clear whether mediators can change role after the end of the mediation. Some bodies provide that the mediator may not represent, advise or counsel either party in relation to any issues dealt with in the mediation. This would mean that a solicitor mediator could not act as solicitor for either party or for the parties jointly, in relation to any matter that arose in the mediation. In such event, he or she could not bring court proceedings in any consequent divorce or deal with the conveyancing of any property that was required to be transferred from one to the other.
- 16-070 There seems to be a broad consensus, though not necessarily unanimity, that a mediator should not be precluded from subsequently acting in another role (such as solicitor) for a party to the mediation in relation to any issue or matter that is unrelated to the issues in the mediation. However, he or she should not do so or even discuss or agree to do so until the settlement terms have all been implemented. This would ensure that the parties are able to revert to mediation if any problems or issues arise during the course of implementation. It would be invidious and improper for a mediator during the mediation to agree or even to discuss the possibility that he or she will after conclusion of the mediation act for one party albeit in an unrelated matter.

Footnotes

- 16 See the landmark House of Lords case of *Bolkiah v KPMG* [1999] 2 A.C. 222; [1999] 2 W.L.R. 215 HL relating to the unqualified duty that attaches to confidential information imparted during a professional relationship that has to be retained confidentially after the ending of that relationship. Lord Millett referred to the "Chinese walls" and expressed the view that "an effective Chinese wall needs to be an established part of the organisational structure of the firm, not created ad hoc" ([1999] 1 All E.R. 517 HL at 530).

Ethics of Confidentiality

Brown & Marriott's ADR Principles and Practice, 4th Ed.

Mainwork

Chapter 16 - Ethics, Values, Fairness and Power

Ethics of Confidentiality

- 16-071 The legal implications of ADR confidentiality are dealt with in Ch.15. However, certain ethical issues arise in relation to the subject of confidentiality which, although they overlap with the legal aspects, will be considered separately from them in this chapter. These arise, first, in relation to the broad issue of confidentiality within the ADR process, and secondly, in relation to the subject of maintaining confidences in private meetings with the parties.

Ethics of confidentiality in ADR generally

- 16-072 An ethical issue may arise where a practitioner is bound by an agreement to maintain confidentiality in ADR proceedings and comes across a situation in which he or she feels morally or ethically obliged to breach that duty of confidentiality. This may, for example, arise where parties in a mediation inform the mediator in confidence that a public structure or a product being marketed is unsafe or a couple tell the mediator confidentially that a child is being subjected to physical or sexual abuse.
- 16-073 Whether or not there is a legal obligation to maintain confidentiality will depend upon the conditions under which the process takes place, and on the applicable law. So, for example, in some states in the US there is an obligation on the part of the mediator to report to the authorities any serious allegations of abuse or neglect in family mediation.¹⁷ In the UK, the terms of many agreements to mediate and relevant Codes of Practice may exempt the mediator from maintaining confidentiality in relation to certain kinds of information, for example where there is significant risk of serious harm to anyone.
- 16-074 If there is no legal duty of confidentiality, or if the circumstances of the matter and a legal duty of disclosure override the obligation to maintain confidentiality, the mediator can consider the ethical position without legal constraints. The mediator's dilemma will, however, arise where there is a legal duty to maintain confidentiality with no clear exemption from that duty, and yet the facts are such that the mediator feels obliged to make a disclosure. There is no standard answer to that dilemma. The mediator must be guided by the applicable law; the terms of the agreement to mediate; the terms of any relevant Code of Practice; his or her duties to the parties; the nature, seriousness and implications of the information; any applicable public policy considerations; and ultimately the mediator's own conscience.
- 16-075 This moral issue has been addressed in an article by Gibson.¹⁸ He challenges a perception that exists among some writers that everything in mediation is necessarily strictly confidential and incapable of being examined. He believes that few mediators are "absolutists" with regard to the question of confidentiality, but rather that "there is a broad spectrum of opinion about what should be revealed" and with what justification.
- 16-076 The Code of Practice under which a mediator works may guide this question, particularly if it is incorporated explicitly or by indirect reference into the contract for mediation between the mediator and the parties. It follows that organisations establishing such codes or individuals creating their own contracts could make their own choices as to what degree of freedom from confidentiality they wish to provide.¹⁹

- 16-077 Gibson considers the moral aspect of confidentiality, including the distinctions between the law and morality, where “legal acts are sometimes immoral, and moral acts are sometimes illegal”.²⁰ Consequently:

“mediators who face difficult or novel questions about whether or not to disclose client confidences are unlikely to find plain guidelines in the law”

though an examination of the law may be helpful.²¹ Gibson analyses the various bases for mediator confidentiality and decides that these “do not support a clear-cut rule for mediators to always keep their client’s confidences.”²² He analyses the cases where there may be a duty to break confidences, for example, warning victims of intended violence, child abuse and public interest and concludes that:

“mediation confidentiality is only as strong as the justifications that can be made on its behalf...There are two (crucial) elements...one is the policy element which supports the institution of mediation and the related role obligation; the second is the mediator’s own ethical judgment.”

- 16-078 He argues for public accountability, substantial and adequate rather than absolute confidentiality, an external review mechanism and a review of codes of practice to allow mediators more scope to make their own considered judgments about disclosure.

Ethics of confidentiality in private meetings

- 16-079 Caucusing is the process of meeting the parties separately and privately in the mediation process, often combined with “shuttle mediation” in which the mediator moves between the parties, carrying messages and helping to facilitate their negotiations with one another.

- 16-080 The holding of separate meetings with the parties is by no means used in all models of mediation. Some mediators only have joint meetings with the parties and do not consider it right to maintain separate confidences. However, where separate meetings are held, there are three principal ways of dealing with the confidentiality aspect:

1)parties may agree that there will be no separate confidences, and that anything said in the separate meeting will be brought back to the joint meeting;

2)they may agree that matters discussed in the separate meetings will be maintained confidentially, save as the mediator may be authorised to disclose;

3)there may be special rules or individual circumstances applicable to separate meetings.

Each of these will be considered.

Disclosure of information from separate meeting into joint meeting

- 16-081 Where mediators work on the principle of not maintaining separate confidences, there may nevertheless be occasions when they need to meet each party separately, for example, where a party feels uneasy about discussing something in the joint meeting. Separate meetings then enable each party to speak more freely to the mediator, who will bring the separate information into the joint meeting, having perhaps discussed with each party separately how this will be done. This maintains the principle that all matters discussed will be made available to all parties.

- 16-082 Ethical problems can arise if notwithstanding the agreement for open disclosure of matters discussed separately, a party may say something in the separate meeting which he or she does not after all want disclosed to the other. This may place the mediator in a difficult position, especially where the information could be embarrassing or inflammatory. In that situation the mediator would have to reinforce the need to disclose the information according to the agreed procedure, and perhaps help to deal with any concerns relating to such disclosure. If the party is adamant that there cannot be disclosure, the mediator may feel unable to continue acting in that mediation. The mediator can avoid such a situation by emphasising at the outset the need to bring back all information to the joint session and that no separate confidences can be maintained.
- 16-083 Mediators will not necessarily report back verbatim to the joint meeting, but will commonly summarise and paraphrase. Many consider that they do not need to repeat non-material statements. This is understandable and generally unobjectionable; but it leaves the discretion as to materiality with the mediator and risks potentially material information being withheld.
- 16-084 There may also be some risk that the mediator, in carrying the information back from the separate meeting to the joint meeting, may summarise or paraphrase it inaccurately and consequently not fully comply with the agreement for disclosure. The mediator needs to ensure that communications are carefully and accurately conveyed when this model is used.

Agreement to maintain confidentiality of separate meetings

- 16-085 The practice of maintaining confidentiality—subject to obtaining permission to disclose aspects as appropriate—is a common way of working in civil and commercial disputes, as also in some models of family mediation.
- 16-086 An ethical dilemma can arise where the mediator receives confidential information in the separate meetings and is subsequently required to arbitrate formally, in med-arb mode. Can the mediator do so using confidential information not known to the other side?²³ The ethical aspect can probably best be addressed by ensuring that either the parties have an opportunity to opt out of the process if there has been any confidential information given to the mediator.
- 16-087 Another ethical dilemma could arise if the mediator receives confidential information that indicates that another party is under some material misapprehension. Clearly, the mediator would not wish to allow any misunderstanding to remain if it arose as a result of anything said by the mediator or the other party. The situation may be more complicated if the error arose without any fault or misleading element on the part of the mediator or any other party, and if the mediator is required to maintain strict confidentiality about the correct position. In that event, the mediator may need to seek permission to correct the misunderstanding (being sure not to breach any confidence the other way round). The mediator may perhaps point out where relevant that the erroneous understanding could result in an unsatisfactory and unworkable agreement being reached. If confidentiality is still insisted upon, and the misunderstanding is significant and material, the mediator would have to consider whether or not to continue with the mediation. This would depend on the circumstances, the nature of the misapprehension and its effects, whether the other party is being professionally advised, and other relevant factors.
- 16-088 Another ethical dilemma might arise if a mediator learns confidentially that a party would pay more than the other party has privately said he would accept. How does the mediator deal with the surplus? Concluding on either the higher or the lower amount would result in the mediator aligning with one party. Is the mediator justified in taking a mid-figure? Or should the mediator ignore the information and leave the parties to reach their agreement? Views have been expressed that it would be appropriate to discuss the dilemma with the parties and to see whether they would “split” the surplus. There is no right answer to this dilemma: the mediator may need to make a judgment based on each individual case.
- 16-089

Ethical dilemmas of this kind occur infrequently. The mediator can invariably deal with them by following sound principles and acting with integrity. It is important for practitioners to be alive to these issues and to be prepared to deal with them in a proper and principled manner.

Separate meetings with special rules

- 16-090 In the UK, some family mediators extend the joint meeting model by also having separate confidential meetings with each party.²⁴ However, in view of the standard rule in family practice that financial information is evidentially open and available to be used in court, whereas attempts to resolve the issues are without prejudice, this principle is also applied to the separate private meetings. Consequently, a party cannot maintain confidentiality from the other about financial information in a private meeting. The mediator would need to insist on the disclosure as the fundamental basis on which the whole process is undertaken, and indeed this is addressed in the Agreement to Mediate where this model is used.
- 16-091 Another special situation may arise in relation to the Mediation Information and Assessment Meetings in family matters.²⁵ These may be held jointly and also separately in order to check privately whether there has been violence or abuse that may make mediation inappropriate. If the mediator is told in a separate meeting that there has been violence or abuse that would make the matter unsuitable for mediation, the mediator may retain this information confidentially for the protection of the party disclosing it, and may simply decline to mediate without giving reasons. This may raise some ethical questions as well as practical difficulties if the party alleged to be abusive enquires why the mediator is unwilling to proceed. However, it seems that pragmatic issues of safety and well-being may predominate in these circumstances: the risk of any further violence or abuse needs to be minimised.
- 16-092 Separate meetings may arise spontaneously even where joint meetings without separate confidences are the norm, as for example where something distressing or provocative arises and parties need to be temporarily separated. Clearly the broad understanding of no separate confidences needs to be maintained, and the joint meeting re-established as soon as practicable.

Footnotes

- 17 See “Confidentiality and Privilege in Divorce Mediation” in J. Folberg and A. Milne, *Divorce Mediation—Theory and Practice* (New York: Guilford Press, 1988), p.323.
- 18 Kevin Gibson, “Confidentiality in Mediation: A Moral Reassessment” (1992) *Journal of Dispute Resolution* 25.
- 19 The Codes referred to in the appendix of precedents provide examples of confidentiality clauses.
- 20 Gibson, fn.18.
- 21 The legal, as distinct from the ethical and moral, issues concerning confidentiality are dealt with in Ch.15. In practice, the law on public policy disclosure and the contractual provisions increasingly inserted into agreements to mediate may well cover many situations.
- 22 Gibson, fn.18, p.4.
- 23 The practicalities of med-arb are addressed in Ch.19.
- 24 As outlined in Ch.11.
- 25 As referred to in Ch.11.

Power Imbalances

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Chapter 16 - Ethics, Values, Fairness and Power

Power Imbalances

Forms of power

- 16-093 The issue of power understandably gives rise to many concerns. It is perhaps summed up by the question:

“How does ADR, which depends upon consensual resolution, deal with the situation where one party to a dispute is more powerful than another and can accordingly use that power to influence the outcome?”

To address this question, the notion of power in dispute resolution should be considered.²⁶

- 16-094 Because power exists in different forms and is often subtly exercised, it is sometimes difficult to describe and identify. It is affected by the perceptions that parties have of their own power and the power of others, which may or may not be accurate. Power is not necessarily static, but may shift as circumstances change. Power relationships may be complex, and different elements of power may reside in different ways in the parties to provide a more complicated balance than may be obvious.
- 16-095 Analysis of any dispute will reveal this. For example, in a commercial dispute between a multi-national corporation and a small franchisee, there is apparently a clear power imbalance. The multi-national company is likely to have very substantial resources to fight a case, will engage top lawyers, and may be unaffected by the outcome whereas the small franchisee may be crippled by an adverse outcome. That could well be the true power position. Other factors might, however, balance the power between them. For example, the legal merits of the dispute might favour the franchisee, so that the franchisee might well succeed in a trial. There may be other franchisees interested in the way the multi-national company deals with its franchisees, which could make its handling of the situation politically sensitive. The multi-national company might also be sensitive to adverse publicity if it crushed a small company in what could be portrayed as a “David and Goliath” encounter. The financial collapse of the franchisee in the event of the multi-national company winning at a trial may be a less satisfactory outcome for the multi-national company than working out a solution that allows the franchisee to continue in business. The circumstances and factors comprising the total power relationship between the parties may not be as one-sided as first impressions may have suggested.
- 16-096 In this example, mediation of the dispute between the parties could well provide them each with what they need, namely a mutually acceptable, agreed resolution of their differences. The suggestion sometimes made that litigation would be more effective in redressing power disparities would not necessarily be valid in this situation. The power imbalance would be manifest in litigation, which might operate to favour the multi-national company with its ability to extend and prolong the dispute. The smaller company would perhaps be hard pressed to sustain and fund lengthy and expensive litigation, which in the final analysis it could not be assured of winning, given the uncertainties and risks inherent in the litigation system.
- 16-097 Similarly, a husband who is a businessman with a domineering manner may appear to have a power imbalance over a wife who does not work and who has a quiet manner. This may well be a true reflection of the power balance; but there may be other factors making the situation more complicated. For example, the wife’s quiet manner may conceal strength and determination which may have supported the family in stressful times, and the wife may have a more powerful position, actual or perceived, with regard to the children of the family. (“Do not use the children as pawns in your disagreement” is a very proper admonition

to couples; but this may not recognise the complex and subtle nature of power relationships and family dynamics.) Power imbalances are not always what they seem.

- 16-098 Practitioners need to be aware of the different forms of power and the way in which these are manifested. Power can be overt or covert. Maintaining silence and declining to co-operate effectively with the process can be very powerful. Practitioners cannot make premature assumptions about power because it can be more complex than may initially be appreciated.

Power imbalances: the mediator's role

- 16-099 In circumstances where there is an apparent power imbalance between the parties, the mediator's role is to effectively manage the mediation process to ensure that the power imbalance does not adversely affect the dynamic of the mediation.
- 16-100 Where parties have equal power, they may be expected to behave more co-operatively, function more effectively and behave in a less exploitative or manipulative manner than when the relationship is unequal.²⁷ In most cases, there is likely to be some power disparity between parties. This raises some questions for mediators.

Should a mediator try to redress a power imbalance?

- 16-101 Employment mediators and conciliators who facilitate issues between employers and employees commonly take the view that it is not their function to redress power imbalances. The power balances, for example between large employers and trade unions representing employees, can be delicately poised. At times one side may have greater power, at times the other. Mostly, their joint interests are served by finding solutions that do not test their power balance. In this context, employment mediators and conciliators consider that the parties have to continue working with one another and that it would be inappropriate to contemplate trying to redress the power balance between them.
- 16-102 Analogous points may arise in other kinds of mediation. If parties engage the mediator to help them resolve specific issues, does that entitle the mediator to assume the role of redressing their power balance (even if he or she could do so, which is seldom the case)? On the other hand, if power imbalances exist, can mediation, which depends on parties being able to negotiate with one another, work effectively and fairly?
- 16-103 This issue has been debated among mediators. Moore outlines the difficult position mediators face when confronted with a discrepancy in parties' power relationship and the means of influence which a mediator can impose as follows:

“The independent mediator, because of his or her commitment to neutrality and impartiality, is generally ethically barred from direct advocacy for the weaker party, yet is also ethically obligated to assist the parties in reaching a relatively fair, acceptable and durable agreement”.²⁸

- 16-104 The following thoughts may be useful in this regard:
- Mediators cannot assume that they can or should automatically try to address issues of power balancing that arise in the mediation. They should consider whether this is part of the brief required by the parties, and whether it would be proper and possible for them to do so.

- The mediator's responsibility is not to seek to change the power relationship between the parties, but rather to ensure that any power disparity that exists does not impact on the process in such a way as to make it unworkable or unfair.
- The mediator should appreciate that power imbalances are complex and that superficial appearances of imbalance may not give the whole picture. However, mediators can initially take power imbalances at their face value and need not delay in dealing with those that present themselves. If other facets of the imbalance manifest themselves, the mediator can then consider whether and how to address those.
- Where imbalances are observed, the mediator should always be vigilant in guarding against any abuse of the process. He or she will be likely to observe as the process unfolds whether the parties can use the process effectively and can suggest procedures or use strategies which help to exclude these imbalances from the communications and negotiations between the parties.
- If power imbalances are severe, affect the process and cannot be redressed, they will almost certainly prevent one of the parties from being able to negotiate with the other effectively in the mediation forum. This may for example occur where one party consistently dominates, harasses, threatens or abuses the other. In such event, the mediation is unlikely to be able to continue and the mediator would have a responsibility to end it. However, power imbalances that do not affect the process, such as financial power, would not ordinarily be a reason to end the process.

16-105

The transformative model of mediation²⁹ does not directly address the issue of power imbalances. Instead, it does so indirectly through its twin approach of empowerment and recognition. Instead of viewing disputes as problems, it sees a conflict as:

“first and foremost a potential occasion for growth in two critical and interrelated dimensions of human morality. The first dimension involves strengthening the self. This occurs through realizing and strengthening one’s inherent human capacity for dealing with difficulties of all kinds by engaging in conscious and deliberate reflection, choice and action. The second dimension involves reaching beyond the self to relate to others. This occurs through realizing and strengthening one’s inherent human capacity for experiencing and expressing concern and consideration for others, especially others whose situation is ‘different’ from one’s own.”³⁰

16-106

Transformative mediators would therefore not approach the issue of power from the perspective of seeking ways to balance power. Their approach would be to see the conflict as an opportunity for parties to discover and strengthen their resources for dealing both with the substantive issues and the relationship questions, to develop their inherent capacities for strength of self and relating to others. Power would arise in a very different way from the concept of a mediator helping to redress imbalances. Rather, it would arise through the concept of empowerment, which, in general terms, is said to be:

“achieved when disputing parties experience a strengthened awareness of their own self-worth and their own ability to deal with whatever difficulties they face, regardless of external constraints”.³¹

16-107

All people engaged in conflict (even “powerful” executives) are said to feel unsettled, fearful and vulnerable, and can be empowered as to goals, options, skills, resources and decision-making, irrespective of outcome. By empowerment and by giving recognition (by voluntarily becoming more open, attentive, sympathetic and responsive) based on this empowerment, parties will experience the:

“strengthening of self and greater actualization of their capacity for relating to others, and they will advance in both critical dimensions of moral development”.³²

16-108

Bush and Folger say:

“As we are using the term, empowerment does not mean ‘power balancing’ or redistribution of power within the mediation process itself in order to protect weaker parties. Indeed, empowerment is always practiced with

both parties. Of course, empowering *both* parties, in our sense, may indeed change the balance of power, if one party starts off with greater self-confidence and self-determinative ability. That, however, is a side effect of empowerment and not a conscious objective.”³³

What steps could a mediator take to redress power imbalances?

- 16-109** A mediator may consider it necessary to try to redress power imbalances insofar as these are adversely affecting the fairness and efficacy of the process. If the weaker party is unable to function effectively in the mediation forum, the mediator may wish to intervene to make it more possible for him or her to be more effective. The problem about this is that it could become or be perceived as partial and lacking the even-handedness that should characterise proper mediation practice.
- 16-110** Moore distinguishes between:
- “the situation in which a mediator assists in recognizing, organizing, and marshalling the existing power of a disputant and that in which a mediator becomes an advocate and assists in generating new power and influence. The latter strategy clearly shifts the mediator out of his or her impartial position, whereas the former keeps the mediator within the power boundaries established by the parties”.³⁴
- Moore acknowledges that “there is no easy answer to this strategic and ethical problem”.
- 16-111** The mediator might use any of the following strategies for addressing unequal power positions between parties that affect the process:
- trying to ensure that proper and relevant information is brought into the process to redress any imbalance in the possession of data (because having and controlling information is a form of power);
 - assisting parties in considering any such information;
 - where appropriate, providing legal or other information on an even-handed basis, while being careful not to advise the parties as to their respective rights or generally;
 - allowing both or all parties a proper opportunity to express their views and to be heard;
 - preventing abusive, threatening or harassing behaviour including sarcasm or other forms of belittling or ridicule;
 - helping a party to articulate their views and proposals, always ensuring that they remain the party’s views and proposals, and not becoming the party’s spokesperson;
 - agreeing rules with the parties to make communications and negotiations more effective;
 - helping the parties to deal with their concerns and interests in a way that is constructive and not unduly threatening to them;
 - discussing and agreeing rules that prevent a party from exercising undue power or influence that could improperly affect the outcome of the mediation, either inside the process or, as far as practicable, outside it;
 - if the parties are not legally represented, suggesting that they take independent legal advice, or suggesting that legal advisers join them in the process, where appropriate.
- 16-112** A practitioner who remains concerned about the issue of power imbalance, either initially or perhaps after having worked with the parties for a while, could discuss this issue with the parties in some appropriate manner, to establish their views about it. While eventually having to make his or her own decision, the practitioner may be guided by the parties’ views and

preferences, in particular the genuine preference of the party perceived as having less power, so far as these can be effectively established.

- 16-113 If a practitioner believes that a party is participating unwillingly in the process or is in any respect not acting in a voluntary way, or if despite all reasonable steps, the issue of power imbalance remains an obstacle to proper and effective negotiation, that would need to be dealt with, and if necessary, the process should be terminated. In this regard, a Code of Practice would help to inform the mediator's actions.
- 16-114 As mediation and other ADR processes are voluntary and consensual, a party who feels that a power imbalance or any other consideration is leading to an unacceptable or unfair result can refuse to continue with the process or to enter into an agreement.
- 16-115 If the existence of power imbalances between parties meant that they could not negotiate settlements of their disputes with one another, but would have to get those resolved by the courts, no cases would ever be settled unless parties had equal power. That, of course, is not the reality of the position. In fact, parties are constantly settling their cases, many of them finding that the litigation system does not in practice offer them power equalisation any more than any other process could do so.
- 16-116 Nevertheless, litigation does offer those who can afford it or who are publicly funded the opportunity to come to court with their more powerful opponents on relatively even terms. Where the disparities in power are so great that no agreement could realistically be negotiated, either between parties and their lawyers bilaterally or in an ADR process, litigation may well be the way to proceed. Most cases are, however, amenable to ADR processes despite the fact that power disparities may exist, as long as these do not preclude effective negotiation and agreement.

Footnotes

- 26 For a brief discussion of this concept, see Ch.4 “Negotiation” under the sub-heading “Power”.
- 27 Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, fn.3, pp.518–521.
- 28 Above, p.519.
- 29 See Ch.3.
- 30 R. A. Baruch Bush and J. P Folger, *The Promise of Mediation* (San Francisco: Jossey-Bass, 1994), p.81.
- 31 See fn.30, p.84.
- 32 See fn.30, p.95.
- 33 See fn.30, pp.95–96.
- 34 Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (1996), p.69.

Mediator Cautions

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Chapter 16 - Ethics, Values, Fairness and Power

Mediator Cautions

- 16-117 There are some situations in which mediation would be entirely inappropriate, others in which it might be appropriate, but with some caution.

When mediation is inappropriate

- 16-118 There cannot be a comprehensive list of all the situations where mediation is inappropriate. The following are some of the circumstances in which mediation should not be undertaken:

- Where because of mental or other incapacity or for any other reason a party is unable to participate in the negotiation and decision-making process. This does not refer to negotiation inexperience or reticence about participating, but an inability to cope with the process notwithstanding the mediator's intercession and assistance. However, this should not preclude properly appointed representatives such as Mental Capacity Advocates choosing to mediate in appropriate cases.
- Where a party is unable to participate properly because of fear directly or indirectly engendered by the other, for example through violence, abuse, threat or intimidation.
- Where power imbalances are so great and irremediable that the mediator does not believe that the process can be fairly conducted and an equitable result achieved.
- Where the parties require the mediator to act illegally, improperly or in a way that would infringe public policy or breach material provisions of the relevant Code of Practice.
- Where fundamental and non-negotiable rights are in issue, for example relating to constitutional rights or personal freedom.
- Where it is necessary for a party to take urgent action to protect their position, for example to obtain immediate injunctive relief (though there may be circumstances in which this can be negotiated, but the mediator cannot take responsibility for this).
- Where it is essential to obtain a binding precedent (though there may be circumstances where this can be agreed and a consent order obtained).
- Clearly some matters require a court order that affects the status of either party, such as a divorce decree, though this can of course be agreed in principle.

When mediation needs to proceed with caution or reservation

- 16-119

There are situations in which mediation may not be precluded, but the mediator needs to check whether it might be inappropriate to proceed, or where he or she needs to proceed with care and circumspection. Here again, this is a matter for individual judgment and there cannot be a comprehensive list, but the following are some of the considerations that may signal an amber light:

- Where there is any past record of abuse, intimidation or threat, but where both parties indicate that they wish to proceed with mediation nonetheless. Mediation may well be possible and appropriate, but the mediator does need to assess the position with care.³⁵
- Where it appears that any of the circumstances set out in the preceding section may perhaps exist, but this is uncertain. In this case, the mediator may wish to have a preliminary meeting to help him or her and the parties assess whether or not mediation would be suitable and appropriate.³⁶
- Where it appears that a party may have no genuine intention of negotiating in good faith with a view to reaching a resolution, but seems to have some other motive in wishing to mediate, such as seeking to establish details of the opponent's case or causing delay.³⁷
- In civil or commercial disputes, if it appears from the *Halsey* principles, as outlined in Ch.17, that mediation might not be appropriate, the mediator may wish to check this, though these are factors that parties, rather than the mediator, would ordinarily consider.
- If working with a model that involves a joint meeting of the parties for part or all of the process, the mediator would ordinarily check with all concerned that the parties feel able to meet with one another in this way. If not, whether because of strong antagonism or for any other reason, a process should be followed that does not involve a joint meeting, at least until everyone feels ready for it.

16-120 As will appear from the above, where there are uncertainties about the suitability of the mediation process, or indeed any other, a preliminary meeting with parties and/or lawyers as appropriate might often help the mediator and the parties to decide whether or not to go ahead. If the mediation continues thereafter, it is in any event a useful step in the process.

Footnotes

³⁵ Considerations about mediating in these circumstances are set out in Ch.11, in the section "Issues around mediating with domestic violence or abuse".

³⁶ For example, where there are issues of principle that appear to be irreconcilable, and may indeed be so, mediation may still be useful to help parties to manage the dispute rather than necessarily resolve it. See Mayer, *Staying with Conflict: A Strategic Approach to Ongoing Disputes* (San Francisco: Jossey-Bass, 2009)—in Ch.8, paras 8-051 to 8-053 and fn.37 in that chapter.

³⁷ But even when a party is perceived as untrustworthy and not genuinely committed to resolution there may be times when negotiation might still be productive. See Mnookin, *Bargaining with the Devil: When to Negotiate, When to Fight* in Ch.4, paras 4-034 to 4-036 and fn.27 in that chapter.

Conclusion

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Chapter 16 - Ethics, Values, Fairness and Power

Conclusion

- 16-121 The issues addressed in this chapter are important in private and public sector mediation of all kinds. They are particularly important in court-related mediation especially if there is an element of compulsion, whether through a mandatory process or one ordered or proposed by the court.
- 16-122 Practitioners should be imbued with the ethical principles outlined in this chapter; but for the public to have the confidence in them, there also needs to be some element of accountability to an organisation or body with the power to ensure that these ethical rules are observed.

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Introduction

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Chapter 17 - Lawyers' Role Representing Parties in Mediation

Introduction

- 17-001 This chapter considers how lawyers can best represent their clients in mediation, with particular reference to civil-commercial and family practice. Similar principles may apply to representing parties in other fields and non-adjudicatory ADR processes.
- 17-002 Representing a client in mediation does not change the lawyer's basic duty to act in the best interests of the client. There are, however, differences in the way in which that duty can most effectively be carried out. The lawyer must have regard to the fact that the client has chosen to try to resolve the dispute in a consensual and not an adjudicatory manner or forum, which requires a suspension of the adversarial mode of practice. Results can be achieved for the client in a way that does not necessarily involve having to defeat the other side but rather by seeking solutions that are mutually beneficial, as far as this is possible. These all involve a difference of approach on the part of the lawyer.
- 17-003 On the other hand, each party will invariably still wish to achieve the best possible result in mediation, and strong positions and tough negotiations may well take place. The lawyer's task is to balance these competing requirements and tensions in a way that produces the best outcome for the client.

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Differences Between Civil-Commercial and Family Mediation

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Chapter 17 - Lawyers' Role Representing Parties in Mediation

Differences Between Civil-Commercial and Family Mediation

- 17-004 There are differences of both process and culture between civil-commercial mediation and family mediation, which will be reflected in the way that lawyers represent their clients in each field of activity. However, processes are starting to overlap and the distinctions are not as rigid as they used to be.
- 17-005 So, for example, the role of the party's lawyer in family mediation on separation and divorce has tended to be one of advising outside the mediation meetings rather than participating directly in them, though with developing and overlapping models, this is changing. In civil and commercial mediation the lawyer's role usually involves direct participation in the mediation proceedings.
- 17-006 In this chapter, general principles and practice applicable to both fields will be stated. Differences will be indicated where applicable.

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Specialist Mediation Advocacy

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Chapter 17 - Lawyers' Role Representing Parties in Mediation

Specialist Mediation Advocacy

- 17-007 Mediation advocacy has become a specialist skill attracting a body of specialist practitioners and, in the UK, there are organisations which promote best practice in mediation representation and advocacy and provide mediation advocacy training and seminars.¹ The subject has also been addressed in a number of conferences, and has been written about.²
- 17-008 Mediation advocacy is not a soft option but relates to a sophisticated process with its own internal dynamic that advocates need to be aware of in order to achieve the goals desired by their clients.³ With mediators coming from specialist sectors and risk analysis assuming a role in the resolution of disputes, particularly in the civil and commercial fields, so the role of the skilled mediation advocate is likely to increase.

Footnotes

- 1 See the Standing Conference of Mediation Advocates (SCMA) at <http://scmastandards.com/>, an organisation which has also taken European and other international initiatives, the ADR committee of the Bar Council, the Centre for Effective Dispute Resolution (CEDR), and the ADR Group.
- 2 A. Goodman, *Effective Mediation Advocacy* (Student Edition) (St Albans: Mediation Publishing, 2017). A. Goodman, *Effective Mediation Advocacy—A Guide for Practitioners*, 3rd edn (St Albans: Mediation Publishing, 2016); S. Walker, *Mediation Advocacy; Representing Clients in Mediation* (London: Bloomsbury Professional, 2015).
- 3 See Goodman, fn.2 (2016 and 2017).

Deciding on the Mediation Forum

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Chapter 17 - Lawyers' Role Representing Parties in Mediation

Deciding on the Mediation Forum

- 17-009 Lawyers representing clients who are engaged in a dispute need to consider with their clients in what forum the dispute can most effectively and appropriately be addressed. It is no longer acceptable to assume that litigation will automatically be required.⁴

Is the dispute suitable for mediation?

- 17-010 To assess whether a dispute is suitable for mediation, the following questions may need to be considered:

Is it essential to have a court order?

- 17-011 Clearly, mediation would be inappropriate in cases where a binding precedent has to be established⁵ or where an urgent injunction regulating behaviour is needed. Some issues, relating to constitutional rights or personal freedom, are not amenable to mediation at all. However, sometimes mediation may be possible after or in conjunction with the obtaining of an interim injunction or a court order.

How do the Halsey principles apply?⁶

- 17-012 The guidelines set out by the Court of Appeal in *Halsey* can help lawyers decide on the appropriateness of mediation in civil and commercial cases. These are:

- The nature of the dispute: although the court in *Halsey* observed that “most cases are not by their very nature unsuitable for ADR”, there may be some which are unsuitable, such as those mentioned above where a court order, injunction or binding precedent is needed, or where a point of law needs to be resolved.
- The merits of the case: if one party has a patently weak case and is using mediation as a tactical ploy, mediation may not necessarily be appropriate. This is, however, an objective and not a subjective judgment: belief in one’s case must be reasonable. In any event, mediation may provide a relatively low cost alternative to trial that allows the issues to be aired and a resolution broadly appropriate to the merits to be reached.
- The extent to which other settlement methods have been attempted: if previous attempts to settle have been made and one party is unresponsive, that is a factor militating against the use of mediation.
- Whether the costs of the ADR would be disproportionately high: it is not indicated if the amount in issue is relatively small and the costs of mediation would be disproportionate.

- Whether any delay in setting up and attending the ADR would be prejudicial: this might be particularly applicable if an offer to mediate comes very close to a trial date.
- Whether ADR has a reasonable prospect of success: this is a test on the basis of objective reasonableness.

Is there a time limit within which litigation must be started?

- 17-013 If there is a statutory limitation period within which a claim must be brought, a lawyer may need to bring court proceedings to prevent the claim being statute-barred (time-barred). However, once limitation is interrupted, for example by the institution of proceedings, a choice of fora for dealing with the issues may again be available.
- 17-014 This question is addressed by the European Directive on certain aspects of mediation in civil and commercial matters⁷ which regulates the mediation of cross-border disputes, and which has been adopted by some countries for their domestic mediation as well. The UK has adopted the Directive for cross-border disputes only.⁸

Is the case being brought or defended for strategic reasons?

- 17-015 Are there objectives that cannot be met through settling, such as attracting public interest or delaying the fulfilment of obligations? These are contra-indicators to mediation, though sometimes objectives such as these can be met through a mediated outcome.

Does the dispute involve a past or present relationship that has broken down?

- 17-016 Mediation is strongly indicated where a personal, professional or working relationship has broken down or is in crisis. However, it is not limited to those kinds of issues and is also suitable for most other kinds of disputes.

Does a lack of trust preclude mediation?

- 17-017 This fundamental question is addressed by Mnookin,⁹ who considers that while there are situations where one should properly decline to negotiate—and therefore to mediate—more often than not negotiation may well be appropriate and productive despite concerns about the other party's trustworthiness.

What kind of mediation is required?

- 17-018 Some thought needs to be given as to what kind of mediation and mediator is required. Some mediators are purely facilitative and will not express any view as to the merits of the dispute, directly or indirectly. Others may introduce an evaluative element on a spectrum that ranges from minimal and indirect questioning or observation through to expressing a view to the parties as to

the likely outcome of the dispute if taken to litigation. Between these two parameters, there is a range of practice that may include “reality testing” (checking if perceptions match up to objective reality by selective questioning), or playing “devil’s advocate”.

- 17-019 There are many misperceptions as to what facilitation and evaluation comprise, so when considering appointment, rather than simply using these terms, it may be prudent to establish how the mediator would react if he or she thought that the mediation was deadlocked through one party misperceiving the strength of his position.¹⁰

Does the mediator need to be an expert?

- 17-020 The most important requirement of a mediator is to be an expert in the mediation process. If a choice has to be made between process expertise or expertise in the subject matter of the dispute, then process expertise will always prevail.
- 17-021 It may, however, be possible to engage a mediator who has expertise in the subject-matter of the dispute, as well as process expertise. Although a competent general mediator of civil-commercial disputes could effectively mediate on a range of issues (as a competent general litigator could do in litigation), some parties may feel more comfortable with a competent mediator with a specialist knowledge and experience in the field of activity of their dispute.

Commercial and civil disputes

- 17-022 So, for example, people involved in construction disputes are more likely to choose a mediator with specialist knowledge of the construction industry. Similarly, there are specialist mediators in most civil and commercial fields of activity.
- 17-023 There are a number of reasons for this, relating to understanding the industry in which the dispute arises, personal authority in the field, more effective “reality testing” and risk analysis, and perhaps a greater ability to challenge stuck and mistaken perceptions. On the other hand, someone unconnected with their industry may bring a fresh and creative view; and in many cases, the issues do not necessarily turn on the specialist topic.
- 17-024 Where the substance or complexity of the dispute warrants it, co-mediators might be considered. For example, a medico-legal issue might benefit from having a team comprising a doctor and a lawyer. Or an accountant and a lawyer might be appropriate as a joint appointment for a complex corporate dispute involving share valuations.

Family issues

- 17-025 There are two different views about the relevance of the mediator’s background expertise in relation to the mediation of family issues, particularly those arising on separation and divorce.
- 17-026 One view is that mediators who have an aptitude for mediation and who are properly trained, will be able to acquire sufficient generic skills to enable them to work effectively with couples. On this view, the mediator’s background expertise (if any) is irrelevant. While therefore mediators may be drawn from legal, social work, counselling or other professions concerned with families, they may also be drawn from any other background irrespective of its relevance to family issues.

- 17-027 The other view is that the mediator's professional background has some relevance. On this view, family lawyers and counsellors, psychotherapists and others with experience and expertise in working with families who are trained to mediate bring their experience, knowledge and awareness to bear in the mediation process.
- 17-028 Here again, co-mediation is a viable option, which may involve combining mediators of different background professions and/or a male and female mediator to provide a gender balance. This may be a preferred option where, for example, there are complex financial, children and emotional issues.
- 17-029 Even where the mediator has relevant background professional expertise, he or she would not seek to influence the couple as an "expert". This would be inappropriate on any view. Rather, the mediator could draw on his or her professional background experience to provide even-handed legal or other information to the couple, to help develop options, and to help couples check whether their ideas and proposals are effective, workable and (where appropriate) within the parameters that a court would approve.

Footnotes

- 4 See generally; *F.E.A. Sander and S.B. Goldberg*, "Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure" (1994) 10 Neg. J. 49, 66; or (2005–2006) 7 *Cardozo J. Conflict Resol.* 83.
- 5 There is a view that ADR deprives the civil system of precedents by settling disputes. Individual litigants do not need to sacrifice their best interests for the public good; but sometimes issues of principle need to be established to guide future disputes of a similar nature. See arguments against settlement in *O. Fiss*, "Against Settlement" (1984) *Yale Law Journal* 93; *N. Andrews*, "A New Civil Procedural Code for England" (2000) *C.J.Q.* 19–38 and; *J. Wade*, "Don't Waste My Time on Negotiation and Mediation: This Dispute Needs a Judge", (2001) 18(3) *Conflict Resolution Quarterly* 259–280.
- 6 In the case of *Halsey v Milton Keynes General NHS Trust [2004] EWCA (Civ) 576; [2004] 1 W.L.R. 3002*, the Court of Appeal set out guidelines for deciding whether costs sanctions should apply in the event of a refusal to mediate. See Ch.10.
- 7 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. Article 8.1 provides that Member States are to ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process.
- 8 The Cross-Border Mediation (EU Directive) Regulations 2011 (SI 2011/1133). Part 3 amends primary legislation in relation to various limitation and prescription periods (which should be individually checked where this may be relevant), so that neither party is prevented from initiating proceedings simply because a limitation or prescription period expired during the course of mediation.
- 9 See Mnookin, Bargaining with the Devil: When to Negotiate, When to Fight (Simon & Schuster, 2010). See Ch.4, paras 4-034 to 4-036 providing guidance on these issues.
- 10 For a more detailed consideration of the concept of evaluation, see Ch.19.

Engaging the Other Party in Mediation

Brown & Marriott's ADR Principles and Practice, 4th Ed.

Mainwork

Chapter 17 - Lawyers' Role Representing Parties in Mediation

Engaging the Other Party in Mediation

- 17-030 In those jurisdictions, such as England and Wales, where mediation and other ADR forms are reasonably well established, the task of engaging the other party in mediation involves little more than approaching them with this suggestion. Indeed, as outlined in Ch.9, there is commonly an expectation that mediation will be considered in all civil and commercial disputes, with potential court sanctions for failing to do so. Similarly in the family field there is provision for a preliminary meeting—a Mediation Information and Assessment Meeting or MIAM—in relation to all disputes in the courts.
- 17-031 In those jurisdictions where mediation is less well established, there may be a concern that mediation would not be properly understood or that suggesting it might be viewed as a form of weakness or lack of confidence in one's case. Inasmuch as mediation does imply some willingness to find a mutually acceptable solution, there would be little point in suggesting it if there were no willingness at all to compromise. However, even if one is confident of success at trial, the process can allow the other party a graceful and low-cost opportunity to withdraw from the litigation. In suggesting mediation, parties can indicate that they are sufficiently confident in their prospects of success to agree to a mediation. A proposal to mediate can be accompanied by expressions of confidence in one's case, in the same way that this may be done when entering into bilateral negotiations.

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Understanding the Mediation Process

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Chapter 17 - Lawyers' Role Representing Parties in Mediation

Understanding the Mediation Process

- 17-032 Lawyers representing parties need to understand the principles and procedures of mediation. This will enable them to use it to best effect, knowing when and how to adapt negotiations to the needs of each situation, to enter the problem-solving mode without necessarily having to concede individual advantage and to gain the maximum benefit from using the dynamic of mediator intervention.
- 17-033 To assist in considering the process, this book views the process in three phases. It considers an initial pre-mediation phase, before the substantive mediation starts. Then there is a second phase involving the substantive mediation process. Finally, there may sometimes be a post-mediation phase.¹¹

Footnotes

- ¹¹ Chapter 9 covers the stages of mediation, and the individual chapters dealing with specific fields of activity do so in greater detail relevant to each field.

The Pre-Mediation Phase

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The Pre-Mediation Phase

- 17-034 This phase includes considering mediation and assessing suitability, engaging the other party and selecting the mediation forum (addressed above), selecting a mediator and entering into an Agreement to Mediate.

Preliminary meetings

- 17-035 In some cases, the mediator may hold a preliminary meeting other than a MIAM with the parties and/or their lawyers. This may take place in civil-commercial cases if the mediator thinks it would be useful, or in family cases though this is not widely done in privately-funded matters in England.¹²

- 17-036 The preliminary meeting may serve a number of functions:

- It allows the lawyers an opportunity to form a view about appointing the mediator.
- The mediator can explain the process and deal with any procedural queries or concerns.
- If a decision is taken during the meeting to appoint the mediator and go ahead with the process, the meeting can be converted into a preliminary meeting within the mediation. The mediator and the lawyers can discuss and agree procedural aspects such as preparing and submitting the parties' statements and documents, the mediation timetable and other procedural matters. In family mediation, they may be able to agree on the way in which financial disclosure particularisation (if required) and other matters can be dealt with.

Selecting a mediator

- 17-037 In the civil and commercial field, ADR organisations commonly have case managers who will provide preliminary information about the process including timing, procedures and costs, as well as panels of mediators, who might be generalists or specialists. The case manager may help parties select a short-list of suitable potential mediators. The organisation will also arrange the venue and facilities, provide the framework for the mediation including its rules and Agreement to Mediate, and will deal with all necessary formalities and practicalities.

- 17-038 Alternatively, parties may choose a mediator independently of any specific organisation, who will similarly deal with the necessary practicalities.

- 17-039

Family mediation organisations vary in their practice. There are groups or services who can help set up the process, whereas some will provide a list of mediators regulated by them, leaving it to the parties to contact the individual mediator direct.¹³

The agreement to mediate

- 17-040 Parties should enter into an Agreement to Mediate before the process begins. Lawyers for the parties should ensure that they have an opportunity to consider the agreement and to discuss it with their clients before the mediation meeting. If they have any queries, these should be discussed and clarified with the mediation organisation or the mediator who sent the document to the parties. The parties will be expected to sign the agreement by or at the commencement of the mediation meeting. The agreement will usually deal with matters such as evidential privilege, confidentiality, mediation costs and other practicalities.¹⁴

Footnotes

- 12 In some jurisdictions preliminary meetings involving lawyers in family cases are more common. B. Landau, M.D. Bartoletti and R. Mesbur, *Family Mediation Handbook* (Toronto: Butterworths, 1987).
- 13 In the UK, the Family Mediation Council approves mediator bodies with individual mediator members. See its website <http://www.familymediationcouncil.org.uk/> [accessed 21 May 2018] for member organisations with their own mediator panels.
- 14 Specimen Agreements to Mediate can be found online. See [Appendix I paras A1-009 to A1-011](#) for a brief outline and paras [A1-043](#) and [A1-044](#) for reference to sample agreements.

The Substantive Mediation Phase

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Chapter 17 - Lawyers' Role Representing Parties in Mediation

The Substantive Mediation Phase

Preliminary meetings and communications

- 17-041 A preliminary meeting once the mediation has started deals with the practicalities for the substantive mediation meeting(s). The mediator would meet with the parties, or in civil-commercial mediation more usually their lawyers, and arrange matters such as venue, documents, timetable, procedures, authority, representation and anything else that might help the substantive process to take place more efficiently and smoothly.
- 17-042 However, the more usual practice is for these matters to be dealt with by telephone or email given especially the cost and logistics of arranging a meeting. With the improvement of electronic and other communications including virtual meetings, it should become increasingly practicable for these useful meetings to take place.

Dealing with the documentation

Civil-commercial disputes

- 17-043 The lawyer in consultation with his or her client will usually prepare a without prejudice case summary for the mediator and the other party, setting out, in simple and non-legal terms, the relevant facts, issues and submissions.
- 17-044 The case summary may include an outline of the legal propositions and facts supporting parties' respective contentions, in an informative rather than combative way. It is usual for one copy to be sent to the mediator and one copy simultaneously to the other party.
- 17-045 A bundle of relevant documents is usually also provided. Where possible, a common bundle of documents may be agreed. This bundle does not have to follow the selection or disclosure process that would be used in traditional litigation. Selection is based rather on including relevant documents that may clarify the position for the purpose of the mediation. If parties cannot agree on a common bundle, each party may prepare their own separate bundle for the other party and the mediator.
- 17-046 Where a case is pending in the court or in an arbitral or other adjudicatory forum, the mediator may wish to have a set of documents from the other forum, or at least those that outline the respective cases such as statements of case.
- 17-047

All necessary documentation is ordinarily exchanged before the mediation starts, and should be available at the mediation meeting. Occasionally a party may show a mediator a document on a confidential basis. (Some mediators and organisations also provide for a supplementary case summary to be delivered to the mediator on a confidential basis, “for the mediator’s eyes only”, which may outline confidential information that the party does not wish to share with the other side. More usually, though, this is covered in the separate confidential meeting that the mediator will have with each party.)

Family issues

- 17-048 Family mediators may obtain preliminary information from the couple before starting the mediation, commonly through a standard referral form, which provides basic information about the parties and any children, a brief outline of their financial position and their legal representation. It can also serve as an initial step in the process of screening for domestic abuse. This preliminary information may be disclosed to the other party, though addresses and telephone numbers may be confidentially maintained.¹⁵
- 17-049 Unlike civil-commercial mediation, a bundle of documents would not be prepared at this stage. Where financial issues are to be dealt with in the mediation, a detailed financial disclosure is required. This is usually discussed and arranged during the mediation, rather than beforehand.

Preparation

Civil-commercial cases

- 17-050 The lawyer will be expected to prepare and present his or her client’s case effectively, signalling a need to prepare carefully and thoroughly for the mediation, with an ability to demonstrate on facts, law and any technical aspects reasonably good prospects of success at a trial.
- 17-051 Wulff, an American litigation lawyer, mediator and mediation advocate considers that “skimping on preparation for a mediation is myopic”.¹⁶ He questions “what better quality time” could be spent than in preparing for what will probably be “the most important event of the case”. Another US mediator, Jansenson, points out that:

“mediations are less formal than arbitrations or hearings, but they require no less preparation. Not only should the client be thoroughly prepared for the mediation, but every statute, case deposition transcript and document supporting the party’s position should be brought to the mediation”.¹⁷

Hanger, an Australian barrister and mediator, points out that:

“Although not necessarily as extensive, preparation for a mediation is just as important as preparation for a trial. If the mediation is unsuccessful, experience indicates that most of the preparation is not wasted and is useful by way of trial preparation.”¹⁸

- 17-052 This preparation is not inconsistent with adopting a problem-solving approach to the issues. There is an “essential tension” between a problem-solving approach that seeks joint gains and a competitive approach that seeks the best outcome for each individual party.

Family cases

- 17-053 Where the mediator meets the couple without their lawyers, there would not ordinarily need to be any preparation by the lawyer. It is, however, good practice for a party to have preliminary legal advice before attending the initial mediation meeting. Even where mediators offer legal information on an even-handed basis, this is not a substitute for each party being advised individually and specifically as to their legal position and rights.
- 17-054 Where the lawyer participates in the process at any stage, it will clearly be beneficial to support the process and the parties' aims. The lawyer should be prepared to explain any legal contentions in a clear and understandable way.

The substantive meeting

- 17-055 During this phase, the mediator will welcome the parties and the substantive mediation process will commence. In most models, the mediation will start with a joint meeting. In family mediation, joint meetings commonly continue throughout the process, though in some models separate meetings may well take place. In civil and commercial mediation, it is usual for the parties to break into separate meetings and for the mediator to undertake shuttle mediation between them and other permutations of meetings, after the conclusion of the preliminary joint meeting.
- 17-056 In civil and commercial mediation, the parties will ordinarily be asked to make an oral presentation of their respective cases, but that is not usually done in family mediation.

Presentation of the case in civil commercial mediation

- 17-057 Ordinarily, the task of presentation will fall to the lawyer where there is one, although it can be powerful for a party to do so, or to add a personal statement following a lawyer's presentation.
- 17-058 Whereas in adjudicatory processes, the primary object of the presentation is to persuade the adjudicator to make a determination in one's favour, that focus shifts in non-adjudicatory forms of dispute resolution because the decision-making power does not lie with the neutral, but with the other party or parties. The parties may feel that the mediator has a moral authority and perhaps some evaluative role. However, it is ultimately the other party who has to be persuaded by the presentation.
- 17-059 This shift in approach means that the presenter, while addressing the mediator, must present the argument in such a way that it is persuasive but not aggressively combative or provocative. The aim is not only to persuade the mediator of the rightness of the case, but also to explain one's views to the other party so as to create a climate for negotiations in which the other party will consider making reasonable concessions.
- 17-060 The following practical observations may be helpful in formulating a presentation strategy:

- An aggressive approach could be counter-productive in mediation, where the parties are going to have to arrive at their own resolution. This does not mean that the strength of a party's views and feelings should not be made clear. Rather, that there must be an awareness of the effect that the presentation can have on the other parties. The object of the exercise is persuasion rather than belligerence, and exacerbating antagonism by the content, manner or style of presentation is unlikely to have a beneficial effect on the process that will follow.
- A presentation is more likely to influence the other party if based on a version of the case which that party can recognise, confronting the issues in an understandable context, rather than one perceived to be misrepresented. Differences may arise because of good faith disagreements, recollections or perceptions; different technical opinions; values or ideas of fairness which do not accord with one another; miscommunications and misunderstandings. Presentations can be made in a context that allows and helps the parties to appreciate the possible validity of conflicting viewpoints.
- Consideration may be given to ways of supporting or enhancing the presentation, where appropriate, for example, by reference to documents. Although in most mediations presentations will just be by way of summary of the case, technical devices may be used, such as flip charts, audio-visual devices or slides.
- Time-limits agreed between the parties or stipulated by the neutral should be observed as closely as possible, and time used efficiently and effectively.
- It is unusual to have responses following the initial presentation. Lawyers should not expect the right of response unless there is some special reason to do so. Usually there will be an opportunity to deal in the separate meetings with any matters raised.

Presentations in family mediation

- 17-061 There is not usually a presentation in family mediation. It is often said to be "future focused" so that the history of issues and grievances is not primarily addressed. However, it is sometimes necessary to look at past issues, because they may contain the reasons for present positions and attitudes. Indeed, there is a view that it is essential to allow the past its space in working out the future. Relevant past issues are likely to emerge during the course of the mediation.
- 17-062 In some situations and models, the parties' lawyers may attend a mediation meeting after the parties have had some sessions. In such event, the lawyers may sometimes be asked to give a brief outline of the position, as they see it. This would require the lawyer to balance two competing priorities. The one is to present the client's case clearly. The other is to avoid being unnecessarily contentious, which may not help the negotiating process.

Providing information

- 17-063 In civil and commercial mediation, relevant information is provided at the outset, through the written statement and the bundle of documents. The mediator may obtain supplementary information as the process develops. In family mediation, information is provided at different stages. Some is obtained in the preliminary telephone conversations, some through the preliminary information form, some through more detailed financial forms, and some through documents provided, questions asked and developments that take place during the substantive mediation.

Negotiating and communicating during the mediation

- 17-064 One of the strengths of mediation is that it lends itself to problem-solving approaches rather than the purely competitive approaches which so often typify adversarial proceedings.¹⁹ The intercession of an impartial third party makes this more possible.²⁰
- 17-065 However, even in mediation, there may not always be scope for a problem-solving approach, and in any event, for many negotiators the tendency will be to negotiate in the most familiar way: the competitive approach. Problem-solving and competitive approaches are likely to co-exist within any ADR process, requiring a lawyer to be able to shift between them as necessary.
- 17-066 The following may be helpful in conducting negotiations and communications in mediation:
- Even if using a competitive negotiating method, lawyers should be aware of the problem-solving approach and should be willing to consider constructively with their clients any approaches that enable all parties to gain an advantage from a suggested outcome.
 - Proposed settlement proposals should be examined from the vantage point of all parties. What is the incentive to the other party to accept the proposals? Can anything be added or varied to make the offer more acceptable without eroding any material aspect? Is there any outcome that could bring gains to all parties? Are there any beneficial side-effects to resolving the dispute which could be incorporated into the proposals, such as the continuation or extension of an existing business relationship? A constructive and creative approach does not need to be at the expense of the client's best interests.
 - "Bottom lines" or "final offers" are usually unhelpful unless these are genuinely meant. The problem about taking positions is that it is often very difficult to move from them, and parties will not wish to lose face or to feel discredited by having to extricate themselves from a position that was previously reflected as immovable. Positional bargaining does not necessarily produce the best results, and parties may prefer in many cases to engage in principled negotiation aiming for a fair outcome using objective criteria.²¹
 - Confidential separate meetings provide a good opportunity to test settlement ideas and options in discussion with the mediator, without being committed to developing them. The mediator may be able to indicate whether a particular line of thought is helpful or not, or whether intended proposals might more effectively be structured in an alternative way. Negotiators should use this resource to maximum effect.
 - Courtesy, respect for opposing views even while disagreeing firmly with them, a willingness where appropriate to acknowledge the correctness of an opposing position and perhaps to shift one's own position, and the establishment of common ground can be of positive assistance in creating the climate for progress in mediation.
 - An important element in successful negotiation is for the lawyer to have an understanding of and respect for his or her client's position, concerns and interests and for the client to trust the lawyer sufficiently to appreciate that the lawyer may sometimes need to give advice which the client will find unwelcome. That relationship can be as important for lawyers as their negotiating skills. The lawyer will need to prepare for the mediation by analysing the case, understanding its strengths and weaknesses and expressing a frank and honest opinion to the client. Supporting the client does not involve taking an inappropriately optimistic view of the position, but rather identifying with the client's aims and concerns and trying to achieve the best result realistically consistent with these.
- 17-067 The mediator's availability can assist the lawyer in the task of helping the client to assess the position realistically. Where the client has reservations about the lawyer's advice, or perhaps where the lawyer is tentative about views that the client may not

be happy to hear, the lawyer may raise such issues with the mediator in caucus in order to get the mediator's reactions to these. This may allow both the lawyer and the client an opportunity to consider and discuss the issue, with the benefit of the mediator's comments where the mediator is willing to give these.

- 17-068 While bearing these matters in mind, negotiators will be guided by their own experience, instincts and instructions to conduct effective negotiations. They will probe, make judgements about the way in which their clients' proposals are made and the timing of them, draw conclusions from what is said to them and will react as they then consider proper. They will, in short, draw on all the skills which they have, but will be aware that there are additional benefits that can be achieved by working flexibly and creatively.

Strategies

- 17-069 Negotiators in the traditional process are likely to have a negotiating strategy of some kind, even if informal. They will know what their clients' aspirations are, what the other side's expectations are likely to be, how they envisage movement might proceed, at what point they will call off discussions and generally at what pace and in what direction they wish to move. The situation is similar in mediation negotiations, though the mediator's role and function may change the dynamic of negotiations.

- 17-070 The following points arise for consideration:

- Is it possible that either side is strategically using the mediation to achieve some gain that would not have been available in the traditional process? If, for example, the mediation may be used to delay litigation, terms may have to be agreed, such as fixing a time-limit or arranging that court proceedings will run parallel to the mediation. Or if the concern is that a party may only be using mediation to establish how the case will be argued at the trial and not to engage in good faith negotiations, then this may affect the way in which the case is presented; and mediation may be discontinued if there are no signs of bona fide movement.
- The mediator may invite the parties to indicate confidentially their proposals and parameters for negotiation. Should the party tell the mediator his outer limits right away, even if restricting the mediator's authority to use that data? Or should the party rather hold back, aiming for the best outcome and only easing into improved offers when pressed by the mediator? There are no absolute answers to these questions. In practice, it is unlikely that parties will make their best offers initially. A natural inclination must exist to test the process and the possibilities. If, however, in the judgment of the party and the lawyer, that party's best interest will be served by confidentially telling the mediator the best offer right at the outset, even if controlling the pace at which that is released to the other side, that would be a matter of individual judgment. Negotiations can develop their own dynamic, with new ideas emerging as time passes; so it would be understandable if parties moved slowly forward, waiting to see how far they needed to go, where time and other factors permitted.
- Each party and lawyer may need to consider to what extent the client should play a leading role in the mediation and to what extent it is to be lawyer led. This decision will depend at least in part on the client's skill as a negotiator, the nature of the issues, and the relationship between lawyer and client. On any version, close teamwork and collaboration are needed.
- The decision whether to settle on terms arrived at in mediation is the same as it would be in bilateral negotiations and will, as in all such situations, involve assessing the client's best and worst alternatives to a negotiated outcome and analysing the client's realistic prospects of success in litigation and the costs and outcome risks.

The lawyer's role during substantive family mediation

- 17-071 Family mediation very largely takes place with the couple themselves, without direct lawyer participation. That can feel uncomfortable for some lawyers. They may feel anxious on their client's behalf, especially if the client is perceived as vulnerable and the other party as strong or manipulative.
- 17-072 The following principles are relevant to the representation of clients in family mediation:
- Family mediation involves an element of personal empowerment of the parties by working directly with them. Lawyers should respect this and allow their clients to formulate their own thoughts how to resolve their issues, as far as they may wish and be able to do so.
 - On the other hand, clients may not have chosen mediation to empower themselves, but rather to achieve the resolution of their issues in a fair, effective and expeditious way. They may wish to be supported by their lawyers through the process.
 - Lawyers should therefore be available to advise and support their clients as required through the mediation process. Some clients may wish to discuss matters between every meeting, and get guidance as it progresses. Others may prefer to consult their solicitors only as specific issues arise.
 - There are some points at which the lawyer should be consulted. The first might be for general advice before embarking on mediation. The next important stage is usually the formulation of the financial disclosure form, especially if their financial circumstances are at all complex.²² Other stages may arise as specific issues are addressed, and certainly when settlement terms are being formulated.
 - If lawyers believe that the process is prejudicing their client in any way, then they should be explicit in advising their client accordingly. Some way may need to be found to rectify the problem so that the process can be more effective and fair. In the final analysis, they may need to suggest to the client that the process is inappropriate and should be ended.
- 17-073 Lawyers may be uncertain whether it is proper for them to communicate with the mediator while a family mediation is pending. This is not surprising, since some family mediators do not encourage communications from lawyers. If there is any aspect that a lawyer feels should be mentioned, it may be preferable for the client personally to do so. If, however, the issue feels too sensitive or the client feels unable to raise it, then it may well be necessary for the lawyer to communicate with the mediator direct. It must though be borne in mind that this will be on a non-confidential basis, and that any such communications will be shared with the other party. An exception would be if this was done pursuant to an agreement that the mediator could have separate and confidential communications with each party.
- 17-074 It should be noted that the concept of separate confidences between the mediator and the parties is gradually increasing in use and availability, with two of the FMC's six organisational members supporting it and a third member having specifically authorised it in the past.²³ In this context, more direct lawyer involvement is envisaged in the process generally, including for example in assisting with preparation of financial disclosure and in attending some sessions, particularly where separate confidential meetings take place, though this is certainly not essential.

Drafting and formalising

17-075

If total or partial resolution is achieved, some record of the terms will have to be prepared. In civil and commercial mediation, it is generally regarded as a primary aspiration for a binding settlement agreement to be signed before the parties leave the meeting. In family mediation, it is usual for the mediator to prepare a without prejudice memorandum of the terms after the meeting, and to send it on to the parties for consideration. They would not ordinarily be bound until having had the opportunity of taking independent legal advice on the proposed terms.

- 17-076 The drafting of the settlement agreement in civil and commercial mediation will usually be the responsibility of the parties or their lawyers. The mediator may have a supporting role, perhaps providing notes and comments, and checking drafts as they are prepared.
- 17-077 The settlement agreement must be drafted with care and precision, even if informal: the parties will not want any later arguments or misunderstandings about the settlement terms.
- 17-078 The following checklist may be helpful to a lawyer drafting civil-commercial settlement terms:
- Are the terms to be binding immediately? If not, when and under what circumstances do they become binding?
 - Are the terms unconditional? If not, what specific and unambiguous conditions are to apply?
 - Are all dates, periods, amounts, methods of calculation and other directions and formulae clear, specific and unambiguous?
 - Does the agreement need to specify the consequences of non-compliance?
 - What format is appropriate for the settlement agreement? A formal document, heads of agreement, a letter of agreement, a deed or some other?
 - Do the parties envisage that a further and more comprehensive document will be entered into later? In such event, what is the status of the document meanwhile being entered into? What will the effect be if no such further document is executed?
 - Is an order of the court required? If so, are its terms to be drafted and agreed immediately or will this be done later, and with what consequences if there is a later problem in relation to the drafting and finalising? Who will deal with the formalities of getting the order made?
 - If court proceedings are pending, is the agreement clear as to what is to happen with such proceedings? Are they to be discontinued? Is there any agreement as to costs?
 - Are there any special requirements as to confidentiality of the settlement terms?
 - Are there any aspects that involve a neutral third-party role after execution of the agreement, such as acting as a stakeholder? Are documents to be held in escrow or items to be retained pending completion? Is there to be any supervision by the mediator?
 - Does the agreement need to specify which country's laws are to apply to the construction of the settlement agreement? Do the parties wish to submit to the jurisdiction of any court or provide for arbitration or any other form of adjudication if any further disagreement arises? Or for further mediation?
 - Will the parties be executing the agreement in personal or representative capacities? In the latter event, do the signatories have the necessary authority?
- 17-079 The role of the lawyer in finalising and formalising any settlement arrived at in mediation is similar to the role where the parties have arrived at an agreement following without prejudice bilateral negotiations. However, the mediator can add a significant resource in helping with the drafting and in overcoming any obstacles to finalisation.

Vetting family mediation proposals

- 17-080 Parties will ordinarily be given the opportunity before finalising any agreement to take independent advice from their solicitors about the proposed terms. For this reason, agreements as such are not reached in family mediation (in England and Wales in any event), but rather mutually acceptable proposals are formulated, which are subject to independent advice.
- 17-081 To enable parties to obtain such advice, the mediator will usually prepare two summaries: an open statement of financial particulars (where appropriate) with relevant supporting documents, and a privileged summary of settlement proposals, commonly known as a Memorandum of Understanding.
- 17-082 Where a lawyer has had little or no role during the mediation process, it may be challenging and difficult to endorse the settlement terms without the benefit of working through the process and understanding the reasons for the terms having been arrived at, albeit that the mediation summary may help to explain these reasons. The lawyer has responsibility and might be liable in negligence if allowing the client to enter into disadvantageous terms; yet the lawyer could be regarded as obstructive advising against agreeing such terms.
- 17-083 The lawyer's duty is to advise fairly and effectively on the proposed terms and to draw attention to any deficiencies. The client will often be able to explain why certain terms were accepted, and the lawyer will no doubt wish to respect decisions that are well considered. There are, after all, many reasons for agreeing terms that may be perceived as less than ideal, and many parties have found themselves doing so "at the doors of the court". A client may choose to accept terms in the face of advice that better terms might be achieved in court. Lawyers may wish to protect against negligence claims by recording their advice in writing, as they would do in similar circumstances in traditional negotiations.
- 17-084 Mediators may invite parties to return to mediation for further discussion if either lawyer considers the proposals inappropriate. Some will also invite the lawyers to attend, if that is thought to be helpful. Having lawyers vet proposed terms is the safeguard built into the family mediation process, and lawyers should not shy away from challenging terms where they consider them to be inappropriate. Equally, they should where appropriate support clients who have gone through an arduous process and who have arrived at terms that they wish to accept.

Footnotes

- 15 The mediator does not ordinarily maintain separate confidences as between the couple, save that special confidentiality rules may in some cases, and in some models, be agreed if the mediator has separate private meetings and/or communications with each party.
- 16 See R.W. Wulff, "A Mediation Primer" in J.H. Wilkinson, Donovan Leisure Newton and Irvine ADR Practice Book (New York: Wiley Law Publications, 1990), p.124.
- 17 D.R. Jansenson, "Representing Your Clients Successfully in Mediation: Guidelines for Litigators" (1995) 1(2) The NYLitigator.
- 18 I. Hanger QC, "The Role of Lawyers in Mediation": address to the 1st Asian Mediation Association Conference, Singapore, June 2009.
- 19 See Ch.4 "Negotiation".
- 20 E. de Bono, Conflicts: A Better Way to Resolve Them (Harmondsworth: Penguin, 1986) considers that certain functions, relating to "the design of an outcome" must be carried out by a third party. This is because he considers that the parties

themselves, for practical reasons and flowing from the logic of their maintenance of opposing positions, generally cannot do so themselves.

- 21 See R. Fisher, and W. Ury, Getting to Yes: Negotiating Agreement Without Giving In (Boston: Houghton Mifflin, 1981) and the discussion about this work and the various theories of negotiations in Ch.4.
- 22 In England, a complex form, Form E Financial Statement, is used. Lawyers should probably assist their clients in completing this form especially where finances are complex or substantial.
- 23 The ADR Group and Resolution have both provided training in this model, and the Law Society's Code of Practice for Family Mediation, 2nd edn (1999) provided specifically at para.5.7.2 for mediators to have an option to "maintain separate confidences: provided that if separate confidences are to be maintained, they must not include any material fact which would be open if discussed in a joint meeting." This was dropped when the Law Society adopted the FMC Code, but the principle was not reversed and as this 4th edition goes to press, the Family Mediators Association will be discussing and reviewing standards and models at its forthcoming conference.

The Post-Mediation Phase

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Chapter 17 - Lawyers' Role Representing Parties in Mediation

The Post-Mediation Phase

- 17-085 Even if the matter is resolved in the mediation, there is scope for the mediator to have a continuing role in two respects. The first relates to the mediator's role in implementing any settlement terms, the other relates to a possible role thereafter in appropriate circumstances.
- 17-086 The settlement agreement can, if required, provide for the mediator to facilitate any aspect of implementation should any problems arise during that phase. In addition, there may be other ways in which the mediator, or any mediation organisation concerned, may have a role. For example, the mediator or organisation may act as a stakeholder in relation to funds to be released on agreed terms, or may hold documents in escrow pending the implementation of the settlement. An example of the latter role was a term of the settlement agreement that confidential documents held by a party were lodged with the mediation organisation, on terms that they were to be destroyed only when the terms of settlement had been fully implemented.
- 17-087 It is possible for the mediator to be given a future role under the terms of settlement. For example, the terms of an agreement on divorce might include future financial reviews or review of arrangements for children, which could provide for these matters to be dealt with by negotiated agreement, failing which, by mediation. Commercial arrangements may similarly envisage a future review with a backstop appointment of the mediator to help facilitate any problems that may arise if bilateral negotiations are not successful.
- 17-088 If the mediator has worked successfully with the parties and has established trust and a good understanding and working relationship with them, and if the settlement terms provide for any possibility of their needing any further facilitation of issues in the future, it does seem sensible to build an option for this into the agreement where appropriate.

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The Ombudsman Concept

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Chapter 18 - Ombudsman

The Ombudsman¹ Concept

- 18-001 As various forms of dispute resolution alternative to traditional adversarial processes continue to gain traction in the UK and elsewhere, one such procedure that has attracted huge support, though not without some criticism as well, is the ombudsman institution—or enterprise.² Referrals to ombudsmen now outstrip all other forms of ADR.
- 18-002 For example during the third quarter of the financial year 2017/2018 the UK's Financial Ombudsman Service (FOS) handled 147,775 enquiries, taking on 80,958 new cases.³ The Parliamentary and Health Service Ombudsman received 10,558 enquiries between April and June 2017, completing 1,184 investigations⁴; and during 2016–2017 the Local Government and Social Care Ombudsman received 16,863 complaints and upheld 54 per cent of them.
- 18-003 The ombudsman institution combines a number of features. It addresses public grievances, promotes good administration and provides “a ‘third way’ between the courts and various forms of alternative dispute resolution”.⁵

The ombudsman's role and function

- 18-004 An ombudsman is an independent person whose primary role in the public sector is to deal with public complaints against administrative injustice and maladministration, with the power to investigate, criticise and make issues public. Although having no power to alter a decision when a complaint is found to be justified, he or she may persuade the relevant department or authority to alter its decision or to pay compensation to the complainant. The ombudsman has become an important part of the administrative justice system in the UK and elsewhere. The ombudsman's role is also an accepted and significant form of ADR, which includes investigative and in some cases determinative and mediatory functions, as well as using various forms of ADR as part of its operations.⁶
- 18-005 Although the ombudsman institution is predominantly in the public sector, it is also found in the private sector, including for example the Legal Ombudsman and the Financial Ombudsman Service, and a national private sector ombudsman scheme, Ombudsman Services.⁷ However, the distinction between these sectors is not considered to be helpful as there is a cross-fertilisation of practice and ideas.
- 18-006 The office of ombudsman was originally established in Sweden early in the nineteenth century and from there moved to various other countries in Scandinavia, New Zealand, Australia, Germany, parts of the US and elsewhere. In the UK the first ombudsman was appointed under the Parliamentary Commissioner Act 1967, with the title of Parliamentary Commissioner for Administration, with lesser powers than the ombudsman under the Swedish system. This has become the Parliamentary and Health Service Ombudsman (PHSO), which describes its service to the public as follows:

“We make final decisions on complaints that have not been resolved by the NHS in England and UK government departments and other UK public organisations We look into complaints where someone believes there has

been injustice or hardship because an organisation has not acted properly or has given a poor service and not put things right.”⁸

The range of ombudsman institutions⁹

18-007 The ombudsman concept has been adopted in over 70 countries. In the UK there is a range of ombudsman services, which include the following (in addition to the PHSO mentioned above):

- Agencies dealing with complaints relating to departments of the UK’s devolved administrations, such as the Scottish Public Services Ombudsman, the Northern Ireland Ombudsman and the Public Services Ombudsman for Wales.
- The Legal Ombudsman (LeO), established in 2010 pursuant to the [Legal Services Act 2007](#), replaced the Legal Services Ombudsman—a role that had been established under the [Courts and Legal Services Act 1990](#). The LeO deals with public complaints about legal services covering all legal service providers. It describes its job as “look[ing] at complaints about service providers in a fair and independent way.”¹⁰
- The Financial Ombudsman Service “set up by Parliament to resolve individual complaints between financial businesses and their customers... looks into problems involving most types of money matters.”¹¹
- The Housing Ombudsman ensures the fair and impartial resolution of housing disputes, helping landlords and tenants to resolve disagreements.¹²
- The Property Ombudsman “has been providing consumers and property agents with an alternative dispute resolution service since 1990.”¹³
- The Waterways Ombudsman scheme provides impartial and independent dispute resolution for unresolved complaints of injustice suffered as a result of maladministration or unfair treatment by the Canal & River Trust or its subsidiaries.¹⁴
- The Prisons and Probation Ombudsman investigates complaints made by prisoners, young people in detention, offenders under probation or supervision and immigration detainees, and investigates deaths in prison or detention and of immigration detainees.¹⁵

18-008 The second edition of this book observed that there might be scope for extending the ombudsman’s role in the private business sector, suggesting that businesses could appoint ombudsmen to investigate consumer complaints, or particular industries could appoint them to investigate a range of matters from complaints about quality to procedural grievances. Since then private companies including The Ombudsman Service Limited (Ombudsman Services), a not-for-profit company limited by guarantee, have been established providing ombudsman services.¹⁶ The sectors they cover include a wide range of communication, energy and property companies, as well as others such as copyright licensing and home improvement. Ombudsman Services also has an independent reviewer who considers complaints about the standard of service provided by the Solicitors Regulation Authority and about companies that are members of UK Finance, covering various finance, banking, markets and other services.

18-009 The Retail Ombudsman was a service provided by another not-for-profit company, Consumer Dispute Resolution Limited (CDRL), which has been converted to a non-ombudsman service RetailADR providing complaint handling ADR services apparently modelled on the ombudsman process. They similarly deal on a non-ombudsman basis with complaints relating to the aviation industry (AviationADR), utility providers (UtilitiesADR) and the communications industry (CommsADR).¹⁷

18-010

The Ombudsman Association, formerly called the British and Irish Ombudsman Association, is a professional association for ombudsmen and complaint handlers, their staff and others interested in the work of independent complaint resolution. It has as its central objectives the supporting and promotion of an effective system of complaint handling and redress and encouraging, developing and protecting the role of an ombudsman in both the public and private sectors as the “best practice” model for resolving complaints.¹⁸

- 18-011 There is also an Office of the European Ombudsman, established in 1995, which considers complaints about maladministration in EU institutions, bodies and agencies. It also conducts enquiries on its own initiative. Vogiatzis considers that this ombudsman role has contributed to the EU’s democratisation, transparency and accountability.¹⁹

Footnotes

- 1 There are questions as to whether the term “ombudsman” is discriminatory and should be “ombudsperson”. This issue was addressed in a Research and Information Service Briefing Paper written in June 2015 by Tim Moore for the Northern Ireland Assembly entitled “Ombudsman— Gender Neutral?” It considered the etymology and usage of the word and noted that the word “Ombudsman” is Scandinavian and gender-neutral in origin. (See: <http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2015/ofmdfm/8115.pdf> [accessed 10 June 2018]). There are however other views. For example, in an online Ombuds Research article in June 2015 entitled “‘Manning’ the ombuds barricades”, Margaret Doyle undertook an analysis and questioned the conclusions reached about the etymology. She considered other alternatives such as “ombud/s” and “ombudsperson” and invited a wider conversation about this subject. (See: <https://ombudsresearch.org.uk/2015/06/09/manning-the-ombuds-barricades/> [accessed 10 June 2018]).
- 2 The concept of the ombudsman as an “enterprise” was suggested by Trevor Buck, Richard Kirkham and Brian Thompson in the title and content of their book, *The Ombudsman Enterprise and Administrative Justice* (Routledge, 2010), in which they explain that an enterprise is defined as “a project or undertaking, especially a bold one” (*OED*)—and that this reflects the proactive approach adopted by the ombudsman community in the UK in providing a significant role in the delivery of public services and in the country’s constitutional arrangements.
- 3 See <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/143/143-ombudsmanfocu-complaints-statistic.html> [accessed 10 June 2018].
- 4 See <https://www.ombudsman.org.uk/about-us/corporate-information/how-we-are-performing/performance-statistics/july-2017-performance-statistics> [accessed 10 June 2018].
- 5 As described by Nick O’Brien and Mary Seneviratne in *Ombudsmen at the Crossroads: The Legal Services Ombudsman, Dispute Resolution and Democratic Accountability* (Palgrave Macmillan, 2017).
- 6 See Buck, Kirkham and Thompson, *The Ombudsman Enterprise and Administrative Justice*, fn.2.
- 7 See <https://www.ombudsman-services.org/> [accessed 10 June 2018] and see below at para.18-008.
- 8 See <https://www.ombudsman.org.uk/about-us/what-we-do> [accessed May 2018].
- 9 This list is not comprehensive, but merely reflects a cross-section of some of the available services.
- 10 See <http://www.legalombudsman.org.uk/helping-the-public/> [accessed 10 June 2018].
- 11 See <http://www.financial-ombudsman.org.uk/> [accessed 10 June 2018].
- 12 See <http://www.housing-ombudsman.org.uk/> [accessed 10 June 2018].
- 13 See <https://www.tpos.co.uk/about-us> [accessed 10 June 2018].
- 14 See <http://www.waterways-ombudsman.org/> [accessed 10 June 2018].
- 15 See <https://www.ppo.gov.uk/> [accessed 10 June 2018].
- 16 See <https://www.ombudsman-services.org/> [accessed 10 June 2018].
- 17 See <https://www.cdrl.org.uk/about-us/> [accessed 10 June 2018].
- 18 See <http://www.ombudsmanassociation.org/index.php> [accessed 10 June 2018].
- 19 Nikos Vogiatzis, *The European Ombudsman and Good Administration in the European Union* (Palgrave Macmillan, 2018).

How the Ombudsman Operates

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Chapter 18 - Ombudsman

How the Ombudsman Operates

Ombudsman procedures

- 18-012 Procedures and policies vary between the different ombudsmen. However, all tend to commence with the receipt of a formal complaint lodged with them, alleging some administrative fault or shortcoming and/or some failure to provide a proper service. The ombudsman service will generally need to be satisfied that the complaint falls within their remit and jurisdiction and that an individual (or in some cases a group of individuals) has suffered injustice, hardship or financial loss because of the action or lack of action complained of.
- 18-013 A complaint to the ombudsman should only be made after the organisation complained of has been afforded an opportunity to address the issue through its own complaints process. Submitting a complaint before that will ordinarily be considered premature.
- 18-014 Even where these preliminary matters are complied with, certain kinds of complaints would not ordinarily be dealt with by the ombudsman. These might for example include complaints which are pending in the courts, or which could be taken to a court or tribunal; complaints which relate to matters earlier than a prescribed period; or disputes relating to the supply of goods or services.
- 18-015 Once an ombudsman is satisfied that a complaint falls properly within his or her remit, it may be dealt with immediately if the facts are not in issue and the evidence is clear that the complaint should be upheld, otherwise it will need to be investigated. Procedures for investigation vary. The public service ombudsmen have powers similar to those of a High Court judge with regard to the attendance and examination of witnesses and the production of documents.
- 18-016 The Legal Ombudsman arranges to investigate complaints against solicitors, barristers, registered European lawyers, trade mark attorneys and others carrying out legal services and the investigator will form an independent view about what happened. Attempts will then be made to find an agreed resolution. If agreement is not possible, the investigator will write a report that may propose a remedy or action the service provider should take. This may take the form of a Preliminary Decision, which the parties may accept to resolve the issues. If the Preliminary Decision is not accepted by the parties, the ombudsman may be required to make a formal decision, which is final and binding.
- 18-017 The UK's Financial Ombudsman Service (FOS) will initially check that a complaint has been referred to the relevant business in case direct resolution may be possible. If direct resolution is not possible, a case handler will be appointed to consider it. If the complaint falls outside the scope of the ombudsman's function, it will be dismissed. Otherwise the complaint will be further investigated. The case handler will give a view of the case and proposals for resolution that are considered fair and reasonable in the circumstances. Informal attempts may be made to reach a resolution, including the use of mediation. If these do not result in agreement, the ombudsman may become directly involved, carrying out an independent review before making

a final decision. If the consumer accepts the ombudsman's decision, it is binding on the business; if not, the consumer is free to take court proceedings against the business.

- 18-018 The FOS's 2014–2015 annual review reflected that “405,202 cases [were] resolved by our adjudicators through mediation, recommended settlements and adjudications”.²⁰ In Ireland, it was reported that “the vast majority of complaints to the Financial Services Ombudsman [in 2017] were resolved through mediation.”²¹ Of 3,867 complaints closed in 2017, a total of 2,370—more than 60 per cent—were resolved using mediation.
- 18-019 These are examples of procedures adopted by ombudsmen. Specific procedures should be checked with each individual ombudsman.
- 18-020 Buck, Kirkham and Thompson refer to the benefits of ADR and the informal processes embodied in the ombudsman concept, including the fact that it provides a fitting forum in accordance with the principles of proportionate and appropriate dispute resolution, providing informality, accessibility, flexibility and costeffectiveness.²² In contrast, court procedures and rigorous formality are often deemed disproportionate to the kind of complaints commonly brought and the potential remedies available.

Remedies

- 18-021 Ombudsmen will ordinarily furnish reports outlining their decisions and the actions that they propose should be taken.
- 18-022 Remedies vary according to the provisions applicable to each individual scheme. They may include requiring a respondent organisation or authority to do any of the following:
- to apologise;
 - to provide better facilities or procedures, as appropriate;
 - to remedy a problem or repay any money received;
 - to pay compensation of a specified or maximum amount for loss suffered;
 - to pay interest on that compensation;
 - to ensure (and pay for) putting right any specified error, omission or other deficiency;
 - to take (and pay for) any specified action in the interests of the complainant;
 - to pay a specified amount for costs the complainant incurred in pursuing the complaint.

Footnotes

20 See <http://www.financial-ombudsman.org/publications/ar15/index.html#a2>.

21 Irish Legal News. See: <http://www.irishlegal.com/11981/vast-majority-complaints-financialombudsman-resolved-mediation/> [accessed 10 June 2018].

[22](#) Buck, Kirkham and Thompson, The Ombudsman Enterprise and Administrative Justice (2011), fn.2, pp.8, 40, 223 and 226.

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Online and Communication Ombudsmen and Adjudicators

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Chapter 18 - Ombudsman

Online and Communication Ombudsmen and Adjudicators

- 18-023 Inevitably, there will be an increasing need for dispute resolution services in relation to issues arising online, and for services to be provided online and/or electronically.²³ Ombudsmen and complaints mechanisms have been developing and some examples are outlined below.
- 18-024 An early development, the Online Ombuds Office was established in the US in 1996, and established as the Center for Information Technology and Dispute Resolution at the University of Massachusetts in 1997. The Online Ombuds Office no longer functions as such, though the Center continues to operate.
- 18-025 Although the idea of a specific UK Internet Ombudsman has occasionally been floated,²⁴ this has not yet been adopted (at the time of publication of this 4th edition of this work) and online complaints processes have been linked together with communications complaints generally, and dealt with through Ofcom.
- 18-026 Ofcom is the UK's communications regulator, covering aspects including radio, television, fixed-line phones, mobiles and postal services. It has stipulated that communications providers offering services to individuals and small businesses (up to 10 employees) must be members of an ADR Scheme; and has authorised two ADR schemes that provide complaints resolution services in relation to the sector that it covers.
- 18-027 The two schemes authorised by Ofcom, and which operate independently of Ofcom and of the communications providers, are CISAS (the Communications and Internet Services Adjudication Scheme), operated by CEDR (the Centre for Effective Dispute Resolution); and a scheme operated by Ombudsman Services in its communications sector. Individual service providers will generally belong to one or the other of these two schemes, and customers with complaints will need to direct these to whichever scheme their communications provider belongs to.
- 18-028 These schemes can order the service provider to fix the problem, make a payment or take other practical steps. Their decision is final and binding on the provider, but not on the consumer who is free to decide whether to accept the decision or to seek a remedy elsewhere.
- 18-029 The Internet Services Providers' Association (ISPA UK) is the UK's Trade Association for providers of internet services. Membership is voluntary but the companies who choose to become members of ISPA agree to abide by the ISPA UK Code. Under the Code, all ISPA members are required to belong to an ADR scheme approved by ISPA Council: at the time of publication, both CISAS and Ombudsman Services are the approved schemes.²⁵

Footnotes

- 23 See Ch.20.
- 24 For example in an article in The Guardian in August 2017 entitled “UK considers internet ombudsman to deal with abuse complaints”. See: <https://www.theguardian.com/technology/2017/aug/22/uk-considers-internet-ombudsman-to-deal-with-abuse-complaints> [accessed May 2018].
- 25 ISPA Code of Practice para.8.2. See <https://www.ispa.org.uk/about-us/ispa-code-of-practice/> [accessed 10 June 2018].

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EU Directive on Consumer ADR: Implications for Ombudsmen

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Chapter 18 - Ombudsman

EU Directive on Consumer ADR: Implications for Ombudsmen

- 18-030 In 2013 the European Union published a directive requiring member states to make provision by June 2015 for consumer disputes to be dealt with through ADR processes.²⁶ The objective was to ensure that consumers would have recourse to an ADR scheme in the event of any complaint about goods or services not being resolved to their satisfaction. In particular, the aim was to provide access to “simple, efficient, fast and low-cost ways of resolving domestic and cross-border disputes which arise from sales or service contracts”.²⁷
- 18-031 The directive also referred to the variable quality levels of available ADR procedures, and observed that disparities in ADR coverage, quality and awareness in Member States constituted a barrier to the internal market.²⁸ These concerns and the wish to improve the handling of cross-border disputes to increase confidence in the internal market were motivating factors for the directive.
- 18-032 The UK gave effect to the directive by way of the [Alternative Dispute Resolution for Consumer Disputes \(Competent Authorities and Information\) Regulations 2015](#), as amended by The [Alternative Dispute Resolution for Consumer Disputes \(Amendment\) Regulations 2015](#), which came into full effect in January 2016.²⁹ Among its other provisions, these Regulations required all traders to provide information about ADR whenever there was an unresolved complaint relating to a sales or service contract. ADR providers (called “ADR entities” in the regulations) in turn are obliged to seek accreditation from a competent authority, such as the Chartered Trading Standards Institute, which will monitor their performance.
- 18-033 ADR entities must meet specified requirements which include maintaining an up-to-date website and providing relevant information about its ADR procedures; providing expertise, independence and impartiality; ensuring that it does not have any conflicts of interest; being transparent, effective and fair; and ensuring the legality of any proposed solution and that it does not deprive the consumer of his or her rights.³⁰
- 18-034 The EU directive does not specifically refer to ombudsmen, but covers their activities by implication. The UK regulations refer to ADR entities, which include ombudsmen, in some cases quite specifically.³¹ However, the principles and requirements of the regulations cover the activities carried out by ombudsmen, irrespective of their being named as such or not. The effect has been to bring the ombudsman process directly within the ambit of the EU directive and the corresponding regulations. Services provided by ombudsmen are covered by and subject to those regulations.

Footnotes

²⁶ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No.2006/2004 and Directive 2009/22/EC (Directive on consumer ADR). For a full transcript, see: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0011> [accessed 10 June 2018]. See Ch.20, paras 20-027 to 20-031 for further discussion of the European Directive on Consumer

Alternative Dispute Resolution, the [Alternative Dispute Resolution for Consumer Disputes \(Amendment\) Regulations 2015](#), the Statutory Instruments incorporating the EU Directive into UK law, and in particular the aspects relating to the resolution of online disputes.

27 Directive, see [fn.26](#)—preamble para.(4).

28 Directive, see [fn.26](#)—preamble paras (5) and (6).

29 Respectively [Statutory Instrument 2015 No.542](#) and [2015 No.1392 Consumer Protection](#).

30 [Statutory Instrument 2015 No.542](#), see [fn.29](#): Sch.3, with reference to [reg.9\(4\)](#): Requirements that a competent authority must be satisfied that the body meets.

31 [Regulation 8](#) mentions the Pension Ombudsman; and Pt I of Sch.1 mentions the Financial Ombudsman Service and the Office for Legal Complaints, which established the Legal Services Ombudsman.

Ombudsman Developments, Challenges and Criticisms

Brown & Marriott's ADR Principles and Practice, 4th Ed.

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Chapter 18 - Ombudsman

Ombudsman Developments, Challenges and Criticisms

- 18-035 Walter Merricks, erstwhile Chair of the British and Irish Ombudsman Association (now the Ombudsman Association) and founding chief ombudsman of the Financial Ombudsman Service, has observed that whereas ombudsmen were originally seen as quite distinct from the civil justice system with very little cross over between the two, public sector ombudsmen were now dealing with many cases that could equally be dealt with through the civil justice system.³² This observation continues to be valid.
- 18-036 There are other processes that can similarly address consumer complaints effectively, whether or not described as ombudsmen, such as consumer conciliation. So, for example, issues arising under the Renewable Energy Consumer Code (RECC) are dealt with by the Independent Conciliation Service (RECC) through CEDR subsidiary IDRS, who describe the conciliation process as “a private and structured form of negotiation between the parties, facilitated by an independent conciliator, who may propose a solution for the parties’ consideration in order to reach agreement”.³³
- 18-037 Ombudsmen do not have unfettered discretion and their decisions are subject to judicial review like any other public body. If their decisions are irrational or unreasonable, they may be set aside. So, for example, in *R (Crawford) v Legal Ombudsman*,³⁴ the High Court held that the Ombudsman’s decision was irrational³⁵ and that no reasonable person could have made it. Consequently the court quashed the decision.
- 18-038 Similarly, the High Court quashed a decision of the Legal Ombudsman in *Hariz & Haque Solicitors v Legal Ombudsman & Tahira Quereshi*³⁶ which it found to be irrational and unlawful. In *R. (on the application of Rosemarine) v Office for Legal Complaints*³⁷ the Court again applied the Wednesbury test,³⁸ but in this case did not find the ombudsman’s decision to be unreasonable.
- 18-039 Although there has been substantial support for the ombudsman function, there have also been critics, including activist consumer groups (“ombudsman watchers”). This was considered by Creutzfeldt and Gill in their policy briefing paper for the Economic and Social Research Council (Impact Acceleration Account), Critics of the Ombudsman System: Understanding and Engaging Online Citizen Activists.³⁹ Workshops related to this project identified four broad themes in terms of the groups’ critiques of ombudsman schemes, notably lack of accountability, procedural and practice issues, staffing and qualifications and the impact of the system on complainants. The preliminary conclusions of the paper were that there appeared to be interesting and wide ranging critiques, useful for those interested in the ombudsman institution by identifying consumer perspectives and indicating how the ombudsman institution might be misunderstood by the public. Ombudsman schemes were responsive to these critiques in various ways, while there was also perceived to be a risk of privileging unrepresentative opinions by devoting too much resource to engagement.
- 18-040 In March 2018 the Financial Times newspaper reported growing dissatisfaction with the UK’s ombudsman system.⁴⁰ It referred to accusations of services serving consumers badly, lacking enforcement powers, confusion in some sectors and a perception that

some—funded by their members—might favour those members. The report also referred to an undercover television programme critically investigating the Financial Ombudsman Service⁴¹ and indicated a “general groundswell for reform”.

Footnotes

32 Presentation to the ADR Committee of the Civil Justice Committee, April 2003.

33 IDRS: Independent Conciliation Service (RECC) June 2015. See: <https://www.cedr.com/idrs/documents/150721142401-independent-conciliation-service-june-2015.pdf> [accessed 18 June 2018].

34 *[2014] EWHC 182 (Admin)*.

35 The test used was the one set out in *Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223*—the test of Wednesbury reasonableness.

36 *[2014] EWHC 1539*.

37 *[2014] EWHC 601 (Admin)*.

38 See para.18-037 and fn.35.

39 Naomi Creutzfeldt & Chris Gill, December 2015—See: <https://www.law.ox.ac.uk/sites/files/oxlaw/critics-of-the-ombudsmen-system-understanding-and-engaging-online-citizen-activists-dec15.pdf>.

40 “Complaints put consumer watchdogs on watch”—report by Lindsay Cook, 16 March 2018. See: <https://www.ft.com/content/510b5344-279b-11e8-b27e-cc62a39d57a0> [accessed May 2018].

41 A Channel 4 Dispatches investigation at the Financial Ombudsman Service found that staff with inadequate training or understanding of financial products and without properly reading case files were judging cases. See: <http://www.channel4.com/info/press/news/investigation-at-fos-finds-staffwith-severe-lack-of-training> [accessed 10 June 2018].

Complaints Adjudication

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Chapter 18 - Ombudsman

Complaints Adjudication

- 18-041** Alongside the ombudsman system, and closely related to it, is the complaints adjudication system. So, for example, the Registrar of Companies has Complaints Adjudicators to investigate complaints about delay, courtesy and mistakes and the way in which these complaints have been handled at Companies House. There is also an Adjudicator who acts as an unbiased referee looking into complaints about HM Revenue & Customs and the Valuation Office Agency. Certain complaints about the police can be referred to The Independent Office for Police Conduct (formerly the Independent Police Complaints Commission), and complaints in relation to television and radio can be referred to the Broadcasting Standards Commission.
- 18-042** The relationship between the complaints adjudication system and ADR is underscored by the fact that the Independent Complaints Adjudication Service for Ofsted (ICASO), the Office for Standards in Education, Children's Services and Skills, is administered by CEDR, the Centre for Effective Dispute Resolution, described in its website⁴² as a leading ADR service provider specialising in the resolution of conflict deadlock, and that CEDR's Director of Consultancy, Graham Massie, is ICASO's Senior Independent Complaints Adjudicator.

Footnotes

42 <https://www.cedr.com/> [accessed 10 June 2018].

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Chapter 20 - Online Dispute Resolution

Introduction

- 20-001 It seems extraordinary to think that in 1990 there were no Internet Service Providers, online services and inter-communication availability were limited and networks could not exchange information with one another. The developments over the following three decades have been astonishing and happened—and continue happening—at an exponential rate.
- 20-002 Information technology has developed into Information Communication Technology (ICT) to include the increasingly wide range of available communications such as email, data sharing, VoIPs (Voice over Internet Protocols), video conferencing, virtual meetings, communications-enabled applications and other information sourcing and usage technologies.
- 20-003 As these developments occurred, and as online activities increased, and especially with the introduction and extension of e-commerce, the need emerged for appropriate dispute resolution mechanisms to deal with the issues that would arise in this new world. It was logical that these would be located within the same technological environment as the disputes themselves, namely online and incorporating ICT. As observed by the earliest of the writers about online dispute resolution, Professor Ethan Katsh, the resources of the internet provided opportunities for creative approaches and responses to problem-solving.¹ Consequently, with there being much more of an emphasis on dispute avoidance and resolution generally, ICT platforms are being developed and used with increasing frequency to assist the problem-solving process.
- 20-004 However, ICT and Online Dispute Resolution (ODR) resources are not limited to dealing with disputes arising online, but are increasingly used and available for disputes arising in the real world. They are also used alongside traditional ADR processes to complement and enhance those processes.

Footnotes

¹ E. Katsh and L. Wing, "Ten Years of Online Dispute Resolution: Looking at the Past and Constructing the Future" (2006) 38 University of Toledo Law Review 19.

Disputes Arising Online

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Chapter 20 - Online Dispute Resolution

Disputes Arising Online

- 20-005 Katsh and Wing observe that until the 1990s, many college students had access to university mainframes and to the internet, which was not yet widely available to the general public. As a result, some early dispute resolution services were university-based including the University of Massachusetts which established a Center for Information Technology and Dispute Resolution in 1997 and ran the “Online Ombuds Office”, which sought to adapt the ombudsman’s role to cyberspace issues.² It became The National Center for Technology and Dispute Resolution, described as being “at the intersection of technology and dispute resolution”.³ It provides information, supports ODR initiatives and has a list of ODR providers.
- 20-006 A number of other first generation online services that aimed to facilitate the resolution of online disputes no longer exist. A new paradigm is apparently being sought for the next generation.
- 20-007 E-bay for example used to employ a specialist company, Square Trade, to handle some hundreds of thousands of disputes between its buyers and sellers, but in 2008 e-Bay took this service over itself through its Resolution Centre to deal online with matters that could not be resolved between the parties directly. The seller may for example be required to issue a refund, or the buyer may be required to pay for an item, or the sale may be reversed.
- 20-008 Other internet retailers are using different mechanisms to address disputes arising with their customers. One favoured procedure is to invite customers to register a complaint or claim, and to facilitate communications, with the sanction of refunding any amount in issue. Credit card companies also have a role, in making a chargeback of any disputed sum to the account-holder where services or products have not been satisfactory. These procedures facilitate pragmatic arrangements for the avoidance and quick settlement of any disputes.
- 20-009 As observed in Ch.18, complaints machinery and the ombudsman have been other ways in which online disputes are addressed. An Internet Ombudsman has been piloted in which consumers can register their complaints about products or services that they have purchased on the internet and have them resolved by neutral conciliators and adjudicators. Its two-stage process starts with mediation, and if this does not resolve the issues, then adjudication which is not binding on the consumer, but may be binding on the supplier. The Internet Services Providers’ Association has a Code and complaints scheme involving resolution of disputes by CISAS (the Communications and Internet Services Adjudication Scheme), in which an independent adjudicator makes a decision which is binding on the member company but not on the complainant.
- 20-010 Where disputes arise in relation to domain names, these can be dealt with under the Uniform Domain Name Dispute Resolution Policy (UDRP) created by the Internet Corporation for Assigned Names and Numbers (ICANN). Evaluative panels can transfer or cancel domain names and are said to have dealt effectively with tens of thousands of domain name disputes.
- 20-011 In the UK, Nominet, the internet registry for .uk domain names, offers a Dispute Resolution Service to resolve .uk domain name disputes. It initially offers mediation, and where this does not resolve the matter, then an independent expert decision by a different person, who can order suspension or (more unusually) cancellation of the domain name and can also declare

that the complainant was “reverse domain name hijacking”—using the service in bad faith in an attempt to get a good domain name without justification.

Footnotes

- 2 See the UMass Center for Information Technology and Dispute Resolution Online Ombuds Office at <http://www.ombuds.org/center/ombuds.html> [accessed 22 May 2018]. See also information about the Online Ombuds Office under “Ombudsman” in Ch.18.
- 3 See the National Center for Technology and Dispute Resolution at <http://www.odr.info/index.php> [accessed 22 May 2018].

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“Real World” Disputes Dealt with by ODR

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Chapter 20 - Online Dispute Resolution

“Real World” Disputes Dealt with by ODR

- 20-012 Online resources are also being made available in different ways to facilitate “real world” disputes rather than those arising online. Galves suggests that ODR has all of the same cost-saving and efficiency advantages of traditional ADR because “it is simply ADR on the Internet”⁴ and can be faster, more convenient and more cost efficient.
- 20-013 ODR processes for resolving real world disputes range between fully automated programmes through to providing incidental support for mediators and arbitrators (“flesh and blood” practitioners, as one online commentator has called them).
- 20-014 ODR began its existence as “Online ADR” and was intended to be a network-based equivalent of offline face-to-face dispute resolution processes, such as negotiation, mediation and arbitration, according to Rabinovich-Einy and Katsh.⁵ Proponents of ADR have met with much success in encouraging disputing parties to work together through various forms of mediation and negotiation using interests rather than rights or power to frame their disputes. While the “real world” dispute resolution system remains essentially a rights- and power-based system, proponents of ADR seek to introduce mediation and negotiation using models that tend to be more mutually satisfying, value-creating, and “win-win” than polarised, zero-sum rights-based approaches. As internet users have gained understanding of encryption and how that can protect important ADR principles such as trust and confidentiality, use of such systems by governments, courts and court users has increased since the start of the millennium.

Double-blind bidding

- 20-015 At the automated end, one of the main ODR mechanisms is double-blind bidding, which is generally used where the quantum payable is in dispute. Parties are invited to submit their respective figures online, and these are maintained confidentially by the system. If the bids come between a pre-agreed range for example 20 per cent, the system confirms a deal at the midpoint figure. If they are outside that range, parties may be given further opportunities to bid again, until an agreement is reached.

Visual blind bidding

- 20-016 An alternative automated process is visual blind bidding, in which the parties reveal their proposals to one another at the outset, but maintain confidentiality about the levels at which they would settle. The system then calculates and generates suggestions, which may anonymously include suggestions made by the parties, or parties may openly contribute suggestions. The dispute is resolved when the parties agree on a set of proposals. This process is said to be suitable both for simple and complex issues.

Online arbitration

- 20-017 Online arbitration services can involve a range of ICT processes including for example the downloading of forms, the use of email for communications and the submission and exchange of documents, and the use of telephony, videoconferencing and virtual meetings. These services may offer paperless case submission processes, with evidence submitted electronically by secure email. In some services, arbitrators make their award electronically.
- 20-018 One example of an online arbitration service is the US-based net-ARB, which claims to be the world's first and only Small Claims Court for the internet, breaking jurisdictional boundaries by providing for non-appearance dispute resolution by email: the "hearing" is conducted by email over time, usually between a couple of days to a week or more. The arbitrator, or panel if so agreed, will then issue an award.

Supporting traditional ADR

- 20-019 Other forms of ODR technology assist mediators and arbitrators in their traditional process, for example an online mediation service such as Juripax, operated by a company based in the Netherlands, offers support for individual mediators, or for businesses with large volumes of cases, in relation to divorce, employment, e-commerce and small claims. This includes online intake forms, online discussion room and conference facilities, digital document and case management systems, and the use of networked software (ASP).
- 20-020 In the UK, the Mediation Room has developed technology to enable all forms of dispute resolution to be undertaken online, whether wholly or partially, using an interest-based mediation approach. They provide licences for the use of their software and other appropriate tools, enabling the creation of case files with multiple collaborative forums, anonymous brainstorming, audio-visual teleconferencing and desktop sharing, blind bidding facilities and psychometric profiling. They also provide mediators from their panel, and distance training courses in ODR.
- 20-021 The WIPO (World Intellectual Property Organisation) Arbitration and Mediation Center provides ODR facilities for use in connection with dispute resolution procedures such as the arbitration of intellectual property disputes. Digital communication tools allow parties to file requests by completing electronic forms and to submit documents and exchange correspondence online through secure channels, with automatic notifications and databases to support the logging and archiving of documents and secure fee payment facilities. WIPO has also developed an internet-based online dispute resolution facility to deal with disputes arising out of the registration and use of an internet domain name.

Footnotes

- 4 F. Galves, "Virtual Justice as Reality: Making the Resolution of E-commerce Disputes More Convenient, Legitimate, Efficient, and Secure" (2009) (1) Journal of Law, Technology & Policy.
- 5 O. Rabinovich and E. Katsh, "Digital Justice: Reshaping Boundaries in an Online Dispute Resolution Environment" (2014) 1 International Journal of Online Dispute Resolution 1.

Other Usages of ICT in Dispute Resolution

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Chapter 20 - Online Dispute Resolution

Other Usages of ICT in Dispute Resolution

20-022 Given the rapid development of ICT, any list of usages is likely to look dated within a few years. The ways in which ICT is used in ADR generally, in addition or complementary to the ODR usages outlined above, include the following:

- Email and document scanning have become an indispensable means of communication and of transmitting documents in ADR processes.
- Methods of communication with multiple parties include phone and video conferencing and virtual meetings, making it easier for parties in different countries to “meet” one another. Access to the web provides a source of instant information as well as alternative forms of communication such as internet telephony.
- Data storage and retrieval is also instant; documents can be drafted and amended by multiple parties; standard and bespoke forms can be completed and exchanged online; and many other resources are available and constantly being added.
- Websites provide not only marketing opportunities for practitioners and organisations, but offer the extensive delivery of relevant information and links.
- Professional and social networks have extended to include information exchange and advice seeking. The uses of these resources, combined with mobile phone technology, have had a profound impact on the nature of communicating news and events around the world, changing the whole paradigm of information dissemination and marketing.

20-023 As support for human practitioners, ICT resources are likely to have increasing value, though it is unlikely that practitioners, who attach importance to personal connections with disputing parties, would wish to see the automated aspect of their roles predominating over the personal element. As Humpty Dumpty observed in *Alice Through the looking-Glass* “The question is, which is to be master—that’s all”.

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Regulation or Harmonisatio of ODR

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Chapter 20 - Online Dispute Resolution

Regulation or Harmonisatio of ODR

- 20-024** Consumer protection for citizens in European Member States was a topic of focus during the early part of the 21st century. Concerns over the inconvenience and disproportionate expense that consumers experienced in dealing with disputes arising from e-commerce, particularly as these were commonly likely to involve cross-border jurisdictional problems, informed the debate about the need for a regulatory framework for cross-border consumer-related disputes and the use of ICT to develop ODR systems to assist with this.⁶
- 20-025** On 25 October 2011 the European Parliament passed a wide-ranging ADR resolution, strongly supporting ADR processes, *inter alia* seeing “great potential for online ODR, in particular for small claims [and emphasising that] where traditional ADR is carried out online, procedural standards should not be lowered, and that issues such as the enforceability of awards should also be resolved”.
- 20-026** UNCITRAL, the United Nations Commission on International Trade Law, had been considering ODR since 2000. It undertook research into the subject, and received periodical reports from an ODR Working Group that it established. In 2010, the Commission agreed that a Working Group should be established to undertake work in the field of online dispute resolution relating to cross-border electronic commerce transactions, including business-to-business and business-to-consumer transactions. Reviewing legal standards, the Working Group developed draft procedural rules in 2011, with a focus on low-value, high-volume cross-border electronic commerce transactions. There was a recognition that procedural rules should be forward-looking and able to accommodate any changes in technology and practice that might arise in the long-term future. The work of the ODR Working Group helped inform the European Parliament’s decision to introduce of legislation in this area.
- 20-027** The European Directive on Consumer Alternative Dispute Resolution and the Regulation on Online Dispute Resolution of 21 May 2013⁷ was fully adopted into UK law on 9 January 2016.⁸ As well as promoting consumer protection within Member States, the directive is also designed to encourage efficient, fast and low-cost ways of resolving domestic and cross-border disputes which arise from sales or service contracts. Foremost is the promotion of ADR for the resolution of online as well as offline transactions for disputes which arise from cross-border consumer transactions. An ODR platform launched in February 2016 offers consumers and traders a single point of entry for the out-of-court resolution of online disputes arising from purchases made over the internet, through ADR entities which are linked to the platform and offer ADR through quality ADR procedures.
- 20-028** The EU Alternative/ODR platform has been developed and is operated by the European Commission for consumers and traders in Member States and involves the consumer filling in an online complaint form and submitting it via the internet. Once the consumer and trader agree on an ADR entity to handle their dispute, the EU ODR platform transfers the complaint automatically to that entity. The ADR entity then handles the case entirely online and reaches an outcome in 90 days without the parties present.⁹ Currently this system is only available to those consumers living in and traders based in the EU.
- 20-029** Whilst Cortés suggests that consumer ADR entities are an important development for many Member States who do not necessarily see their court system as being the primary route to resolving consumer disputes, he does make the point that although traders are required to provide information about certified consumer ADR entities, they cannot be compelled to participate and mandating trader participation by Member States may be the answer.¹⁰

- 20-030 Since implementation of the EU Directive, the requirement to make the link to the ODR platform easily accessible has been tested in the courts. The decision of a German district court has now extended the requirement to websites. The district court of Bochum decided that an online trader of watches (applicant) who requested a preliminary injunction against another online trader of watches (defendant), who did not include a link to the ODR Platform, should be granted a preliminary injunction, for the defendant's breach of German Unfair Competition Law. The defendant watch trader was prohibited from further trading online until such a link was made accessible.¹¹
- 20-031 The question of enforcement of cross-border consumer disputes is however vague, as the EU Alternative/ODR platform does not make the procedure clear. It seems that this will be left to Member States to determine themselves and may give rise to distortions in the Internal Market, due to the lack of incentives it creates for traders.¹²

Footnotes

- 6 P. Cortés, Online Dispute Resolution for Consumers in the European Union (Routledge, 2011).
- 7 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0063:0079:EN:PDF> [accessed 22 May 2018].
- 8 See SI 2015/1392 Consumer Protection: The Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015, which is the Statutory Instrument incorporating the EU Directive into UK law. Available at: http://www.legislation.gov.uk/uksi/2015/542/pdfs/uksi_20150542_en.pdf [accessed 22 May 2018].
- 9 The EU Online Dispute Resolution Platform at: <https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.home.show&lng=EN> [accessed 22 May 2018].
- 10 P. Cortés (ed.), The New Regulatory Framework for Consumer Dispute Resolution (Oxford University Press, 2016), pp.37–38.
- 11 In District Court Bochum (Germany), Decision 31 March 2016—No: 14 O 12/16, the court held that the defendant was obliged to include an easily accessible link as of 9 January 2016—when the Regulation went into force—even though the ODR Platform was not online at the time. Since the defendant did not provide such link, they violated s.3a of the German Unfair Competition Act in connection with art.14 para.1 sentence 1 of the Regulation (No)524/2013.
- 12 See P. Moreno in Cortés, The New Regulatory Framework for Consumer Dispute Resolution, fn.10, p.403.

Some Practical ODR Issues

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Chapter 20 - Online Dispute Resolution

Some Practical ODR Issues

Confidentiality

- 20-032 Rules regulating confidentiality in mediation or other ODR processes should be agreed before the process is started. This should cover both a contractual commitment to confidentiality by the parties and technological assurances about confidentiality and privacy in the ICT system.
- 20-033 Technological developments, such as digital signatures using encryption technology, are likely to improve levels of security and confidentiality, both in relation to e-commerce and more specifically to ODR processes, videoconferencing and virtual meetings.

Enforcement

- 20-034 The enforceability of online arbitration awards and ADR outcomes has understandably been considered since the early days of ODR. Much depends on the process itself and the nature of the outcome, whether arbitrated or agreed, and how recorded.
- 20-035 Arbitrated outcomes in the shape of awards are expected to be enforceable under the 1958 New York Convention on the Recognition and Enforcement of Foreign Awards, notwithstanding that they are conducted partly or totally online. If there were a serious irregularity in the conduct of the arbitration, there might well be enforcement challenges under the Convention; but the mere fact that ICT was by agreement used in the process should not of itself constitute irregularity.
- 20-036 The enforcement of other forms of consensual outcome in ODR would be no different from the position if they were resolved in the ordinary course, without ICT, subject again to the proviso that there was no serious irregularity—which would in any event also be applicable in those ordinary ADR processes.
- 20-037 As in ordinary practice, enforcement would depend on having a contract or award that would be recognised by a real court, this issue should be considered and agreed in any agreement to participate in ODR.

Law and jurisdiction

- 20-038

Until ODR establishes its own enforceable rules and jurisdiction, all indications are that parties contracting online would be well advised to agree on a legal system that will be applicable to their transaction. It would also be sensible to agree on any territorial jurisdiction that would apply, though some of the benefit of using ODR processes might be to avoid jurisdictional problems.

- 20-039 Practitioners may find that the disputants have already agreed these matters in their contract that forms the subject matter of the dispute. Online providers of goods or services might well have stipulated standard terms regulating the transaction.

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ODR and the Courts

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Chapter 20 - Online Dispute Resolution

ODR and the Courts

Money Claims Online

- 20-040** The Money Claim Online (MCOL) service is the HM Courts & Tribunals Service internet-based service for claimants and defendants.¹³ It became operational in 2012 and enables claimants to commence certain types of county court claims electronically.¹⁴ The issue of a MCOL or by the SDT system for bulk claims leads to the claim being handled, initially, in Northampton but then (only if disputed) being transferred to an appropriate County Court hearing centre in accordance with protocols which pay attention to, but which are not bound by, the claimant's choice or party preference.¹⁵
- 20-041** The MCOL service is for a fixed sum under £100,000 against no more than two people or organisations. The claimant must be over 18 to use the service and it can be used from anywhere in the UK, but only against someone with an address in England or Wales. A court fee must be paid using a debit or credit card. The service cannot be used for personal injury claims or claims for return of deposit from a landlord.
- 20-042** The Civil Justice Council has developed plans to introduce an internet-based dispute resolution service for low value claims of less than £25,000.¹⁶ The proposed Online Court (HMOC) would have three tiers:

Tier 1: Online evaluation to assist a user to categorise and understand options regarding a claim;

Tier 2: A facility for reviewing case papers to support either negotiation or mediation; including automated negotiation tools;

Tier 3: A judicial decision making tool for judges to hand down judgments based on submissions received online.

While the proposed model does have some similarities with ombudsman procedures, Hodges argues that it fails to emulate the individualised response to people who seek advice, and the objective triage of facts presented, that ombudsmen offer.¹⁷ The model follows existing online systems in operation in Canada, Germany and The Netherlands and is designed to provide a new model for flexible and cost-effective access to justice rather than simply supporting existing court services electronically.¹⁸

Footnotes

¹³ See <https://www.moneyclaim.gov.uk/web/mcol/welcome> [accessed 22 May 2018].

¹⁴ See Practice Direction 7E.

¹⁵ See Lord Justice Briggs, Civil Courts Structure Review: Final Report, July 2016 available at: <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf> [accessed 22 May 2018] p.74.

¹⁶ See the Civil Justice Online Dispute Resolution Advisory Group's Report of February 2015: Online Dispute Resolution For Low Value Civil Claims, available at: <https://www.judiciary.gov.uk/reviews/online-dispute-resolution/> [accessed 22

May 2018]. This follows the vision also set out by Lord Justice Briggs in his Report Civil Courts Structure Review: Final Report, July 2016 available at: <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf> [accessed 22 May 2018]. The Ministry of Justice introduced the online court for claims of up to £10,000 on 6 April 2018. It will allow an action to be commenced in the county court, settle disputes online and recommend mediation services.

- ¹⁷ C. Hodges in Cortés, The New Regulatory Framework for Consumer Dispute Resolution, fn.10, p.361.
- ¹⁸ S. Blake, J. Browne and S. Sime, A Practical Approach to Alternative Dispute Resolution (Oxford University Press, 2016), p.77.

Appendix 1 - Drafting, Documents and Precedents

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Appendix 1 - Drafting, Documents and Precedents

All precedents and documents provided or referred to in this Appendix are for general guidance and information only and no warranty or assurance is given as to their suitability for any particular usage or generally. It is up to readers to check and adapt them appropriately for their use and the publishers, authors, consulting editor and others providing the precedents and documents cannot accept responsibility for their use. Furthermore, it should be noted that they are provided as at the time of publication of this book, and may vary in the future.

- A1-001 Most if not all of the documents used in the processes covered in this book are “living” documents that may be updated or varied from time to time. Having regard to this and to the fact that many of them are available in updated form online, this appendix will provide web links to relevant documents rather than publishing the documents themselves. Note that copyright in the documents vests in any organisations mentioned. It should be emphasised that this list is by no means comprehensive or definitive.
- A1-002 Documents set out fully in this appendix may not be generally available online and are included for guidance. They will need to be adapted with judgment for individual use.

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Drafting Mediation and Other ADR Documents

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Appendix 1 - Drafting, Documents and Precedents

Drafting Mediation and Other ADR Documents

- A1-003** Effective documentation may be integral to mediation and other ADR processes. The mediator's appointment and agreement to mediate should be recorded. Some documents may need to be prepared during the mediation. After its conclusion, the outcome has to be effectively and appropriately recorded; and although this is the responsibility of the parties themselves in most situations, the mediator may need to assist and sometimes to take a role in the drafting. This may comprise a binding agreement (as, for example, in most civil and commercial settlements) or a non-binding memorandum or summary that can be used as a basis for the subsequent drafting of binding terms (as commonly required in family mediation).
- A1-004** Mediation organisations will usually have a Code of Practice and perhaps a procedural guide, and may provide precedent documents, such as standard terms of Agreement to Mediate, practice forms, draft summaries of outcome and settlement agreements.

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Codes of Practice and Model Procedures and Standards

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Appendix 1 - Drafting, Documents and Precedents

Drafting Mediation and Other ADR Documents

Codes of Practice and Model Procedures and Standards

- A1-005** Codes differ according to the field of activity of the mediation. In the civil and commercial field in the UK there is no standard Code, but each organisation may have its own Code.
- A1-006** In addition to a Code of Practice for third party neutrals, [CEDR Solve](#), the dispute resolution service of the Centre for Effective Dispute Resolution ([CEDR](#)) has published a Model Mediation Procedure applicable to civil and commercial disputes. A link to this is provided.
- A1-007** In the family field, while different organisations may have their own Codes, the umbrella organisation in England and Wales, the Family Mediation Council ([FMC](#)), publishes a Code which applies to all mediation conducted or offered by mediators who are members of the organisations belonging to the [FMC](#).
- A1-008** The Rules for Expert Determination of the Academy of Experts can be found in a link to that body provided below.

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The Agreement to Mediate

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Appendix 1 - Drafting, Documents and Precedents

Drafting Mediation and Other ADR Documents

The Agreement to Mediate

- A1-009 Before the mediation process is started, the mediator should enter into an agreement with the parties setting out the terms and basis on which the mediation is undertaken.
- A1-010 The agreement ought to cover various matters including the mediator's role, confidentiality, privilege and other relevant process matters. It should also deal with practical matters such as fees, time frame, venue and complaints procedure.
- A1-011 The agreement to mediate can be formal, which is more common for civil and commercial work, or it can be relatively informal in style, which family and community mediators tend to prefer.

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Contract clauses

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Appendix 1 - Drafting, Documents and Precedents

Drafting Mediation and Other ADR Documents

Contract clauses

- A1-012** Commercial contracts commonly indicate which country's law is to apply to their terms and how disputes are to be dealt with. Dispute resolution clauses may state which courts are to have jurisdiction, but frequently set out machinery for addressing disputes without using the courts. So, for example, provision may be made for mediation and/or arbitration. The clause may outline a sequential procedure, which may start with negotiation, moving on to mediation or other consensual processes if necessary, and then to arbitration if still unresolved.
- A1-013** Dispute resolution clauses in contracts allow parties to choose in advance how they want any disputes to be dealt with. That avoids the tendency for parties to become polarised if they try to agree this machinery only after a dispute has arisen.

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Settlement Agreements

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Appendix 1 - Drafting, Documents and Precedents

Drafting Mediation and Other ADR Documents

Settlement Agreements

Who drafts and when?

- A1-014 This is likely to depend on the practice within the field of activity being mediated. In civil and commercial mediation, where agreements are commonly signed before the parties leave the process, the settlement agreement is ordinarily drafted "on the spot". However, this is not always practicable and appropriate and drafting may be undertaken afterwards. As to whether any understandings might be recorded in the meanwhile, see below under "Binding or non-binding".
- A1-015 Where lawyers represent the parties in the mediation, they may agree between themselves as to the procedure and responsibility for the drafting. In either event, the mediator may liaise with them as they do so and may view the document before signature in case of any misunderstanding or oversight. The mediator's role will usually be minimal, with the responsibility for drafting resting with the parties' lawyers.
- A1-016 Where parties are not represented in civil-commercial mediation, or where the mediator has kept notes that will facilitate drafting, the mediator may need to be more closely involved in the drafting and may well produce a first draft agreement. However, it should be made clear to the parties that it is their responsibility to check and ensure that the terms correctly reflect the agreed resolution and that all relevant details and conditions are incorporated. The mediator too would check this. The settlement agreement must be binding and enforceable if this is what is required, or non-binding or conditional if this is the requirement.
- A1-017 It is helpful for civil-commercial mediators to have a template or precedent settlement agreement to facilitate drafting if the matter is settled. This may be general or it may be specific to the case being mediated.
- A1-018 In family mediation, there is a different culture and expectation concerning the recording of settlement terms. Parties commonly attend mediation meetings without their lawyers present and would not ordinarily sign a settlement agreement in the meeting, but would expect a non-binding note of the proposed terms to be sent to them afterwards. Any such note would be non-binding to allow each party to take the document to their respective lawyers for individual advice and to have the terms converted into appropriate formal documentation.
- A1-019 It is usual for family mediators to draft a non-binding note or memorandum of the proposed terms, usually in the form of a "without prejudice" Memorandum of Understanding (MoU). If the respective lawyers approve the terms, they will arrange between themselves for those terms to be incorporated into a binding document, whether a formal agreement, deed or a court order. The mediator would not ordinarily be further involved in the drafting. Of course, if the lawyers attend the mediation, the settlement documentation may well be dealt with at that time.
- A1-020

In other fields of activity, drafting practice varies. Workplace mediation tends to follow the civil-commercial approach, whereas practice in neighbourhood and community mediation depends on the issues involved and the requirements of the parties. In some cases, a binding written agreement will be needed; but in some kinds of inter-personal or community mediation, oral agreements binding in honour only may sometimes suffice or be preferred. Even if a mediation is informal, and the parties do not want their proposed agreement to be binding, it may be helpful to have a written record of their understandings for the avoidance of possible future good faith misunderstandings.

Format

- A1-021** Formats for the recording of settlement terms vary according to the field of ADR in which one is working. Even within the same field, differences of approach and style exist.
- A1-022** In the civil and commercial field, agreements tend to record matters in a businesslike way, as in an ordinary commercial agreement. It can be helpful for the mediator to prepare in advance an outline settlement agreement, providing the framework for the agreed terms to be attached as a schedule to it.
- A1-023** In the family field, a different format tends to be used. The usual practice is for the mediator to prepare a non-binding, without prejudice MoU or Summary of Proposals, which contains a brief outline of the issues and the proposals. It is generally accompanied by an open (not privileged) Financial Disclosure Summary, setting out the financial circumstances of the parties.
- A1-024** In community and neighbourhood mediation, settlement terms may remain oral. If recorded, the memorandum recording them would usually be brief and informal.

Binding or non-binding, principle or detail

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Appendix 1 - Drafting, Documents and Precedents

Some Principles of Mediation Drafting

Binding or non-binding, principle or detail

- A1-025** It must be clear whether the recorded terms are to be immediately binding. If not, will they become binding when some further stage has been reached or condition met?
- A1-026** The agreement under which the parties entered into the mediation may make provision whether or not and in what circumstances the agreement reached in the mediation will be binding on the parties. It may for example stipulate that no agreement is binding unless and until reduced to writing and signed by the parties.
- A1-027** A potential pitfall may arise where Heads of Agreement are signed which outline the main points and provide for it to be amplified in a later, more formal and detailed contract, to be drafted by the parties' lawyers. However, the Heads may well constitute a binding and effective agreement even though a later document does not get signed. The lack of detail may sometimes suit one party more than the other. The status and effect of any intended Heads of Agreement should be discussed with the parties and the intention as to whether and when it becomes binding should be clearly and explicitly recorded.
- A1-028** As a rule, the document should be as detailed and precise as possible, for the avoidance of subsequent misunderstanding and disagreement. Unless all material terms are agreed, there is a risk that the court could subsequently find that no agreement exists.

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Conditional or unconditional

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Some Principles of Mediation Drafting

Conditional or unconditional

A1-029 This is not the same issue as whether an agreement is binding or non-binding. A conditional agreement is one that will come into effect contingently upon specified condition(s) being met; or particular terms of a binding agreement may come into effect in the event of certain conditions being fulfilled. For example, it is possible for parties to agree on a binding basis that X will pay Y a specified sum of money if some specified event occurs, say, if the profits of a company exceed a defined level within a prescribed period. In that event, the test is an objective one which may be outside the control or will of the parties. If the condition is met, the relevant term of the agreement will come into effect.

A1-030 That is of course different from parties provisionally agreeing on terms that will not come into effect at all until the parties bring them into binding effect, for example, they are, and are expressed to be, subject to contract and non-binding until a formal contract has been prepared and executed by the parties.

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Formality and style

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Appendix 1 - Drafting, Documents and Precedents

Some Principles of Mediation Drafting

Formality and style

- A1-031 The degree of formality of a settlement agreement or summary will depend on the style and preference of those drafting it, the requirements of the parties and the conventions of the field within which they are operating. However, whether formal or informal, the terms must be clear and precise, and all necessary provisions must be included and unambiguous, to enable it to be implemented without misunderstanding or further dispute. Informality of style should not be confused with imprecision or sloppiness.
- A1-032 In some cases the parties may want or need the agreement to be recorded as a deed, or it may need to be made into an order of the court, in which event the drafting of the documentation may be in the form of a Tomlin Order or other form of consent order.¹ Alternatively, in some circumstances an agreement may be filed and made a rule of court. Settlement terms that have to be made into court orders are likely to require legal input from the parties' lawyers.²
- A1-033 Inasmuch as ADR processes tend to be less formal than court processes, there is greater scope to avoid a legalistic approach to drafting and to make documents more understandable. It is worth mentioning the worldwide organisation "Clarity", which is committed to simplifying legal language, and which provides helpful guidelines.³

Footnotes

- ¹ A Tomlin Order provides for a stay of proceedings on agreed terms, save to carry such terms into effect, with liberty being reserved to revert to the court in relation to such terms.
- ² With regard to the drafting of consent orders, see Foskett on Compromise by David Foskett QC (8th edn, 2015).
- ³ <http://www.clarity-international.net/>.

Authority to sign

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Some Principles of Mediation Drafting

Authority to sign

- A1-034 Those who sign the agreement must have the necessary authority to do so if attending in a representative capacity. This ought to have been established by the mediator at an early stage of the process.

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Document 1: CEDR Solve Code of Conduct for Third Party Neutrals

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Document 1: CEDR Solve Code of Conduct for Third Party Neutrals

A1-035 CEDR Solve, the Dispute Resolution Service of CEDR—the Centre for Effective Dispute Resolution (see www.cedr.com)—publishes model documents at http://www.cedr.com/about_us/modeldocs/.

Its Code of Conduct for third party neutrals (2018 edition) and any updates can be found at https://www.cedr.com/about_us/modeldocs/?id=4.

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Document 2: CEDR Mediation Model Procedure (2018 Edition)

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Appendix 1 - Drafting, Documents and Precedents

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Document 2: CEDR Mediation Model Procedure (2018 Edition)

A1-036 This document may be found at https://www.cedr.com/about_us/modeldocs/?id=21.

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Document 3: Code of Practice of the Family Mediation Council (FMC)

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Document 3: Code of Practice of the Family Mediation Council (FMC)

A1-037 This document may be found at <https://www.familymediationcouncil.org.uk/wp-content/uploads/2016/09/FMC-Code-of-Practice-September-2016-2.pdf>.

For further information about the FMC, see their website at <http://www.familymediationcouncil.org.uk>.

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Document 4: Code of Practice of the Restorative Justice Council

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Appendix 1 - Drafting, Documents and Precedents

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Document 4: Code of Practice of the Restorative Justice Council

- A1-038 This document, which is renewed every three years, may be found at: <https://restorativejustice.org.uk/sites/default/files/resources/files/RJC%20Practitioner%20Code%20of%20Practice.pdf>.

For further information about the RJC, see their website at <https://restorativejustice.org.uk/>.

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Document 5: Academy of Experts—Rules for Expert Determination

Brown & Marriott's ADR Principles and Practice, 4th Ed.

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Document 5: Academy of Experts—Rules for Expert Determination

A1-039 This document may be found at: https://www.academyofexperts.org/system/files/documents/ed_rules_booklet.pdf.

These Rules provide a framework and timetable for the expert determination process, designed for use in virtually any dispute in any jurisdiction. For further information, see the Academy's website at <http://www.academy-experts.org/>.

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Document 6: Mediation clause (short form)

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Appendix 1 - Drafting, Documents and Precedents

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Document 6: Mediation clause (short form)

- A1-040** *This is a simple form of clause for civil or commercial mediation. See Ch.21 for considerations about the enforceability of contract clauses, which may need to have significant detail to be upheld by the courts in some jurisdictions. If however, sufficient detail is inserted to give the clause effect, for example, an identified or identifiable neutral, organisation and procedure, it may well be upheld.*

If any dispute arises out of this agreement, the parties shall in the first instance attempt to resolve it by mediation. In such event, the mediator shall be [name] [nominated by (mediation organisation)] and shall mediate in accordance with the [rules] [mediation Code of Practice or model procedure] of [name of organisation].

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Document 7: Arbitration clause (short form)

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Appendix 1 - Drafting, Documents and Precedents

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Document 7: Arbitration clause (short form)

A1-041 *The following is a specimen short form for domestic arbitration⁴:*

If any dispute arises out of this agreement, including any dispute about its performance, construction or interpretation, it shall be referred to arbitration in accordance with the provisions of the **Arbitration Act 1996**. A single arbitrator [nominated by ... and arbitrating under the Rules of Arbitration of] shall conduct the arbitration, whose decision in relation to any such dispute shall be final and binding.

Footnotes

- ⁴ This needs to be adapted to specific needs and circumstances. For examples of clauses suggested by specific arbitral organisations see e.g. the ICC clause at <https://iccwbo.org/publication/standard-icc-arbitration-clauses-english-version/> or the LCIA clause at http://www.lcia.org/dispute_resolution_services/lcia_recommended_clauses.aspx.

Document 8: Combined negotiation, mediation and arbitration clause

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Appendix 1 - Drafting, Documents and Precedents

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Document 8: Combined negotiation, mediation and arbitration clause

A1-042 *Parties may wish to stipulate in a contract that they will try to resolve differences by negotiation in the first instance. If that fails, it is to be followed by mediation if necessary. That would be followed by arbitration if the mediation were not to produce an agreed outcome. The following is a specimen of this⁵:*

If any dispute arises out of this agreement, including any dispute about its performance, construction or interpretation, the parties shall in the first instance endeavour to resolve it by agreement through negotiations [conducted in good faith].⁶ If they are unable to agree, the dispute shall be referred to mediation by [name] [nominated by (mediation organisation)] who shall mediate in accordance with the [rules][mediation Code of Practice or model procedure] of [name of organisation].

The parties reserve all their rights in the event that no agreed resolution is reached in the mediation. Neither party shall be precluded from [taking interim formal steps as may be considered necessary to protect such party's position] [commencing or continuing litigation, arbitration or other adjudication] while the mediation is pending.

If the dispute is not resolved by mediation within [28][42][60] days of its initiation, or such extended period as the parties may agree, the dispute shall be referred to arbitration in accordance with the provisions of the [Arbitration Act 1996](#). A single arbitrator [name] [nominated by (relevant arbitral or other body)] shall conduct the arbitration, whose decision in relation to any such dispute shall be final and binding. In such event, the rules of the [relevant arbitral body] shall apply in relation to such arbitration.

The law of [England] shall apply to this agreement, which shall be interpreted and construed in accordance with such law.

Footnotes

⁵ See [Ch.21](#) regarding the enforceability of contract clauses.

⁶ As to the questionable effect of contracting to negotiate "in good faith", see [Ch.4](#) under the heading "Good faith in negotiation".

Document 9: CEDR—model mediation agreement

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Document 9: CEDR—model mediation agreement

A1-043 This document may be found at: https://www.cedr.com/about_us/modeldocs/?id=31.

It should be read together with the relevant notes at: https://www.cedr.com/docslib/11th_edition_CEDR_Solve_notes.pdf.

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Document 10: Agreement to Mediate (family)

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Appendix 1 - Drafting, Documents and Precedents

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Document 10: Agreement to Mediate (family)

- A1-044** Family mediation organisations tend to have or recommend their own form of Agreement to Mediate, which may commonly be adapted to individual circumstances. Members may have online access to these templates, which are currently not available to non-members. Examples may be found, for members of the family lawyers' organisation Resolution at <http://www.resolution.org.uk/> or for members of the Family Mediators Association at <https://thefma.co.uk/>.

The following sample has not been specifically approved by any mediation organisation, but provides an outline example of the kind of agreement that might be used in relation to a divorcing couple in England and Wales (where there is an obligation to provide complete financial disclosure when addressing financial issues)—subject to appropriate individual adaptation as necessary and subject also to any requirements under the General Data Protection Regulation (GDPR) 2018 in which regard, see Ch.22, paras 22-027 to 22-031. It would be signed by the mediator(s) and counter-signed by each party. If any lawyers and/or other participants are to be involved in the mediation, they too would counter-sign it by way of acceptance of the confidentiality and other relevant terms.

To [parties]

You have asked me to mediate certain issues concerning your relationship. I now record the terms on which I do so:

1.

You appoint me and I agree to act as mediator in relation to these issues. I confirm that I do not have any conflict of interest in doing so or any interest in the outcome. I will try to help you both reach terms that you find acceptable, which does not mean trying to anticipate what the outcome would be if the issues were decided by the court.

2.

I do not mediate as a solicitor but function as an independent and impartial mediator, and I do not advise or represent parties or give legal advice to you, jointly or individually.

3.

We undertake to one another that, except as may be otherwise agreed in writing, we will each maintain confidentiality in respect of all statements, communications and matters arising in the mediation, subject to the following exceptions in which confidentiality will not apply:

- 3.1insofar as there is a need for disclosure in order to comply with any statutory obligation and/or data protection provision, obtain professional advice or enforce any settlement agreement;
- 3.2if any public policy requirement (including anyone suffering or appearing likely to suffer significant harm) exceptionally overrides the duty of confidentiality; or
- 3.3if any obligation or requirement of law, whether under the [Proceeds of Crime Act 2002](#) and/or under any related regulations and/or otherwise, requires a disclosure to be made to any relevant authority.

4.

You both undertake to provide such financial and other information as may be relevant to your issues and to furnish any supporting documents reasonably required. All financial information (which may include personal information that would be relevant to a court in making a financial determination) is provided on an open basis, which means that it can be used in court whether in support of a consent application or in contested proceedings.

5.

Subject to Paragraph 4 and to all relevant data protection laws (including in particular the General Data Protection Regulation (GDPR) 2018) to which this entire Agreement is subject, the mediation and our discussions and communications, for example about possible terms of a financial settlement, are conducted without prejudice and with a claim of evidential privilege. You may not have access to any of my notes or call me as witness in any proceedings relating to any aspect of the mediation.

6.

As part of the mediation process, in addition to any joint or other meetings, you agree that I may have separate meetings or discussions with each of you and with your lawyers. Anything discussed separately will be maintained confidentially and not disclosed to the other, save as I may be authorised to disclose, subject to the following exceptions:

6.1 The exceptions set out in Paragraphs 3 and 5 above;

6.2 As set out in Paragraph 4: any financial information even if disclosed to me separately will be open and will not be kept confidential from the other;

6.3 Anything that may cause or risk causing any harm to a child or any unilateral action actually taken or intended to be taken that may fundamentally affect existing child arrangements without due consultation with the other party; and

6.4 Any communication or information of which I may become aware indicating that any agreement or record being drafted or prepared by either/both of you and/or your legal representatives contains any error, ambiguity or misunderstanding

7.

Any decisions arrived at in the mediation which may be significant to either or both of your positions (including any proposed settlement terms) will not be made into a binding agreement until you have each had the opportunity to seek advice on them from your lawyers (who may in some circumstances be in attendance). Any such terms will not be legally binding unless and until reduced to writing in an open, binding agreement or draft order signed by you or on your behalf. Your lawyers will prepare any such agreement and/or order and I may if required assist them in doing so.

8.

You both reserve your respective rights (including the right to proceed to court) should the mediation not result in a settlement of the issues under discussion.

9.

I will act in good faith throughout the process and will not be liable to you, individually or collectively, for any act or omission in respect of my services under this Agreement.

10.

Either of you may terminate the mediation at any stage. If I think that the continuation of the mediation or my appointment is inappropriate, I may end the mediation without necessarily assigning any reason. However, as long as it is pending, you both agree to work in good faith towards seeking an acceptable outcome.

11.

My fees, shared between you equally unless otherwise agreed, are charged at the rate of £x per hour for meetings, phone, e-mail and other communications, any agreed drafting and any other work necessarily undertaken in the mediation.

12.

Apart from these fees you will be responsible for providing the mediation venue (which I can arrange on your behalf) and paying any other expenses necessarily incurred.

13.

These fees and expenses are payable on presentation of my invoice or any interim invoice(s) that I may render.

14.

You will each be responsible for your own costs and expenses of taking part in the mediation and your individual representation.

15.

This Agreement shall be governed by and construed in accordance with English law.

Document 11: CEDR Model Early Neutral Evaluation Agreement —and guidance notes

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Appendix 1 - Drafting, Documents and Precedents

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Document 11: CEDR Model Early Neutral Evaluation Agreement—and guidance notes

A1-045 This document, including notes, may be found at https://www.cedr.com/about_us/modeldocs/?id=9.

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Document 12: CEDR Model Executive Tribunal Procedure and Agreement

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Document 12: CEDR Model Executive Tribunal Procedure and Agreement

A1-046 This may be found at https://www.cedr.com/about_us/modeldocs/?id=10.

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Document 13: Dispute risk analysis

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Appendix 1 - Drafting, Documents and Precedents

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Document 13: Dispute risk analysis

A1-047 *The following fictitious example was inspired by risk analysis work done by Professor John Wade and developed from a model originated by a group comprising Heather Allen, Tony Allen, Henry Brown, Philip Naughton QC and Roger Tabakin, whom the authors wish to acknowledge. The form may be individually adapted: para.5 is based on the issues appearing from the parties' summaries and documents and may follow a decision tree sequence. Ultimately judgments tend to be subjective and this analysis is merely an aid to reaching those judgments.*

The form may be provided at the outset or reserved as an impasse strategy. Parties may return it to the mediator, but more usually it is provided for parties' own private analysis, not shared with the mediator.

<i>Dispute Risk Analysis</i>	
<i>Dispute between ABC Agency Limited ("ABC") And DEF Traders Limited ("Traders") Risk analysis by [] On (date) [] January 2018</i>	
PRINCIPAL ACTION AND COUNTERCLAIM (IF ANY)	
1. How much is the claim (quantifiable)?	£
2. What are the unquantifiable elements of the claim (if any) e.g. injunction, accounting, rectification, declaration etc.?	
3. How much is the counterclaim, if any (quantifiable)?	£
4. What are the unquantifiable elements of the counterclaim (if any) e.g. injunction, accounting, rectification, declaration etc.?	
5. Regarding the important issues listed on 12 December 2017, how do you rate your chances of succeeding on each issue at trial? These are crystallised to include the following:	Prospects of success %
5.1 Were Mr Smith and/or Mr Jones "ABC personnel" such as to render ABC responsible for their actions?	
5.2 Were their actions such as to entitle Traders to terminate the 2015 Agreement summarily?	
5.3 Do the Commercial Agents Regulations apply?	

5.4 Is ABC entitled to an indemnity?		
5.5 Did Traders cause the destruction of ABC's business?		
5.6 If 5.2 answer is negative, quantification of ABC's claim.		
5.7 If 5.2 answer is positive, quantification of Traders' counterclaim.		
5.8 What is the appropriate contractual adjustment between ABC and Traders?		
6. Having regard to Question 5, and taking all other relevant factors into account, what are the % prospects of the main claim succeeding:	%	Sum receivable or payable
In full as claimed		£
A significant part of the claim		£
7. Having regard to Question 5, and taking all other relevant factors into account, what are the % prospects of any counterclaim succeeding:	%	Sum receivable or payable
In full as claimed		£
A significant part of the counterclaim		£

HOW MUCH IS IT GOING TO COST?

8. Are you fully indemnified for your own costs to trial (for example by insurance or other arrangement?)	Yes	No
9. Are you fully indemnified for your opponent's costs to trial (for example by insurance or other arrangement?)	Yes	No
10. If you settle before trial, will your opponent's costs be fully covered by insurance or any other indemnification?	Yes	No
11. If the answer to Question 10 is "no", estimate your opponent's costs to date of settlement.	£	
12. Is your opponent indemnified for its/their costs?	Yes	No
13. What are your total costs and expenses to date?	£	
14. What are your estimated legal costs to the end of a trial? Consider witness expenses, expert costs, counsel's costs and all other cost items.	£	
15. If you succeed, estimate how much of your costs you are likely to recover.	£	
16. Even if you succeed, how much of your costs will not be recoverable? (How much of this will relate to future costs still to be incurred in getting to trial?)	£	(Future element £)
17. If you do not succeed, estimate how much of your opponent's costs you are likely to have to pay.	£	
18. If the matter goes to trial, estimate the time taken by your management, staff and others in preparing, seeing lawyers and attending court. Put a value on this.	Time:	Value: £

19. Estimate the value of resulting lost business/income.	£
20. If you succeed at trial, what interest (if any) are you likely to receive?	£
21. If you do not succeed at trial, what interest (if any) are you likely to pay?	£
22. If either party appeals a trial judgment, estimate what extra costs you might incur.	£
23. Estimate what costs and expenses you will need to lay out pending the trial?	£

HOW LONG WILL IT TAKE?

24. If a date of trial has been fixed, when is it?	
25. If not yet fixed, estimate when it is likely to take place.	
26. Estimate the length of trial (number of days in court).	
27. If either party appeals, estimate the further time involved in going through the appeal process.	
28. Is there any prospect that your opponent will not have the resources to meet a judgment, immediately or at all? If so, estimate the time, prospects and costs of enforcing a judgment.	£

OTHER FACTORS

29. Has the other party made an offer to settle (under Part 36 of the Rules or otherwise)? If so, what are your chances of “beating” that offer?	%
30. Have you made an offer to settle (under Part 36 of the Rules or otherwise)? If so, what are the other side’s chances of “beating” that offer?	%
31. Is this dispute limited to the existing litigation, or is there any other dispute pending or potentially likely anywhere else (for example in courts abroad, tribunals, trade mark registries, or other dispute resolution fora)? If so, place an estimated value on resolving all such other disputes.	£
32. Put a (notional) value (positive or negative) on the benefit of settlement rather than trial, taking into account the possibility of publicity (positive or negative), impact on your and/or your opponent’s reputation and goodwill, effect on working relationships and any other factors.	£
33. Is there any risk that even if you succeed at the trial, there will be other consequent negative repercussions? Place a value on such risk.	£

34. Put a (notional) value on the benefit for you and/or your employees and witnesses in avoiding the stress of preparing for and attending a trial (apart from the estimated cost in Question 18 above). Might issues arising in a trial risk damaging the credibility, reputation or authority of any party or witness?	£
35. Does this dispute have any non-pecuniary personal element? If so, might settlement terms address that element, for example, through some form of private or public acknowledgment and/or appropriately worded terms? (Particulars are not required here.)	
36. How damaging would an adverse trial decision be to you and/or your business? Put a (notional) value on the effect of losing the case.	£
37. How damaging would an adverse trial decision be to your opponent? Put a (notional) value to your opponent on the effect of losing the case.	£
38. Might there be any indirect benefits from a settlement (e.g. restoring or preventing further damage to goodwill; trading opportunities etc.)?	

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Document 14: Civil/commercial terms of settlement (framework)

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Appendix 1 - Drafting, Documents and Precedents

Documents and Precedents

Document 14: Civil/commercial terms of settlement (framework)

A1-048 *Because of the range of possible agreements and the diversity of styles and requirements, this precedent will merely outline a possible template, which must be adapted according to the needs of each individual case. The substantive terms would be attached as a schedule.*

The format and content of the agreement will vary, depending on whether a draft consent order is required, a deed, a complete formal agreement, heads of agreement, an exchange of letters or an even more informal record. Style will vary from one drafter to another.

AGREEMENT made this day of between:

(1) ABC	(“Mr. C”)
(1) XYZ Investments Limited	(“XYZ”)

PREAMBLE:

A.The Parties have been in dispute in relation to the 2017 Proceedings and the Section 994 Petition, as hereafter defined, and as outlined in the Parties' respective mediation summaries and in the agreed bundle of documents (“the Dispute”).

B.The parties agreed to deal with their disputes in mediation with DEF as mediator. The mediation took place on [date]. Mr C was represented by [solicitor/counsel]. XYZ was represented by [solicitor/counsel].

C.In the mediation the parties settled their differences in relation to all pending disputes, and they wish to record the terms of such settlement on a binding basis in this Agreement.

IT IS AGREED:

1.

Upon signature by the Parties, this Agreement shall immediately be fully and effectively binding on them by way of a complete and final settlement of all proceedings, and of the Dispute and all claims that either of them may have against one another in relation to the Dispute. Tomlin Orders and/or any other court orders shall be obtained by consent to give effect to these terms.

2.

The following definitions shall apply in this Agreement:

“the Company”	XYZ Superior Holdings Limited
“the 2017 Proceedings”	The action, as amended, brought by Mr C against XYZ in the Chancery Division of the High Court, No.
“the Section 994 Petition”	The Petition under Section 994 of the Companies Act 2006 filed in the Chancery Division of the High Court, No.

“all Proceedings”

Collectively, the 2017 Proceedings and the Section 994 Petition

3.

The terms of settlement agreed between the Parties are set out in [the schedule] [draft Consent Order with schedule] attached to this Agreement and signed by them.

4.

This Agreement shall be immediately binding upon signature by the parties. The signatories to this Agreement on behalf of XYZ jointly and severally warrant that they are duly authorised to enter into this Agreement on its behalf.

5.

In the event of any dispute or difference arising in relation to any aspect of this settlement, or the implementation or performance of its terms, the parties agree that before taking any formal contentious steps, they will first attempt to resolve such dispute or difference by negotiation. If that fails, they agree to refer it to further mediation by DEF (subject to his availability, otherwise by a mediator appointed by [mediation organisation]). If it remains unresolved within 4 weeks of such referral to mediation, either party shall be free to take such action as he or they may see fit. These provisions shall not, however, preclude either party from taking any injunctive or other interim legal proceedings considered necessary for the urgent protection of such party's rights.

6.

Each party will pay their own legal costs in relation to the mediation, and will share equally the costs of the mediation including the mediator's fees.

Document 15: Family—Memorandum of Understanding

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Mainwork

Appendix 1 - Drafting, Documents and Precedents

Documents and Precedents

Document 15: Family—Memorandum of Understanding

A1-049 *The authors acknowledge Resolution for permitting the reproduction of this draft summary. The names, details and circumstances used are fictitious and are merely illustrative. Each summary will have to be adapted to its individual needs. An “open” financial summary setting out the couple’s financial position fully would accompany this memorandum.*

Without prejudice

Miles Flurry and Katherine (Kate) Flurry, who have been married for 14 years, have been in mediation with [] regarding various matrimonial issues. They have had six mediation meetings, during which they have examined their respective financial and personal circumstances, and have looked at proposals for their financial settlement. They have also had regard to the position as it affects their children, Oliver (aged 10) and Tamsin (aged 8).

This memorandum is furnished on an evidentially privileged and “without prejudice” basis. It is intended to help Miles and Kate to consider and obtain advice on the current proposals and does not record or create a binding agreement. An agreement will only come into being should they both decide to commit themselves to it, and they execute an appropriate formal document, after having each had an opportunity to take independent legal advice.

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Background circumstances

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Appendix 1 - Drafting, Documents and Precedents

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Document 15: Family—Memorandum of Understanding

Background circumstances

Miles is a director and shareholder in the company Manifest Occult Publications Limited which publishes fantasy and occult books. He has expressed concern about the future of this specialist field of publishing, but accepts that for the foreseeable future, the company is likely to continue to be profitable. Kate is a full-time primary school teacher. She is currently being considered as deputy-head of her school.

Miles and Kate are both living at 33 Aspinall Road, London N3, but are conducting their lives separately. They wished to separate and used the mediation to discuss how they could do so in an orderly way and on terms that they could both accept.

Kate and Miles had a number of factors in mind in formulating their proposals. They were concerned to ensure that any arrangements they might reach in the mediation would be best for Oliver and Tamsin and would provide them with the necessary security. They wanted to achieve a “clean break” settlement but recognised the difficulties in doing this. They wanted the settlement terms to feel fair to themselves and to one another.

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Settlement discussions and proposals

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Appendix 1 - Drafting, Documents and Precedents

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Document 15: Family—Memorandum of Understanding

Settlement discussions and proposals

The following are the matters discussed in the mediation, including the proposals which Kate and Miles find mutually acceptable:

Future of the relationship

1.

Miles and Kate have resolved to separate. This will be achieved in practice when they sell their property at 33 Aspinall Road, London N3, and can buy separate homes.

2.

They have accepted that their marriage has broken down and that a divorce is now inevitable. They do not regard this as urgent, though both wish to have this properly formalised in the ordinary course.

Recording the proposed terms

3.

They propose to record their settlement terms in a Deed of Separation, or in whatever way their solicitors may advise; and they will implement such terms. They realise that until a court order is obtained, there is a possibility that either of them might seek to vary any such terms and that the court retains the power (if it considers it appropriate) to re-open matters. However, neither of them has any present intention to seek to vary the terms, and barring anything wholly unforeseen that might materially change the position, neither would expect or wish to do so in the future.

Arrangements for Oliver and Tamsin

4.

Both Kate and Miles have expressed their concerns for the needs and interests of Oliver and Tamsin. They wish to maintain a good relationship with one another in the children's interests, and propose to arrange their separation, housing and future contact and communications generally in such a way that this is achieved.

5.

Detailed practical arrangements concerning Oliver and Tamsin, including decision making, communications and other matters still need to be discussed and agreed. Kate and Miles have, however, arrived at a broad understanding as to how they will approach these aspects:

5.1 Oliver and Tamsin will continue to reside with Kate when she moves into her new home.

5.2 Kate and Miles will establish a framework for Oliver and Tamsin to spend time with Miles.

5.3 The kind of pattern that Miles and Kate have in mind will be something like Miles spending time with Oliver and Tamsin for a weekend every fortnight. Provisionally, the idea is that he will fetch them on Friday evening and bring them back on Sunday evening; but the details remain to be discussed. Miles will also speak to them freely on the phone between weekend visits, and may visit them if he is in the area. However, he will always check in advance whether interim visits will be convenient for them and for Kate. He will also arrange to have them with him for part of the holiday periods.

Kate and Miles both recognise that Oliver and Tamsin need a good relationship with them both. They want to support one another in achieving this.

5.4 Once the pattern is in place, both Kate and Miles accept that there will need to be flexibility. They will try to establish a mechanism for making changes without unduly inconveniencing the children or one another.

5.5 They have in mind to liaise with one another about Oliver and Tamsin as necessary, and where practicable to deal jointly with matters such as schooling, health needs and the like. They will try to devise a way to ensure that these communications take place, and how each will deal with emergencies in case they cannot contact the other.

5.6 The detailed arrangements concerning these matters have been deferred, partly because of time constraints and partly because both Miles and Kate will find it easier to discuss these matters more usefully when they have actually separated and have established themselves in their separate homes. Meanwhile they are satisfied that these broad principles will be able to guide them in their discussions. If necessary, they will arrange further mediation to deal with any difficulties, should they arise.

Sale of 33 Aspinall Road and division of proceeds

6.

The house at 33 Aspinall Road is to be marketed immediately at an asking price of £980,000. Any genuine offer of £950,000 or more will be acceptable. (A tentative offer of that sum has already been received.) If that level cannot be achieved within

three months, Kate and Miles will consider accepting less, as advised by their agents, Creative Sales (who are being given an initial three months sole agency).

Contracts will not, however, be exchanged on any sale or separate purchases until agreement between Kate and Miles has been reached and formalised.

7.

The mortgage redemption, costs of sale and provision for both parties to move to their new homes are set out in the schedule provided by Miles and Kate. Provisionally, this is expected to total approximately £160,000. It is proposed that the net proceeds of sale will be paid to Kate absolutely, in settlement of all her capital claims against Miles. Assuming a price of £950,000, such net proceeds will be about £790,000. If there is any surplus over £790,000 this will be shared as to 67 per cent (Kate): 33 per cent (Miles).

8.

Kate intends to use the proceeds of sale of 33 Aspinall Road to buy a house for herself and the children for about £700,000. She will pay all costs of purchase and any other expenses out of her capital. It is not her intention to have a mortgage. She has seen a house in the nearby area, which will enable her to remain in the same catchment area for the school. The asking price is £725,000, which she believes will be negotiable: it requires about £25,000 of work to be done to it. She believes that it (or something similar) will be suitable.

9.

Miles has made an offer of £420,000 on a flat for himself, which has been accepted, subject to contract. He will be using his capital towards this, and intends to borrow about £175,000 by way of mortgage.

10.

If Kate and Miles wish to proceed with the sale of 33 Aspinall Road and the purchase of new homes for themselves, then they are aware that certain steps will be necessary before any binding legal commitments are made on the sale and purchases.

10.1 Both Miles and Kate intend to obtain specific advice from their respective solicitors on the agreement they are proposing to enter into between themselves, to satisfy themselves about doing so.

10.2 They propose to sign a written agreement on an open basis, in terms approved by their respective solicitors.

10.3 If a comprehensive settlement is not yet reached, they know that an interim agreement should be entered into on an open basis. It will be expressed to be without prejudice to any further adjustment that might need to be made in the context of any overall resolution of the financial issues and to both of their rights generally. It will also be without prejudice to any argument that either of them may wish to pursue in any subsequent proceedings if matters are not settled by agreement. Its intention would be expressed as being to facilitate their separation, to be taken into account in any final resolution of the matter. The terms of the interim agreement would need to be agreed between the solicitors.

11.

If final terms of settlement are now reached and approved by Miles and Kate after having been advised by their respective solicitors, then an interim agreement would not be necessary. In that event, all terms can be incorporated into a final

agreement as advised by the respective solicitors (for example, in a Deed of Separation or in minutes of order if proceedings are envisaged).

Maintenance for Oliver and Tamsin

12.

Miles proposes to pay Kate the sum of £675 per month as maintenance for each of Oliver and Tamsin, with effect from the first day of the month following completion of the sale of 33 Aspinall Road. That would be acceptable to Kate. This will continue until each child attains the age of 18 years or completes full-time schooling, whichever is the later, or further agreement or order. This offer is being considered within the context of Kate's income needs generally. It is not being considered within the provisions of the Child Support Act. Kate and Miles have declined to have CSA calculations informally made, but may revert to this if they wish.

Maintenance considerations for Kate

13.

In consideration of the imbalance of payment of the proceeds of sale of 33 Aspinall Road in favour of Kate, Miles wished to be relieved of any further maintenance obligation towards Kate personally. He accordingly proposed that the settlement terms should constitute a "clean break", with Kate having no claims at all against him. The implications and effect of a "clean break" were considered and discussed.

Having regard to her other financial resources, Kate was willing to consider these proposals, and to accept the capital imbalance and the maintenance figure of £1,350 per month for the children, with no personal maintenance for herself. However, she did not feel able to agree to waive her right to maintenance permanently, in case anything should arise while the children were still young, which might preclude her from working. She therefore proposed that Miles's offer would be acceptable if instead of an immediate clean break, he was willing to pay her a nominal sum of £1 per year in order to reserve her rights.

Considerable time was spent in trying to find a solution to this issue. Ultimately, both agreed to consider the following formula:

13.1 The above terms would be acceptable, with a nominal maintenance payment of £1 per annum to Kate, on the basis of the further matters set out below.

13.2 It would be recorded that a capital payment had been made in consideration of Kate's personal maintenance being waived, and that although she was reserving her rights, that would only be against an unforeseen and serious problem arising, which could not be met in any other way. Maintenance would not be sought to meet any day-to-day difficulties that Kate might experience in managing on her income. (Both parties acknowledged that it would be difficult to know which way the court would exercise its discretion if the issue ever had to be dealt with by the court.)

13.3 If and to the extent that Kate sought any future maintenance, either directly for herself or attributable to her within a Child Support Agency context, she would agree to credit Miles with a corresponding capital sum by way of an interest in her property, subject to a maximum of £25,000. She would hold that by way of a Declaration of Trust. (It was understood that this provision might not necessarily be legally enforceable.)

13.4 Attempts would be made to cover Kate by way of sickness and if possible redundancy insurance for a period of 10 years. By that time, both children will have attained their majority. Miles would contribute 50 per cent of the premiums for the duration of this period (subject to these not being “loaded” in any way, otherwise 50 per cent of the unloaded level).

13.5 Kate's claims for personal maintenance would be dismissed 10 years from the date of an Agreement being formalised on this settlement. She would not be entitled to apply for this term to be extended.

Division of assets

14.

Miles and Kate will each retain their own motor car and other personal possessions. They will share the contents of 33 Aspinall Road, according to their respective needs, which they expect to be able to resolve without assistance. Broadly, they envisage that Kate will have all bedroom furniture for herself, Oliver and Tamsin, and that the remaining furniture will be divided approximately 3:1 in Kate's favour. If they have any difficulty in resolving this, they will arrange a further mediation meeting.

15.

Miles will pay Kate's Visa and personal debts in full as listed in her financial statement.

16.

Subject to the above, Kate and Miles will each retain as their sole property all assets respectively in their own name or under their individual control.

Full settlement of all capital claims

17.

Subject to the above terms, Kate makes no further claim on Miles' assets, nor Miles on Kate's. This is a full and final settlement of all capital claims that either of them may have against the other, however arising. All capital claims are to be reciprocally dismissed in any court proceedings to be brought in due course. All claims under the [Inheritance \(Provision for Family and Dependants\) Act 1975](#) are similarly to be dismissed as and when Kate's maintenance claims are extinguished: meanwhile will be reserved. The implications of that Act were briefly discussed, but Kate and Miles will discuss and consider these further with their solicitors.

Dealing with future issues

18.

Miles and Kate have resolved to try to deal in a reasonable way with any issues that may arise in the future, whether to do with Oliver and Tamsin, or of a financial nature, so far as the latter aspect has been reserved. If they have any problems about doing so personally, they intend to revert to mediation.

Miles and Kate will now wish to consult their respective solicitors for advice on these proposals. If, having received advice, they wish to enter into an agreement to settle all issues, the solicitors will prepare the necessary documents. Alternatively, the solicitors may assist with the preparation of interim documents (in discussion with me if so agreed) to enable the house sale and purchases to proceed in the meanwhile.

If after seeing solicitors Miles and Kate wish to discuss matters further, then further mediation meeting(s) can be arranged for that purpose (attended by the solicitors as well, if that is considered helpful and necessary).

Document 16: Civil/commercial mediation checklist

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Appendix 1 - Drafting, Documents and Precedents

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Document 16: Civil/commercial mediation checklist

- A1-050** *Mediators may find it helpful to have a checklist, by way of an informal guide. The following checklist could serve in relation to the standard model of commercial and civil mediation, adapted as necessary to suit individual requirements:*

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Mediation checklist

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Document 16: Civil/commercial mediation checklist

Mediation checklist

A. Preliminary matters

1.

Have both/all parties agreed to the mediation? If not, is any assistance required in examining the process? Any documents to be sent? Discuss mediation with each party?

2.

Has a formal agreement to mediate been submitted to the parties and agreed by everyone regulating the terms on which the mediation is to be undertaken, including mediation confidentiality, privilege, fees etc.?

3.

The following matters may need to be discussed and agreed, either at a preliminary meeting of lawyers and/or parties, or by way of phone and/or e-mail communications:

3.1 Arrange for case summaries and bundles of relevant documents. Outline requirements and timetable.

3.2 Consider appropriate process and meeting arrangements. Is one block of time required, or might parties want an initial meeting with the possibility of further meetings? Fix initial or substantive meeting: date, venue and arrangements.

3.3 Discuss parties' presentations.

3.4 Check authority of representatives of parties. Will they be able to conclude an agreement or will they need to seek further authority? Will all necessary parties be present or contactable, e.g. insurers, sub-contractors? If not, do parties all agree to proceed in any event, and will this be viable?

3.5 Consider whether any aspects can be addressed pending the substantive meeting. Anticipate and reduce issues for the main meeting.

3.6 Discuss and check legal representation.

3.7Check whether there are any deadlines, e.g. limitation period shortly to expire, court hearing date or the like. If so, ensure that they are noted and built into timetable or that there is a binding agreement for limitation period to be suspended or otherwise covered.

3.8Discuss practicalities e.g. after hours availability? Are experts or specialist advisers contactable after hours if needed?

3.9Check process and ground rules understood, address any queries.

4.

Arrange or check venue details including for example:

4.1Ensure that adequate accommodation is available. Is a room needed for each party? Are special reception arrangements needed? Set up practical arrangements for working lunches, refreshments, etc.

4.2Is the venue available after hours if required? Will printing, copying and any other necessary facilities be available?

4.3Any special circumstances requiring special preparation? Flip-chart, photocopying and printing facilities or any other facilities needed and available?

5.

Check summary and documents when received. Any supplementary documents or information needed before meeting?

B. At the substantive meeting

1.

Mediators commonly welcome each party as they arrive, show them to their rooms, put them at ease.

2.

Mediator's welcome and introduction, acknowledge summaries and documents, outline procedure (including in particular confidentiality aspect and without prejudice basis for discussions) and deal with any queries.

3.

Where mediator considers appropriate, each party, personally and/or through their lawyer, to make a brief case presentation.

4.

If any additional factual information is needed, consider whether this should be sought from the parties together, or whether considerations of confidentiality indicate that these should be obtained privately in caucus.

5.

Consider (i) how long to continue with all parties together; (ii) when to caucus, for how long, and whether and when to meet together again; (iii) whether and how best to work with legal representatives; (iv) whether to seek expert input or other third party involvement and how to do so.

6.

When any party is not with the mediator, is there any useful task that can be done while waiting, e.g. getting supplementary information or considering options?

7.

Maintain notes sufficient to ensure that all aspects covered, confidentiality between parties preserved, tasks of parties noted, and terms recorded.

8.

Consider whether and how to obtain any missing expertise, technical, legal or other. Engage an independent expert and at whose cost? Status of advice received?

9.

If caucusing with one party takes longer than expected, check out periodically with other parties if necessary.

10.

If issues unresolved at end of initial meeting:

10.1 Consider procedure for future: Fix new appointment? Meet parties separately by appointment? Any other procedure or specific matter for agenda?

10.2 Any practical tasks which the parties and/or the mediators need to undertake before next stage? Additional information or documents? Third-party inquiries? Legal or other professional advice? Specify, with timetable if appropriate.

10.3 Any settlement-gearred steps parties can take in the meanwhile, e.g. formulating proposals, considering existing options, looking at new settlement permutations?

10.4 Check whether any interim matters need to be urgently resolved before next step in mediation, e.g. decisions which need to be taken in the meanwhile and which parties cannot resolve themselves?

10.5 Consider and check whether an interim summary would be helpful, covering the matters partially resolved and indicating outstanding issues. This could be prepared and sent after the meeting.

10.6 Any other matters that need to be discussed with the parties or arrangements made?

C. In the event of impasse

1.

Can the issue in deadlock be deferred or dealt with on a temporary basis? Alternatively, is there a short-term basis for dealing with it for a trial period?

2.

Have the parties undertaken a risk analysis? Have they examined their best and worst alternatives to a negotiated resolution?

3.

If the deadlock issue arises in relation to a symbol or form of words, have the underlying needs and concerns been examined?

4.

Do the parties have different perceptions of fairness in relation to the outcome? Has this been examined and might it be further discussed?

5.

Will a non-binding evaluation of the sticking issue help the parties to budge? Or might this just entrench positions further? Who should provide this? The mediator or a third party such as counsel? Or perhaps a binding adjudication, limited to the sticking issue?

6.

If strong emotional responses are creating a block, can it help for these to be expressed or for some other person to be asked to take over representing a corporate party or to join an adjourned meeting?

7.

Will it help the parties if the mediator provides a written summary of the position setting out the aspects resolved and those awaiting resolution, with the alternative proposals and settlement parameters? Can and should the mediator suggest some possible permutations of existing proposals which may take matters forward?

8.

Will it help and would it be appropriate for the mediator to make proposals for the settlement of the issues?

9.

Are there any other impasse strategies that may be used? Consider the specific sticking issue, and examine the possibilities. Go back to basics: examine why the parties came to mediation, what they hope to achieve, what other advantages there are in continuing, can the proposals be reconstructed more acceptably? Can the parties themselves suggest any basis for breaking the deadlock or re-establishing the negotiations?

10.

If dealing with a high conflict party or parties, have the special considerations relevant to these been considered and applied? Review approach in the light of these factors.

11.

If the deadlock cannot be resolved and the mediation must come to an end, do the parties realise this and have they considered what the implications would be? Might it help them to have an opportunity to consider these?

D. When issues resolved

1.

Arrange for the parties' lawyers to draft a careful note of matters resolved, for parties' immediate signature or draft terms of consent order if court proceedings are pending. Be clear as to what is required: do parties want to be immediately and unconditionally bound on signature? Or is the agreement conditional upon the fulfilment of any stated contingency, and if so, exactly what? Or is there to be no binding agreement, but merely a note of acceptable proposals which the parties will finalise through their legal advisers? Or some other reservation or nuance? Parties and/or their lawyers may need support during the drafting process.

2.

Are there any provisions in the agreement to mediate or in the ground rules which may affect the terms of settlement? Check this. If, for example, there is a provision that if a party does not give effect to a settlement, the other may be released from the settlement terms on written notice, check if this is required; if so, strict time scales should be specified; if not required, alternative provisions should be specified.

3.

If legal representatives have not attended the mediation, do the parties want the mediator to communicate with those advisers? Clarify requirements.

4.

Check with parties if anything else is required from the mediator or the ADR organisation. For example (i) mediator or ADR organisation to act as stakeholder, with specific directions; (ii) mediator to be supervisor of settlement terms, with

specific instructions and authority; (iii) mediator being available if any issue arises during implementation of settlement; (iv) mediator to act as expert or adjudicator in relation to implementation.

E. If mediation ends with issues unresolved

1.

Do not close the door on any particular options. Leave scope for parties to continue their own discussions. Consider whether parties wish and agree to leave any proposals and counter-proposals open for acceptance for an agreed period. If so, these will need very careful formulation and recording to be effective.

2.

Check if the parties want a without prejudice summary of the position to facilitate any continuing discussions, or anything else from the mediator.

3.

Do the parties want an evaluation and is it appropriate to furnish one? Or perhaps the mediator's proposals for settlement? Have appropriate explanations been given about these options and their implications?

4.

Offer the parties the opportunity to return to mediation if required.

5.

Check whether the parties would find it helpful to use the mediation to narrow and define the issues for adjudication.

Checklist caution

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Document 16: Civil/commercial mediation checklist

Checklist caution

This checklist is for guidance only, and cannot be comprehensive or definitive. It must obviously be used with discretion and personal judgment. It remains the responsibility of individual mediators to ensure that all relevant matters are covered and properly dealt with, whether or not included in this checklist.

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Document 17: Family mediation checklist

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Document 17: Family mediation checklist

A1-051 *This checklist is broadly based on a model of mediation structured into stages as envisaged in this book. It is, however, obviously adaptable to any other way of working. It assumes that the couple are not publicly funded and that they have a range of issues and that they have not expressed any preference for prioritising, and that finance will be addressed first. It follows the model of meeting the couple together, at least for some meetings. It includes provision for the model in which the mediator may also meet parties separately and privately.*

As in all mediation, checklists are for guidance only and do not prevail over parties' wishes and preferences. It cannot be comprehensive or definitive and mediators must use their discretion and judgment in amplifying and adapting it appropriately.

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Dealing with initial phone enquiry

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Dealing with initial phone enquiry

- Deal with any procedural enquiries, and explain how mediation works and the need for a Mediation Information and Assessment Meeting in certain circumstances (where court proceedings are envisaged, subject to exceptions). Where appropriate, indicate costs and possible number of sessions.
- Do not accept information about the merits of the matter. Avoid this by saying that you prefer to find out more about the merits when both are together.
- Check that the other party will be contacting you. Explain that this will be needed before mediation can commence.
- Establish the name and contact details of the enquirer, and check whether explanatory written material is required.
- Check urgency and timetable if a meeting is requested in the telephone call.

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The Mediation Information and Assessment Meeting (MIAM)

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Document 17: Family mediation checklist

The Mediation Information and Assessment Meeting (MIAM)

- Only mediators accredited by the Family Mediation Council (FMCA mediators) can conduct MIAMS.
- The MIAM can be conducted with the couple jointly, or more commonly if both attend, there may be separate meetings—or a combination of joint and separate meetings. However, in order to monitor for possible abuse or risk of harm, some time will have to be spent with each party alone. Sometimes only one party will attend the MIAM.
- Some mediators will conduct a MIAM by use of Skype or a similar electronic communication.
- Use this meeting to explain the mediation process to the couple, to deal with their questions about it and to explore their options. Consider their alternatives as well as cost and other implications, including perhaps the respective advantages and disadvantages.
- Inform the couple if you consider their issues suitable to be dealt with through mediation.
- If the couple decide not to continue into mediation or it is not suitable for them, sign the relevant court form to enable them to take court proceedings if that is what they wish to do.
- If the couple decide to enter into mediation, arrangements will need to be made to set up an initial mediation meeting and for them to be provided with the Agreement to Mediate and any preliminary information form (to be returned before the initial meeting), if not already provided.

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Arrangements for initial meeting

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Arrangements for initial meeting

•Check that both parties have approved the agreement to mediate and have returned the preliminary information form. If not, consider contacting the party whose form is missing to check that it is being sent. Familiarise yourself with the information furnished.

•In co-mediation, ensure that the co-mediator is fully briefed.

•Have the following documents available for the meeting: a spare copy of the Agreement to Mediate, for signature, three sets of financial disclosure documentation (to hand to the parties and for yourself) and the completed preliminary information forms.

•Have the following available namely, flip chart and marking pens, tissues, diary, calculator and any relevant tax, financial, welfare benefits or other tables.

•Set up the room for the meeting. Clear files and papers, establish a professional but informal ambience. Ensure privacy, non-disturbance and diversion of calls.

•Establish reception arrangements. Ensure that you are immediately notified as each party arrives so that they are not left together for any length of time (and not at all if there is any actual or potential hostility). If the parties are thought to be hostile, arrange separate reception areas or place the first arriving in the mediation room.

•Arrange for the availability of tea/coffee/water.

•Ensure that any arrangements for payment of your fee and expenses, insofar as applicable, are made with the parties and clearly understood. If privately funded, some mediators arrange for the fee to be payable in advance, some collect this at the end of each session and some invoice the parties for payment afterwards.

Initial Meeting with the couple (See below for initial meeting with lawyers)

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Document 17: Family mediation checklist

Initial Meeting with the couple (See below for initial meeting with lawyers)

- Put the couple at ease, offer tea/coffee.
- Check permission to use first names all round (unless inappropriate).
- Reiterate key elements of the Agreement to Mediate, which should have been agreed in advance. If it has not already been signed, for example electronically, do so now.
- Consider whether the preliminary information form raises anything needing to be addressed at the outset.
- Insofar as not already done, for example at a MIAM, employ a screening mechanism for possible problems of abuse, violence or threat. These must be addressed. Ensure that mediation can properly and effectively take place. Consider seeing each party separately if this may allow freer discussion about abuse.
- Check and record parties' agenda and priorities. Avoid contention in doing so.
- Check if there are any urgent issues requiring attention in the first session. If so, address them, checking if there are competing priorities. If so, discuss how to allocate the time.
- Check the framework within which decisions are to be taken: exploratory, separation, divorce? Discuss and clarify options if required.
- Sole mediators who may co-mediate in some circumstances should consider whether the dynamics or issues indicate that co-mediation might be appropriate. If so, discuss it with the couple and make any necessary arrangements for the future.
- Acquaint yourself with the relevant facts especially regarding children, housing and general circumstances. Consider and discuss how best to establish the needs, wishes and feelings of any children involved.
- Hand the parties financial disclosure documentation for completion and explain how these are to be dealt with. Arrange how and when these should be returned to you.
- If either party is legally represented, and assuming lawyers are not present, seek permission to write to their solicitor(s), and clarify what may be said to them.
- Deal with concluding practicalities such as summarising matters to be dealt with by each, fixing date of next meeting, obtaining or arranging payment and any other matters.

Maintaining separate confidences

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Document 17: Family mediation checklist

Maintaining separate confidences

The family mediation model primarily used in England and Wales developed on the basis that mediators do not maintain separate confidences, save in some circumstances for private addresses and issues regarding violence and abuse.

However, there is an increasing use and acceptance of a development of process in which mediators have separate meetings with parties and/or their lawyers on the basis that separate discussions will not be disclosed to the other without authority. This is used as an additional resource alongside the standard model of conducting mediation through joint meetings, and not generally as an alternative. However, there are some exceptions to this, in particular that separate confidences will not be maintained in respect of financial information, which is evidently open, will be openly disclosed and may be used in court; also other exceptions include the protection of children's rights, and especially protection for children or others who might be at risk of harm.

The checklist relating to separate private meetings is continued below, after an outline of the standard model. Any references to separate meetings obviously only apply to those models of practice where separate confidences are maintained.

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After initial meeting

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Appendix 1 - Drafting, Documents and Precedents

Documents and Precedents

Document 17: Family mediation checklist

After initial meeting

- If financial disclosure documents have not arrived by the agreed date, contact the defaulting party and check the position.
- When the financial disclosure documents are received, make copies to hand to the parties at the next meeting.
- If appropriate, prepare a flip chart by writing up any outline, but not any data, which should be done together with the couple.
- Consider information given by the parties and reflect on any further information likely to be needed.

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Second meeting (if finances are to be addressed)

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Second meeting (if finances are to be addressed)

- Acknowledge the financial disclosure documents. Check if anything material has arisen since the last meeting and review agenda.
- Unless other issues are to be dealt with, continue with information disclosure. Take couple through documents. Start with capital position, writing up on the flip chart. Check for completeness. Indicate what further information is needed.
- After recording the financial disclosure, establish needs and wants against available resources. You may perhaps start with respective housing needs. This may inter-relate with children's accommodation needs and whom they will be primarily living with. Have preliminary discussion about the children (if any) and their needs.
- Are there any legal contentions about respective rights? Consider how these will be addressed. Perhaps invite lawyers to a meeting?
- Start helping the couple to generate options, including housing and finance.
- Consider what action parties can each take pending the next session, for example, checking property value(s), exploring prices and availability of alternative housing, taking legal advice etc.
- Is any urgent action needed before the next meeting? If so, discuss this with the couple.
- Deal with concluding practicalities, summarise matters to be dealt with by each, fix date of next meeting.

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Further meetings

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Appendix 1 - Drafting, Documents and Precedents

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Further meetings

- Each meeting will have to be conducted according to the needs of the situation as it develops. No standard format can be given.
- Financial issues will be dealt with by generating, developing and exploring options and by assisting the parties with their negotiations.
- On children issues, establish a picture of the children and their circumstances, wishes, interests and needs. Consider how to bring those factors into the process. These issues can be dealt with through exploring alternative options. Mediators who have specifically trained to work with children in mediation will consider whether it would be appropriate and helpful to see the children and will arrange to do so in accordance with the principles and requirements of child-inclusive practice.
- Consider with the couple whether they want a parenting plan for the children (if any) and work through a precedent discussing and completing this as appropriate.
- Consider whether any third party assistance is needed, e.g. counselling, legal, financial or any other input, valuations or tax assistance, and how best this can be arranged.
- Consider possibilities of reconciliation throughout.
- Consider impasse strategies if necessary.
- Consider providing a written summary of partly resolved issues.

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Separate private meetings

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Separate private meetings

If working under a model that incorporates separate private and confidential meetings, and if appropriate, one or more separate meetings may be arranged, with or without lawyers, which may be in addition to joint meetings. Bear the following in mind:

- There is a common misperception that such meetings are only useful where there has been abuse and parties cannot meet together jointly. While this and any sense of intimidation are indeed indicators of such meetings, there are many other circumstances in which these might be useful, for example, where the couple's finances require complex planning and negotiation; where either party has difficulty with face-to-face negotiation and needs time to reflect on and respond to proposals; or where a party genuinely cannot understand the other's thinking or intent and needs time and support—perhaps from his or her own lawyer—to reflect on matters. Also, separate meetings can be a useful impasse strategy when negotiations in joint session are deadlocked.
- More time is generally needed than the usual one and a half hours—perhaps a half-day or longer (but check parties' ability to cope and avoid lengthy over-runs).
- Rules about confidentiality and the open nature of financial information and the other relevant exceptions to confidentiality must be agreed and clearly recorded.
- If parties are attending alone, prepare them for periods of waiting alone, including perhaps suggesting relevant aspects that they might consider.
- If lawyers are attending, liaise with them in advance to prepare them for a supportive rather than combative role.
- Separate meetings are sometimes more helpful after parties have had some joint meetings, shared financial data, identified, discussed and narrowed options.
- Separate meetings tend to be more useful for property and financial matters and less useful for dealing with children's issues, which generally require joint discussion and decision-making.

Parties' lawyers

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Parties' lawyers

In the model that has become standard in the UK, parties' lawyers tend to function outside the mediation, providing advice, commenting on the outcome and drafting any formal documentation. In many cases, parties do not have lawyers. However, where lawyers are appointed early on, there is an increasing opportunity for them to play a greater role in the process itself.

- In the model in which parties' lawyers advise outside the meetings, check with the parties that you can contact the lawyers as a courtesy to advise them of the mediation.
- Where lawyers are already instructed by the parties, a preliminary meeting with them, without the parties, can be useful to enable you to outline your process and your expectations, including how the lawyers can contribute, and to establish some rapport and some commonality about the issues.
- As the mediation proceeds, encourage parties to take advice as appropriate, especially on issues such as financial disclosure and different views about respective rights. The lawyers may have a significant role in helping to establish financial disclosure.
- Keep in mind the possibility of lawyers attending a joint session, even if you are not maintaining separate confidences.
- If necessary and if the parties request or agree, liaise with the lawyers about matters requiring attention.

If following a model that allows for separate confidences:

- The above points remain equally valid, but lawyers may have a greater role within the process including perhaps attending a preliminary meeting as outlined above as well as any others, dealing with financial disclosure and liaising with the mediator to try to narrow issues.
- The same rules about confidentiality, privilege and the open nature of financial disclosure that apply to the parties will extend to the lawyers.

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When issues are resolved

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When issues are resolved

- Check with the parties that the terms are understood and that they are acceptable.
- Ensure so far as possible that you have all necessary information on hand to enable the summaries to be prepared in sufficient detail to make it unnecessary for any further inter-party or inter-solicitor negotiations to take place.
- Arrange that summaries will be prepared by you. Estimate time-scale and cost, and practical arrangements for furnishing and checking the summaries, correcting any errors on the draft.
- If lawyers have not been directly involved, recommend the couple to see their respective solicitors with the summaries when finalised. Check if you are required to communicate the outcome to the solicitors.
- Remind the couple that the resolution is provisional and not binding until both parties confirm acceptance after having had legal advice (or declining to obtain such advice having had the opportunity to do so).
- Suggest that a further mediation meeting be held if there are any issues raised by solicitors that cannot be readily resolved between the parties or their solicitors. The solicitors can also be invited to attend that meeting.

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Appendix 2 - Court-Related Documents and Directives

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Appendix 2 - Court-Related Documents and Directives

This appendix lists some relevant court-related guides, directives and documents, with web references, and includes a draft order (the "Ungley Order") not readily available online. This list is not intended to be comprehensive. Insofar as EU directives are concerned, these are provided as at the time of publication, but in view of the UK's imminent departure from the EU at the time of publication, these might well change over time.

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Chancery Guide (Chancery Division of the High Court of Justice)

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Appendix 2 - Court-Related Documents and Directives

Chancery Guide (Chancery Division of the High Court of Justice)

- A2-001 See <https://www.judiciary.gov.uk/wp-content/uploads/2016/02/chancery-guide-feb-2016.pdf> with particular reference to Ch.18—Case management for settlement, which includes provision for “Stays for mediation”, “Early Neutral Evaluation” and “Financial Dispute Resolution”.
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The Technology and Construction Court Guide

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Appendix 2 - Court-Related Documents and Directives

The Technology and Construction Court Guide

A2-002 See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448256/technology-and-construction-court-guide.pdf with particular reference to Ch.7—ADR.

See also Appendix E of the Guide for a draft ADR order and Appendix G for a draft Court Settlement Order.

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Queen's Bench Division Guide

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Queen's Bench Division Guide

- A2-003 See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/587836/qb-guide-2017-final5.pdf with particular reference to para.3.1, which refers to Settlement and Pre-action Protocols, and para.8.4, which deals with Alternative Dispute Resolution (“ADR”). And although not directly related to ADR, para.8.5 (Offers to settle and payments into and out of court) may be of relevance to those working as intermediaries in civil proceedings.

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Commercial Court Guide in Corporating the Admiralty Court Guide

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Appendix 2 - Court-Related Documents and Directives

Commercial Court Guide in Corporating the Admiralty Court Guide

- A2-004 See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/672422/The_Commercial_Court_Guide_new_10th_Edition_07.09.17.pdf with particular reference to s.G, which covers ADR generally and Early Neutral Evaluation in particular. Section O covers arbitration. Appendix 3 provides a draft ADR order.

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Ungley Order

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Appendix 2 - Court-Related Documents and Directives

Ungley Order

A2-005 Order for ADR as approved in Halsey (See [Ch.5](#)).

“The parties shall by [date] consider whether the case is capable of resolution by ADR. If any party considers that the case is unsuitable for resolution by ADR, that party shall be prepared to justify that decision at the conclusion of the trial, should the judge consider that such means of resolution were appropriate, when he is considering the appropriate costs order to make.

The party considering the case unsuitable for ADR shall, not less than 28 days before the commencement of the trial, file with the court a witness statement without prejudice save as to costs, giving reasons upon which they rely for saying that the case was unsuitable.”

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Practice Direction: Pre-Action Conduct and Protocols

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Appendix 2 - Court-Related Documents and Directives

Practice Direction: Pre-Action Conduct and Protocols

- A2-006 See https://www.judiciary.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct#8.1 with particular reference to paras 8–11 (Settlement and ADR).

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Practice Direction 3A: Pre-Application Protocol for Mediation Information and Assessment (Family)

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Appendix 2 - Court-Related Documents and Directives

Practice Direction 3A: Pre-Application Protocol for Mediation Information and Assessment (Family)

- A2-007 See https://www.justice.gov.uk/courts/procedure-rules/family/pdf/practice_directions/Web_pd_part_03a.pdf for this Practice Direction, which supplements the Family Procedural Rules (FPR) Pt 3.
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HM Courts & Tribunals Service—Money Claim Online (MCOL) Service

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Appendix 2 - Court-Related Documents and Directives

HM Courts & Tribunals Service—Money Claim Online (MCOL) Service

A2-008 See <https://www.moneyclaim.gov.uk/web/mcol/welcome>.

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EU Directives and Online Platform

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Appendix 2 - Court-Related Documents and Directives

EU Directives and Online Platform

A2-009 See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF> for the transcript of Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters.

See also <https://publications.europa.eu/en/publication-detail/-/publication/2f3efba7-fb97-41b2-953a-69c6080dfbcc/language-en> for the transcript of Directive 2013/11/EU on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).

The EU Online Dispute Resolution Platform at: <https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.home.show&lng=EN>.

In the UK the relevant Statutory Instruments are: Statutory Instrument 2015 No.542: The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015. See http://www.legislation.gov.uk/uksi/2015/542/pdfs/uksi_20150542_en.pdf for a transcript of the full document.

Statutory Instrument 2015 No.1392: The Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015. See http://www.legislation.gov.uk/uksi/2015/1392/pdfs/uksi_20151392_en.pdf.

Following the UK's decision to withdraw from the EU ("Brexit") there may well be future changes to some aspects of the UK's relationship with any relevant EU Directives.

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