KING'S College LONDON

Centre of Construction
Law & Dispute Resolution

Mediating Construction Disputes: *An Evaluation of Existing Practice*

Nicholas Gould,
Claire King & Philip Britton

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It is not the facts which we can put our fingers on which concern us but the sum of those facts; it is not the data we want but the essence of the data.

John Cheever, *Journals*,
London, Vintage Books (2010) 163

Nicholas Gould,
Claire King & Philip Britton

ABOUT THE AUTHORS

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Nicholas is a partner at Fenwick Elliott LLP, the UK's largest specialist construction and engineering solicitors. He advises on, drafts, negotiates and settles construction documents, and provides strategic contract and dispute avoidance advice. His dispute resolution experience spans negotiation, ADR, adjudication, arbitration and litigation, not just in the UK but internationally. He is an accredited adjudicator and dispute board member, and regularly acts as lead mediator in multi-million, multi-party mediations. Nicholas is Chairman of the International Chamber of Commerce's International Centre for Expertise (Centre International d'Expertise de la CCI), past Chairman of the Society of Construction Law and Senior Visiting Lecturer at King's College London. He has published widely in the area of construction law and dispute resolution. The IBA's 2009 edition of *International Who's Who of Business Lawyers Today* listed Nicholas as one of the ten most highly regarded individuals internationally for construction law.

Claire King BA MSc

Claire read Modern History at Somerville College Oxford, before converting to law. She qualified into Ashurst's Litigation Department in 2003, becoming a Senior Associate in May 2008. Whilst at Ashurst she acted on a broad range of disputes but specialised in construction. She joined Fenwick Elliott in September 2008. At the end of 2009 Claire achieved a Distinction in her MSc in Construction Law and Dispute Resolution at King's College London, being awarded the Bickerdike Allen Prize for the best examination performance by a first-year student, the KCCLA Prize for the best performance in the second-year examinations, the Arbitration Club Philip Ranner Prize for the best Module D (arbitration) result and the Society of Construction Law Prize for the best dissertation. She is a Solicitor Advocate, specialising in all major forms of dispute resolution, including litigation, arbitration and adjudication as well as mediation. She has acted on a wide range of domestic and international construction disputes for both employers and contractors. Since joining Fenwick Elliott she has advised on a successful arbitration under the DIAC Rules arising out of the Jumeirah Village development in Dubai, as well as numerous domestic adjudications. She has also gained experience on a range of high value energy projects, including power and desalination plants in the Middle East and power stations within the United Kingdom.

Philip Britton LLB BCL

Philip joined the Centre of Construction Law at King's College London in 1998, becoming its Director in 1999. He previously taught in the School of Law at the University of Warwick (1970-1991) and was Production Director at Television Education Network (1991-1996), writing and producing video programmes for CPD for lawyers, civil engineers, chartered surveyors and accountants, including on construction topics. Between 1994 and 2001 he was part-time Associate Professor at the University of Lille 2 (France), teaching English law to French law students; he also developed video and interactive training programmes in competition law for Coca-Cola Enterprises, as well as translating court documents for the International Court of Justice in The Hague. He has been a Chief Examiner and Moderator for the CIArb; and was a co-opted Council member of the Society of Construction Law (2001-2003). From 2002 to 2005 he was also part-time Director of Professional Education at the law firm Farrer & Co. He has four times won one of the SCL's annual Hudson Prizes for an essay on a construction law topic and in 2008 won the Society of Construction Arbitrators Norman Royce essay prize. He regularly edits papers for publication by the SCL and is also joint Series Editor (with Phillip Capper) of Informa's construction law library. He retired as Director of the Centre at the start of 2008 and now has a Visiting Professorship in the College.

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PREFACE

The use of mediation to resolve disputes has grown exponentially. Mediation is no longer a novelty in the UK. This is how it should be. However, hard facts as to the progress that has been made are hard to come by. The exception is the excellent work done by Professor Dame Hazel Genn of UCL who, for a significant period, was the sole source providing critical examination of empirical data that she had been responsible for collecting. Commendably, a solicitor, Nicholas Gould, has now with the assistance of a team of supporters completed research for King's College London in relation to litigation in the Technology and Construction Court, analysed in this report. The data has been gathered by and from the TCC, not only in London but in Birmingham and Bristol as well. Mr Gould also has the advantage of having worked in close association with Lord Justice Jackson, who has just published his *Final Report* into the costs of civil litigation.

The TCC is a very suitable subject for this research. Its litigation is among the most complex and time-consuming in the civil justice field; and its nature means that it is particularly suitable for being resolved by mediation. Frequently there is a long-established relationship between the parties which has unfortunately broken down. It is in both their interest that as soon as possible their relationship should be restored. In many situations what is needed is a solution which the courts are unsuited to provide. Success is never assured, but the material that Mr Gould has obtained demonstrates clearly the value of what mediation has to offer.

As I would expect, the survey showed that the process led to a saving of time and cost in a significant number of cases. I warmly congratulate Mr Gould and his team on the empirical data that they have assembled. I also commend him for being prepared to agree to provide without charge hard copies of the data; and to make the entire report available similarly on a number of websites. Very sensibly, he is trying to achieve the widest distribution possible, in order that everyone can benefit from his research work. It is my view that it is only as a result of research of this nature becoming widely available that the merits of mediation will become as generally known as they should be.

This is a worthy task well done and I encourage practitioners, academics and the judiciary to make full use of this valuable resource.

Rt Hon the Lord Woolf

House of Lords
January 2010

FOREWORD

When I became judge in charge of the Technology and Construction Court in 2004, I mentioned in a lecture to TECBAR, TeCSA and the SCL that empirical data as to the effectiveness of mediation would be useful: see (2005) 21 Const LJ 265, 268. Following that lecture, Nicholas Gould, Visiting Senior Lecturer, King's College London and a construction solicitor, kindly approached the TCC judges with a proposal for a questionnaire survey. Nicholas and I jointly developed this initiative, which led to the King's College London research project.

The initial data-gathering phase ran from 1 June 2006 to 31 May 2008, used to survey those involved in TCC cases. The London TCC and Birmingham TCC participated, with some assistance from the Bristol TCC. Those who had settled received a form asking about their settlement experience, whilst those who had proceeded to judgment were asked about their (unsuccessful) attempts to settle. More than a third of cases that settled used mediation. The survey shows that the process of mediation led to a saving of time and costs in those cases.

This is the first time that the TCC has worked with an academic institution to survey the outcomes of litigation and how they are achieved. It has led to some extremely useful data, which Nicholas and his team have written up in interim reports and now in this final report. I also summarised the data in my own *Review of Civil Litigation Costs* (May 2009): see chapter 34 of the *Preliminary Report*. The data show that there appear to be four major points of settlement: during pleadings, after disclosure, following a Part 36 offer or similar and then shortly before trial. The majority of mediations appear to take place after disclosure. My *Final Report* (December 2009) returns to the themes of how best to manage construction disputes, with proposals about ADR and litigation in the TCC.

Obviously the court's case management directions and any directions about mediation will always be heavily dependent upon the circumstances of a particular case. Nevertheless I hope that the information which the King's College London research has gathered and analysed will be of assistance both to policy makers generally and to judges and practitioners in their management of individual cases. Empirical data are far more valuable than the anecdotal evidence about litigant behaviour which sometimes informs decisions.

Rt Hon Rupert Jackson
Lord Justice of Appeal

Royal Courts of Justice
January 2010

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ABBREVIATIONS

ACAS	Advisory Conciliation and Arbitration Service (UK)
ADR	Alternative Dispute Resolution (*sometimes* Appropriate Dispute Resolution)
ADRg	ADR Group (Bristol and London)
ARM	Automatic Referral to Mediation (Central London County Court)
CEDR	Centre for Effective Dispute Resolution (London)
CIArb	Chartered Institute of Arbitrators
CJRA	Civil Justice Reform Act 1990 (USA)
CMC	The Civil Mediation Council (UK) *or, according to the context*, Case Management Conference (under CPR)
CPR	Civil Procedure Rules (England & Wales)
CSP	Court Settlement Process (TCC)
DAB	Dispute Adjudication Board
DB	Dispute(s) Board
DRA	Dispute Review Adviser
DRB(F)	Dispute Review Board (Foundation - USA)
FIDIC	Fédération Internationale des Ingénieurs-Conseils
HGCRA	Housing Grants, Construction and Regeneration Act 1996 (UK)
ICE	Institution of Civil Engineers
PAP	Pre-Action Protocol (under CPR)
PTR	Pre-Trial Review (under CPR)
TCC	Technology and Construction Court (England & Wales)
VOL	The voluntary mediation pilot scheme (Central London County Court)

Part I: INTRODUCTION

1 Authorship and acknowledgments

This report has been drafted by Nicholas Gould (Partner, Fenwick Elliott LLP and Visiting Senior Lecturer, King's College London), Claire King (Assistant Solicitor, Fenwick Elliott LLP) and Philip Britton (Visiting Professor, King's College London), who also edited the work for publication. Nicholas Gould led the research project, with coordination and drafting assistance from Claire King; the project's Research Assistant was Aaron Hudson-Tyreman. The final survey analysis was carried out by James Luton, with assistance from Julio César Betancourt, Pilar Ceron, Cerid Lugar, Annabelle K Moeckesch and Yanqui Li, all with the Chartered Institute of Arbitrators (CIArb).

King's College London gratefully acknowledges the research funding, support, resources and guidance provided by the Society of Construction Law, the Technology and Construction Solicitors' Association (TeCSA) and Fenwick Elliott LLP. Special thanks go to the Technology and Construction Court itself – its judges, in particular Mr Justice Rupert Jackson (now Rupert Jackson LJ), and Caroline Bowstead, TCC Court Manager at the time – for supporting the idea of the survey and for agreeing the procedure by which the court would issue the questionnaires. The CIArb kindly provided research support once the data was collected: assisting in analysing the completed questionnaires and gathering relevant literature and data for the present full report. Finally, of course, thanks go to the respondents of the survey, who kindly provided the raw data for analysis.

2 Executive summary

This report is divided into five parts. Part I is an Introduction, setting the scene for the three main parts which follow. Part II, Mediation in Context, situates mediation within the wide range of dispute resolution systems used in construction and traces mediation's growth in importance. Part III, Courts & Mediation, looks at the relationship between ADR and litigation, in particular how mediation may be encouraged (or even required) by courts. Part IV, Research Report, summarises the findings of the research project carried out in 2006-2008 in the TCC of England & Wales; this shows the significance of mediation in practice and charts its use in the context of traditional litigation in three main centres where the court sits. Part V, Conclusions, summarises the key findings of the whole report and identifies issues still to be resolved in the use of mediation for dispute resolution in construction.

The overall aim is to offer a snapshot of the theory and practice of mediation, in a context of the 'disputology' in general of construction. From this, it becomes clear that mediation has an important, and growing, place among the formal techniques for resolving disputes in this field; but it is not a panacea and needs to be seen as one of many approaches which together can provide appropriate and efficient methods for both avoiding and resolving the frequent and complex problems which construction projects generate

3 Overview

This fuller work builds on *The Use of Mediation in Construction Disputes*, a report on the King's College London research project, initially made public in May 2009 and incorporated into chapter 34 of Rupert Jackson LJ's *Preliminary Report* on costs in civil cases.[1] This summary of the research project and its findings is now included, in a revised form, as Part IV below. The research was conducted by the Centre of Construction Law & Dispute Resolution at King's,

with the active participation of the TCC in London, Birmingham and Bristol. The court agreed to send the appropriate version of a short questionnaire to parties (or their representatives) to 'live' litigation before it, almost all of which was construction-related. The responses to these questionnaires provided detailed information about each case; this made it possible to track the prevalence, timing and impact of mediation in these disputes. The aim was to understand the role this form of ADR appeared to play in permitting (or encouraging) some at least of the TCC's rather specialist categories of disputes to settle, instead of moving towards a traditional trial before a judge.

From the sample of cases studied, it became clear that traditional party-to-party negotiation remained more common than mediation in leading to a settlement ahead of a trial; but about a quarter of the cases did use mediation – almost always on the parties' or their representatives' own initiative, rather than because the court had urged or required them towards it. Most mediators in these cases were legally trained; and the research showed definite 'peaks' in the resort to mediation at different stages in litigation. Where mediation led to a settlement, the respondents reported their belief that the process had led to significant savings, in comparison with the cost of going onwards to a conventional trial. Even where the mediation was unsuccessful, few respondents thought it to have been a waste of time or money; many regarded it as a positive experience.

The results of this investigation flesh out our understanding of litigants' experience of mediation in the context of litigation in the TCC. Although the headlines are unsurprising, the detail in Part IV reveals a picture which is more complex: how and when does mediation happen, and in what kind of case? when does it succeed or fail?

This research responds to a long-standing and well-documented concern by judges, court administrators, lawyers, construction professionals and construction 'consumers' – and not just in the UK. Construction as an economic activity appears to generate a disproportionate number of disputes; and so appropriate ways of dealing with these need to be found. There are of course good reasons why construction will always produce disputes – for example, the prototypical nature of most projects, the extended duration of the work, the large number of parties and the inevitability of changes mid-project to the scope and detail of what is to be constructed. So the potential for reducing the frequency and scale of disputes in construction may have natural limits, though this does not mean that the effort is not worthwhile. With this in mind, the literature repetitively suggests two specific aims:

1 Make carefully considered *dispute avoidance mechanisms* part of the contractual matrix between parties to construction projects; and

2 Equally carefully, choose *formal dispute resolution procedures – and the personnel to operate them* – which have a good 'fit' with the particular characteristics of construction disputes – or even with the particular features of the individual project.

Both of these aims – and how better to attain them – underly the whole of this report.

Heading towards the first aim above, the drafting in standard forms of contract and then adoption in practice of 'collaborative' or 'partnering' styles of working for construction projects has made some headway: within English-language forms, NEC3 includes a partnering option,[2] and PPC2000 provides a contractual 'team' framework intended to encourage collaboration between employer, designers, main contractor and key sub-contractors, from the early conceptual and design stages of a project onwards.[3]

As for the second aim, England & Wales has, since 1998, taken two significant steps at the official level towards it. First, the whole of the UK acquired a statutorily imposed 'quick and dirty' formal procedure for most construction disputes via adjudication, under Part II of the Housing Grants, Construction and Regeneration Act 1996 (even the Isle of Man has its own equivalent of the HGCRA[4]). Second, in England & Wales in 1998 the revived and renamed TCC started down a clear track of procedural innovation, encouraged by the senior judges and by the extraordinary head of steam behind the radical reforms which implemented the Woolf reports on *Access to Justice*[4] via the new Civil Procedure Rules (the CPR).[5] The most obvious feature of these procedural changes has been to give the judges new interventionist powers to manage litigation, if necessary in complete opposition to what the parties would have done if left to themselves. This philosophy of 'active case management' was embraced in the interests both of justice and of good management of scarce judicial resources. It specifically includes encouraging the parties, by having to exchange information before litigation formally starts, to negotiate right away; if proceedings are begun, the court has a range of powers and sanctions which can be used to favour any form of ADR, including mediation. The TCC is in the forefront of these movements, with its own specialist *Pre-Action Protocol* and *Practice Direction*;[7] a further development of these trends is the TCC's own Court Settlement Process (the CSP), which takes the concept of 'court-annexed mediation' a significant – and contested – step further. All of these changes are of course discussed in more detail below.

These national (or sub-national) movements are mirrored by developments in many other countries – for example statutory adjudication in Australasia and Singapore – though none takes precisely the same form as in the UK; and should be understood in a wider context, which Parts II and III of this report aim to provide. What are the options available to those who choose (or submit to) dispute resolution systems in construction? How can these be made more responsive to the wishes and needs of their consumers and to the abstract goals of efficiency, speed, cost and fairness? What role in that process could (or should) mediation play? If a greater role, how could this be encouraged, including by state court judges or by greater regulation more generally?

1 Rt Hon Lord Justice Jackson, *Review of Civil Litigation Costs: Preliminary Report*, vol 1 (May 2009) ch 34, section 4, downloadable from www.judiciary.gov.uk/about_judiciary/cost-review (accessed 13 July 2009).

2 Institution of Civil Engineers, *NEC3: Engineering and Construction Contract*, London, Thomas Telford (2005).

3 Association of Consulting Architects, *PPC2000* (amended 2008), obtainable via www.ppc2000.co.uk/home.htm (visited 10 December 2009).

4 Construction Contracts Act 2004 (Isle of Man), downloadable from www.im/infocentre/acts/(accessed 7 January 2010)

5 Lord Woolf, *Access to Justice*, Interim Report (June 1995) and Final Report (2 vols) (July 1996), London, HMSO, also from www.dca.gov.uk/civil/final/ (accessed 10 December 2009).

6 The Civil Procedure Rules (SI 1998/3132, as heavily amended); see Rt Hon Lord Justice Waller (Editor-in-Chief), *Civil Procedure* 'The White Book', London, Sweet & Maxwell (2009 edition). The current text of the CPR and new amendments can also be downloaded from www.justice.gov.uk/civil/procrules_fin (accessed 9 July 2009).

7 *Pre-Action Protocol for the Construction and Engineering Disputes* (2nd edition 2005, revised 2007); *and Practice Direction: Technology and Construction Court Claims* (supplementing CPR Part 60). Both are included within 'The White Book' n 6 but are also downloadable from the MoJ website n 5 (accessed 10 December 2009).

Part II: MEDIATION IN CONTEXT

4 The spectrum of dispute resolution techniques

The 'conventional' model of dispute resolution describes an adjudicative process, most frequently operated by state courts. According to Schapiro, the ideal court, or more properly the prototype of a court, involves:

> (1) an independent judge applying (2) pre-existing legal norms after (3) adversarial proceedings in order to achieve (4) a dichotomous decision in which one of the parties was assigned the legal right and the other found wrong.[1]

He adds that analysing courts across a range of societies reveals that the prototype 'fits almost none of them'. Nonetheless, this does provide one model of dispute resolution – at the formal binding end of the spectrum. Litigation requires the parties to submit their dispute to a judicial 'umpire', whose role is to impose a legally binding decision; arbitration does the same.

At the other end of the same spectrum sits two-way problem-solving between the parties: an informal, voluntary, non-binding, approach, the successful outcome of which is an agreement to 'settle'. In its most basic form, *direct negotiation* provides a simple, party-based problem-solving technique. The process may be bilateral (between two parties) or multilateral (many parties). A further dimension is added when either party introduces advisers; the process is then often described as *supported negotiating*. Even where advisers participate, the essential feature of negotiation and settlement is that control of the outcome remains with the parties.

Mediation and conciliation are also private, informal processes; but here the disputants are assisted, in their efforts towards settlement, by one or more neutral third parties. The mediator or conciliator re-opens or facilitates communications between the parties, with a view to resolving the dispute; but the involvement of this independent third party does not change the position that settlement lies ultimately with the parties themselves.

The process can be *facilitative*, where the third party merely tries to aid the settlement process; or *evaluative*, where the third party comments on the subject-matter or makes recommendations as to the outcome (either as an integral part of his/her role, or if called on to do so by the parties). The terminology is not the same everywhere: in some parts of the world, mediation refers to a more interventionist evaluative approach. In the UK, the facilitative style of third-party intervention is most frequently referred to as mediation; the term conciliation is reserved for the evaluative process.

Amanda Bucklow, an experienced mediator affiliated with *In Place of Strife*, a well-known London-based provider of mediators,[2] carried out a research project during 2006 which involved interviewing both mediators and 'serial' mediation users.[3] The research was qualitative, aiming to understand the value of those attributes and behaviours which are hard to measure in the field of mediation. Those interviewed had a combined experience in mediations of close to 2000 cases.[4] The mediators interviewed (a group of 30) had completed over 1200 mediations during the previous 12 months.[5] The research asked respondents who had used mediators more than once to consider up to three mediators and describe their style. The options were facilitative, evaluative, a blend on a scale of 1 to 10 or no preference. For the purposes of the research, '*facilitative*' was described as not offering an overt opinion either legal or commercial, but possibly '*skilled suggesting without being directional*'. '*Evaluative*' was described as willing to offer an opinion, either legal or commercial, and openly suggesting settlement figures. A blend was recorded on a scale of 1 (facilitative) to 10 (evaluative). When respondents were asked

which model had been the most successful in terms of (1) outcome and (2) overall experience, the answers were the facilitative model in 47% of cases; the evaluative mode in 10% of cases; a blend (an average of 5 on the scale) in 47% of cases; and no preference in 6% of cases.[6]

Table 1: **Facilitative and evaluative processes**

Mediation or Conciliation	
Facilitative The mediator/conciliator aids the negotiation process, but does not make recommendations	Evaluative The mediator/conciliator makes a recommendation as to the outcome

In UK labour disputes, the statutory Advisory Conciliation and Arbitration Service (ACAS) is well known as adopting the evaluative style of conciliation; more recently, the ICE has begun to offer the same approach in connection with civil engineering disputes. On the other hand, CEDR promotes a style closer to the facilitative model, referring to this as mediation.

In practice, a mediation that starts off in a purely facilitative way may become evaluative in order to try and reach a settlement. This may occur intentionally, at the request of the parties or with forethought on the part of the mediator, or unintentionally by the words or actions of the mediator. The boundary is clear in theory, but not necessarily in practice.

Some suggest two sub-categories: settlement mediation and transformative mediation. *Settlement mediation* is where the parties are encouraged to compromise in order to reach a settlement of the dispute between them, using a relatively persuasive and interventionist approach. Typically this will involve moving the parties towards a point somewhere between their original positions.[7] The Court Settlement Process recently introduced by the TCC (see section 13 below) arguably fits best in this sub-category: it uses a high-status mediator who is not primarily an expert in the process of mediation itself. *Transformative mediation* involves trying to get the parties to deal with the underlying causes of the problems in their relationship, with a view to repairing this as the basis of settlement.

A useful basic distinction remains between 'settlement' processes and 'decision-imposing' processes, as Table 2 below records. In all the processes in the left-hand column, privacy is the normal rule, as it is for arbitration, adjudication and expert determination (save where the outcome is later enforced or challenged in court); the terms of any settlement reached can remain private too. By contrast, the normal rule in civil litigation is that hearings before a court on the merits of a dispute take place in public; and judgments are usually publicly accessible documents.

Table 2: **Dispute-resolution processes**

Control of the outcome rests with the parties	Decisions are imposed
Negotiation Mediation Conciliation	Litigation Arbitration Adjudication Expert determination

We can subdivide the range of techniques for the resolution of disputes into three main types:

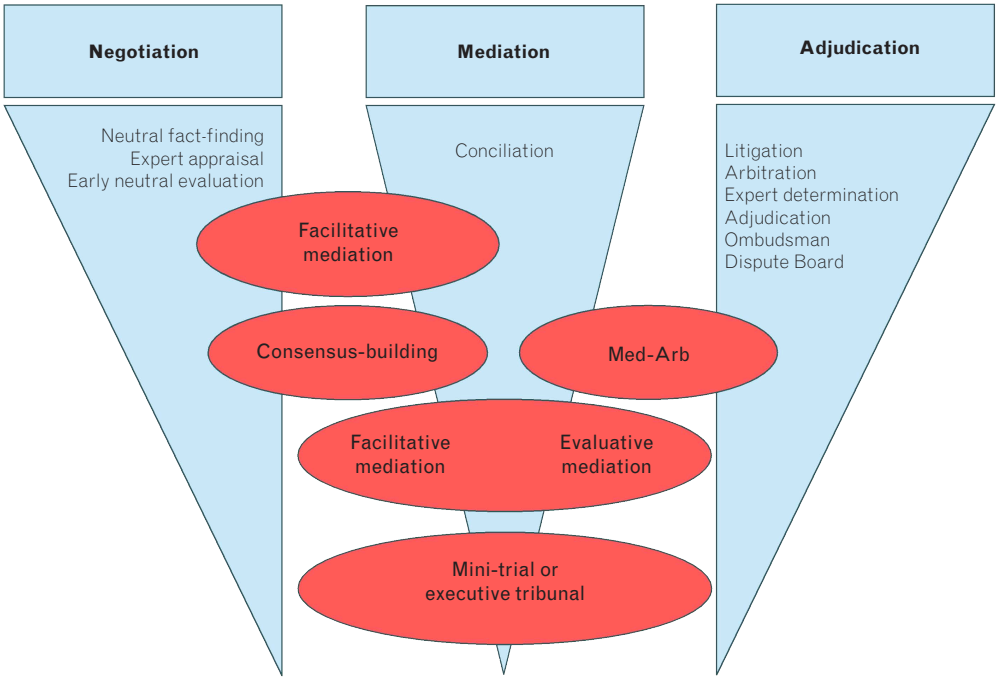
1 *Negotiation*: the problem-solving efforts of the parties themselves;

2 *Third-party intervention* not leading to a binding decision being imposed on the parties; and

3 *An adjudicative process*, the ultimate outcome of which is an imposed binding decision.

Green and Mackie call these 'the three pillars' of dispute resolution. Different techniques fit within each pillar, or between two or more pillars:

Figure 1: The dispute resolution landscape[9]



5 The growth of ADR

The origins of mediation and conciliation can be traced to China some 3000 years ago. China apparently used these techniques as a primary dispute resolution process – in contrast to other parts of the world, which instead developed forms of adjudicative process.[10] The origins of the formalised version of modern mediation are found principally in the USA.[11] Stipanowich has documented the rise of mediation during the 1980s and early 1990s; it appears to have first been taken seriously in the US construction industry.[12] The Army Corps of Engineers apparently pioneered the process in order to avoid the high costs of litigation.

In the UK, the move towards mediation began first to be developed in the area of family disputes, the commercial sector beginning to take an interest in the late 1980s. This culminated in the foundation of the ADR Group (ADRg) in 1989[13] and what is now called the Centre for Effective Dispute Resolution (CEDR) in 1990.[14] Both are keen to promote ADR in a general commercial setting. In the construction field, as early as 1988 the Institution of Civil Engineers established a conciliation procedure, as an add-on option to its widely used Conditions of Contract; and later added its own Construction Mediation Procedure.[15] During the 1990s, dispute resolution techniques became increasingly widely debated in the UK, but the growth of mediation in practice was slow, especially in construction.[16] In the first major survey conducted into the use of mediation within construction in the UK, by Fenn and Gould in 1994, only 30% of the respondents had ever been involved in an ADR process.[17]

The increased use of mediation in practice was assisted with the introduction of the Civil Procedure Rules (CPR) in 1998;[18] these aimed to replace '*confrontation, procedural warfare and aggressive positioning*' with '*co-operative problem-solving*'.[19] The methods used by the CPR and the courts to encourage mediation are analysed in Part III below. Within the construction industry in the UK, Penny Brooker and Anthony Lavers conducted a series of surveys in 2001-2002 to ascertain the experience that construction and commercial lawyers had of mediation. These showed that practitioners were, at that time, proposing and actively using mediation for construction disputes. 70% of those in construction or construction-related work who responded had used ADR at least once.[20] With the Court of Appeal's 2002 decision in *Dunnett* v *Railtrack*,[21] the costs consequences of unreasonably refusing mediation became increasingly severe – and more widely understood. According to Professor Genn and her co-authors, *Dunnett* caused a distinct increase in take-up of the voluntary mediation scheme (VOL) in the Central London County Court.[22] There can be little doubt that mediation is now integrated into every litigator's tool chest.

6 The mediation process

There are, in general terms, three main phases to mediation:

1 Pre-mediation – agreeing to mediate and preparation;

2 The mediation – direct and indirect mediation; and

3 Post-mediation – complying with the outcome.

This basic framework may be further subdivided. Goldberg and his co-authors suggest a five-stage process,[23] while Brown and Marriott propose ten.[24]

Table 3: Mediation stages

BASIC FRAMEWORK	GOLDBERG	BROWN AND MARRIOTT
Pre-mediation	A Pre-mediation – getting to the table	1 The initial inquiry – engaging the parties 2 The contract to mediate 3 Preliminary communications and preparations
Mediation	B The opening of the mediation C The parties' opening presentations D Mediated negotiations E Agreement	4 Meeting the parties 5 The parties' presentations 6 Information gathering 7 Facilitating negotiations 8 Impasse strategies 9 Terminating mediation and recording agreement(s)
Post-mediation		10 Post-termination phase

Before the mediation

The pre-mediation phase develops from the initial inquiry; it may involve an explanation of the process and an attempt to persuade reluctant parties to participate. A contract to mediate is frequently used, in order to agree the terms and the ground rules for the mediation. This will include items such as costs, confidentiality, the 'without prejudice' nature of the mediation,

authority to settle and timetable. In some instances, the parties may provide and exchange written summaries of the dispute, and occasionally furnish copies of supporting documents. During this process the mediator will be identified, becoming a party to the mediation contract.

From the mediator's perspective, the pre-mediation objective is merely to get the parties to the mediation. The strategy of the parties is less clear. Are they preparing their best case? Do they consider innovative ways to settle? Do they really calculate their Best Alternative To a Negotiated Agreement (BATNA)?

The mediation

Most commercial mediations are conducted over the course of one day, although some may extend over several days, weeks or even months. Mediations are usually conducted on neutral territory, rather than at the offices of one of the parties. This is an attempt to avoid the power imbalances which may occur if one of the parties is operating within familiar territory. The mediator's role involves managing the process, so s/he will receive and seat the parties before carrying out the necessary introductions. During this first joint meeting, the mediator will establish the ground rules and invite each party to make an opening statement.

The mediation process is flexible: once the parties have made their opening statements, the mediator may decide to discuss some issues in the joint meeting, or may instead propose a 'caucus'. A caucus is a private meeting between the mediator and one of the parties. The mediator will caucus with the parties in turn, in order to explore in confidence the issues in the dispute and the options for settlement. In a caucus, the mediator is mediating 'indirectly' with the parties. This exploration phase of mediation serves several purposes:

- Builds a relationship between the parties and the mediator
- Allows the parties to vent their emotions
- Attempts to uncover any hidden agendas
- Identifies potential settlement options.

While the mediator is caucusing with one party, it may be possible for the other party to work on a specific task set by the mediator. The mediator may also use further joint meetings in order to narrow the issues, allow experts to meet or broker the final settlement. The aim of mediation is to develop a commercially acceptable, workable agreement which can be written into a binding settlement contract.

After the mediation

The post-mediation phase will involve either executing the settlement agreement or – if no agreement or only a partial agreement is reached – continuing with (or towards) court proceedings or arbitration. The mediator may still be involved as a settlement supervisor, or perhaps there will be further mediations on other aspects of the same dispute, or related disputes. Just because the parties do not settle does not mean that the mediation was not successful: they may have gained a greater understanding of their dispute, which may lead to future efficiencies in its resolution; or they may settle soon after the mediation.

7 Mediators

Skills

Much of the literature on mediation focuses on the function, role and skills of mediators. A mediator is qualified not by the virtue of his or her expertise in a particular area, but rather by the individual's ability to aid the parties towards a settlement. In this respect the mediator must manage the mediation process, gather information from the parties, then evaluate and test that information in order to facilitate an exchange of information which should hopefully then lead to a settlement. These processes can be described as the role or function of the mediator.

However, the skills or attributes required to carry through a successful mediation are more subjective. Foremost are interpersonal skills, in particular his or her ability to communicate effectively; but an effective mediator must also be seen to maintain a neutral role. For example, a mediator must be able to carefully encourage a party to see the weaknesses of its own case without providing his or her own evaluation of the situation: this requires care and skill. A mediator who has no specialist knowledge about the technical issues of a dispute will have the benefit of coming to the mediation without preconceived ideas arising from his or her own background; by contrast, in arbitration an arbitrator is often chosen for his or her particular area of expertise, as are the judges who form the mediators in the TCC's Court Settlement Process.

Amanda Bucklow's 2006 research[25] asked mediators themselves and users of mediation what strengths they thought mediators should show. The top six which the mediators themselves reported as necessary were:

1 Listening;
2 Building rapport with people;
3 Having empathy;
4 Being patient;
5 Having a sense of humour; and
6 Having stamina /persistence.

The top six mediator strengths actually shown, as reported by users, were:

1 Communicating with clarity;
2 Building rapport with people;
3 Inspiring trust;
4 Having empathy;
5 Being incisive; and
6 Being professional.

Bucklow noted that trust was mentioned by the users of mediation but not mediators; she suggested that this was because, as one mediator answered when questioned, mediators took trust as a given.

Professional background

What then is a mediator's professional qualification likely to be? In the field of construction litigation, the King's College London survey indicates that of those used as mediators for disputes arising in the TCC the largest category is of those legally qualified: 41% of the

mediators used for successful mediations were solicitors and 34% barristers. By contrast, only 16% of those appointed were construction professionals; 7% were TCC judges. Similar proportions were seen for unsuccessful mediations, though none of these used TCC judges.

Bucklow reported that the average age of the mediators her survey investigated was 55; the average number of years practising as an accredited mediator was also fairly high at 13.4 years.[28] The youngest mediator was 44 and the eldest 77. 68% were men and 68% were lawyers (not all the same people). The percentage of lawyers was slightly lower than in the King's College London survey; but in both surveys lawyers formed a majority of mediators.

Regulation

There is currently no state control in England and Wales for the training, appointment and performance of mediators.[29] There is therefore no moderation of the content of courses or the standard of those courses.[30] However, training bodies point out that some form of accreditation is, in practice, required for practitioners who wish to gain a reputation in mediation and obtain appointments.[31] Commercial mediation training schemes leading to accreditation include those run by The Academy of Experts, ADRg, CEDR, the CIArb, the Law Society and the RICS.[32] There is also the Civil Mediation Council (UK), which accredits providers of mediation services, as the gateway to referrals from the National Mediation Helpline (funded by the Ministry of Justice);[34] and the non-profit-making International Institute of Mediation in The Hague,[35] which runs an accreditation system relying in part on national bodies' own training systems.

At the European level, we now have the EC Mediation Directive of 2008.[36] This is a harmonising measure, deriving from powers in Title IV of the EC Treaty: '*judicial cooperation in civil matters having cross-border implications… so far as necessary for the proper functioning of the internal market*'.[37] The Directive lays down a minimum package of measures, under which member-states are to recognise and encourage mediation in cross-border civil cases; it correctly defines mediation as intending to lead to a solution *agreed by the parties*, so rights-based adjudication or arbitration are beyond its scope.[38] Echoing English judicial concerns, it expressly aims not only to encourage mediation but also to ensure '*a balanced relationship between mediation and judicial proceedings*'.[39]

As part of the consultation towards adoption of the Directive, a European Code of Conduct for mediators was elaborated, but this Code was not incorporated into the final text of the Directive itself (it remains open for adoption by individuals or organisations, as for example by *In Place of Strife*[40]). There is a Commission Recommendation on minimum standards for out-of-court bodies involved in ADR in consumer disputes – of limited legal value and not relevant to most construction cases.[41] The nearest the Directive gets to legislating on quality is in article 4:

1. Member States shall encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and organisations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services.

2. Member States shall encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties.

Unsurprisingly, the three characteristics mentioned in article 4(2) all figure in the existing codes of conduct, as analysed by Laurence Boulle and Miryana Nesic.[42] But their suggested list is rather longer:

1 *Competence*: the mediator must have sufficient knowledge of the process and subject matter in dispute;

2 *Neutrality*: the mediator must conduct the proceedings fairly and even-handedly and not do anything that would give rise to doubts about his/her independence: in particular, the mediator must not impose a solution on the parties;

3 *Confidentiality*: any information given or arising out of the mediation is confidential and that information must be kept confidential by the mediator. In addition, the mediator may not be called as a witness in later proceedings;

4 *Availability*: the mediator must be sufficiently available to enable him/her to conduct the mediation expeditiously;

5 *Voluntariness*: the mediator must ensure that all the parties are participating in the mediation voluntarily;

6 *Power to terminate*: the parties and/or the mediator should have the power to terminate the mediation at any stage if necessary;

7 *Conflicts of interest*: the mediator must disclose any potential conflicts and only proceed with the consent of all parties;

8 *Fairness*: the mediator should generally ensure that the process of the mediation itself is fair, rather than the outcome;

9 *No legal advice*: the mediator should not provide legal advice, unless asked to give a non-binding evaluation as part of the process agreed by the parties;

10 *Advertising*: any advertisements by the mediator should be professional and accurate;

11 *Professional indemnity insurance*: should be obtained and maintained by the mediator.

More regulation?

There has been much debate as to whether mediators should be regulated and, if so, what form that regulation should take. Should the state regulate the process, or should self-regulation (the current system) be continued?

Proponents of regulation argue that arbitrators, unlike mediators, are subject to numerous safeguards. These include the right to appeal to the courts on the grounds that the arbitral tribunal did not have substantive jurisdiction, or of serious irregularity affecting the tribunal, the proceedings or their award. Arbitrators are also generally regulated by their professional bodies, such as the General Council of the Bar, and typically have professional qualifications (for example, those offered by the CIArb).[43] In contrast, they argue, mediators are not subject to regulation by the courts. There is also no legal requirement for mediators to be accredited or subject to professional regulation (but the same is true of arbitrators).

The only remedy an aggrieved party might have against a mediator would be to take the matter to court, claiming a breach of some form of contractual and/or tortious duty. However, this step is complicated by the nature of the mediation process, which is voluntary, without prejudice and confidential: so real issues may arise as to what evidence can, and cannot, be put before the

courts afterwards.[44] Parties who have been through a mediation will usually have agreed contractually that no details of this shall be given in evidence in court.[45] Further, to give evidence of what happened at a mediation may open up difficult questions of conflicting testimony: memories may easily differ of the fluid and complex procedures (often taking place in long sessions late into the night, in the hope that a shared target deadline will encourage flexibility and a breakthrough) which make up a mediation. Some standard mediation agreements even prohibit the parties from making any record of the process, other than the terms of a settlement (if reached).[46] Most importantly, no participant in a mediation (including the mediator) would act as freely as the process ideally requires if they knew that there was a risk of having each exchange picked over in 'satellite litigation' later on. There is, as a result, a distinct lack of case law regarding the conduct of mediators, even in the United States.[47]

Why is such regulation needed, if the process is voluntary and the parties can step away at any time? Professor Genn observed in the Central London County Court that there was considerable scope for the exercise of power by mediators. They decided who should speak and when, what evidence was relevant and what could be produced and discussed. She also raised queries about the ethics of mediators, sometimes perceived as pushing parties towards settlement, irrespective of the strengths and weaknesses of their positions. Proponents of regulation argue that it would provide better standards and safeguards for consumers, enhance the status of mediation, improve the legitimacy of the service in the eyes of potential users and provide protection to practitioners.[48]

However, opponents of regulation point to the lack of claims against mediators as demonstrating that the system as it stands works well, with the market weeding out inadequate mediators. Other arguments raised against statutory regulation include the risk that it may stifle the development of the discipline.[49]

8 When to mediate?

The question of when mediation should be attempted has been widely debated. David Richbell argues that the right time is 'when parties and their advisors feel they know sufficient for the risks to be minimal yet have avoided excessive legal costs and management time'.[50] When has this stage has been reached? Should the mediation be held as soon as possible, or should it only be carried out later when the parties have accumulated sufficient information about the specific claim? There are advantages and disadvantages to each approach.

If the parties choose to mediate early on, they may avoid escalating the conflict beyond its original issues, allow relationships to be preserved and save excessive costs and management time.[51] On the other hand, the risk of mediating too early may be greater, in that the key information enabling each party to properly assess the strength of its claim may not yet be available.[52]

Some statistical evidence suggests that mediation is more likely to succeed later in the course of a dispute, rather than at an early stage. The Ontario Court of Justice ADR mandatory mediation scheme (started in January 1999) is described in section 15 below. One of the key findings was that dramatically higher numbers of cases subject to mediation were settled at the nine- and twelve-month mark than at the six-month mark, when compared to a control group. In 2007 The Honourable Warren K Winkler, Chief Justice of Ontario, reported the impact on settlement rates of a rule change allowing mediation to take place later:

> The early mandatory mediation aspect of universal case management in the Toronto Region of the Superior Court of Justice prior to the Practice Direction suffered from the fact that it was 'too early' to enable the parties to be adequately prepared to settle advisedly. The Practice Direction, later to become Rule 78 of the Rules of Civil Procedure, sought to cure the problem by altering the timing of mandatory mediation so that it occurred at a time when the parties chose before they could obtain a trial date. …
>
> In recognition of the truism that mediation is all about 'timing, timing and timing,' the adjustment so that mediation takes place when it is most likely to succeed has meant that the success rate of mediation has skyrocketed. Since the time lines for mediation have been extended [*within 90 days of the action being set down for trial, rather than within 90 days of filing the defence*], the success rate for mandatory mediations has almost doubled.[53]

The results of the King's College London survey of TCC litigation in the UK seem to be at odds with the Ontario experience. It found that the largest number of successful mediations took place in the early stages of the litigation (specifically, during the exchange of pleadings and during, or as a result of, disclosure); though there was a (smaller) cluster of successful mediations shortly before trial.

9 Dispute resolution techniques in construction

The construction industry has been particularly innovative in designing a wide range of dispute resolution methods, used both domestically and internationally. This leaves parties with a choice how they would prefer their cases to be resolved and managed and the possibility of retaining an optimum degree of control on the management of the process. An overview of some the key ADR techniques is set out below, in order to help contextualise the use of mediation and also shed some light on the motivation behind the TCC's decision to trial a Court Settlement Process.

The Independent Intervener

In 1986 Clifford Evans suggested the use of an '*independent intervener*' in construction projects.[54] His idea was that the independent intervener would be paid equally by the employer and contractors to settle disputes as they emerged, rather than wait until the end of the contract. The decision would be binding until the end of the project, when either party could start arbitration proceedings.

Dispute Resolution Adviser

The basic concept of a Dispute Resolution Adviser (DRA) also involves the use of a neutral third person who advises the parties to a disagreement or dispute and suggests possible settlement options. Unlike the independent intervener, the DRA does not make interim binding decisions, but advises on the means by which settlement could be achieved. The power to settle ultimately rests with the parties.

A variety of benefits flow from such an approach. First, disagreements at site level can be addressed before a full-blown dispute develops. Not only does this avoid the breakdown in working relationships which could then affect the rest of the project's duration, but it also allows the issues to be dealt with whilst they are fresh in the parties' minds. Further, neither the parties nor the adviser are limited to a 'legal' outcome, so the settlement could encompass wider solutions mutually beneficial to the parties and the project. The disadvantage is that the parties may be unable to agree, or may reject the DRA's advice. Because they are not bound by the advisers' suggestions, the dispute may continue to develop.

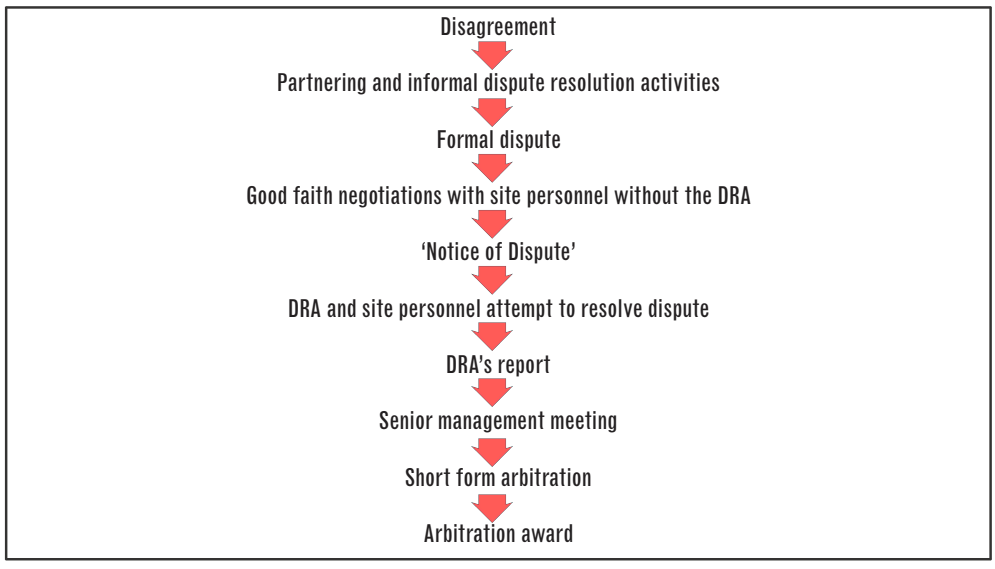
The logical next step was developed by a working party of the CIArb and labelled the Dispute Adviser. Kenneth Severn presented the working party's two-stage solution, classifying disputes as 'minor' or 'major'.[55] Minor disputes are initial disagreements which may be dealt with by the Dispute Adviser, or some other expert whom the parties and the Adviser call in. If a settlement is not reached or the problem continues, then the minor dispute becomes a major dispute. Major disputes may be conciliated or mediated; or the Dispute Adviser may make a recommendation. In this context, conciliation refers to a purely facilitative process, whilst mediation may lead to a written reasoned opinion, binding until overturned by arbitration. The Dispute Adviser may make recommend a form of settlement (which the parties can accept or reject), or alternatively may help the parties to select between conciliation and mediation in order to progress the resolution of the dispute. In any event, major disputes lead to a binding recommendation, rather than allowing a reticent party the opportunity of delaying payment until post-completion arbitration.

Colin Wall designed the most widely known Dispute Resolution Adviser system in practice: a complete process. His model was first developed for the Hong Kong Government's Architectural Services Department and used in the refurbishment of the Queen Mary Hospital in Hong Kong in 1991. It is a hybrid system, building on existing concepts:

> [It] draws upon the independent intervener concept as modified by the Dispute Adviser but provides a far more flexible approach. It embodies the dispute prevention attributes of the Dispute Review Board and Project Arbitration, it uses partnering techniques to re-orient the parties' thinking and encourages negotiation by using a tiered dispute resolution process. It is based on giving the parties maximum control through the use of mediation techniques but also includes prompt short-form arbitration which encourages voluntary settlement and, if necessary, provides a final and binding resolution to the dispute.[56]

The complete process has several distinct stages. First, at the commencement of the project the DRA undertakes partnering-style activities in order to build a rapport with the parties whilst at the same time encouraging the parties to work as a team. Second, the DRA will then visit the site on a regular basis in order to maintain a level of familiarity with the project and its participants. This also provides the opportunity for the DRA to assist in settling any disagreements which may have arisen since the last visit.

Figure 2: **Outline of the DRA system**[57]



The third distinct stage of the DRA's functions relates to formal disputes. The contract provides a time limit of 28 days within which any decisions or certificates issued under the contract may be challenged. If a decision or certificate is not challenged then it becomes final and binding. If one party does challenge it, the parties have 28 days within which to try and resolve the matter by direct negotiations. If these are unsuccessful, the aggrieved party may issue a formal notice of dispute, still within the 28-day period, otherwise the right to challenge is lost. It is most likely that the DRA will have tried to facilitate the early settlement of such disputes, but if a Notice of Dispute is issued then the DRA and the site representatives have 14 days to attempt to resolve it.

During this period the DRA may try almost anything to resolve the dispute, from mediation to calling in an expert in the particular area, if the problem proves to be beyond his/her expertise. The important point is that any evaluation is carried out by another neutral third party, not by the DRA. By maintaining a purely facilitative role the DRA does not jeopardise the impartial and neutral position which s/he has developed with the parties. Time limits may be extended under certain circumstances and the process comes to an end if there is a successful settlement or resolution. The parties could agree to settle; or may agree to be bound by an expert's opinion.

The fourth stage relates to disputes which have not been settled at site level. The DRA produces a report which outlines the nature of the disputes and each party's viewpoint; this may contain a non-binding recommendation or evaluation of the dispute. The site representatives are given an opportunity to check the accuracy of the report and comment. This provides an important chance for the individual disputants to review their position before the report is passed to senior management. Senior management should be able to obtain a clear picture of the nature of the dispute and bring a non-emotional perspective to the problem. The DRA may continue to facilitate the resolution of the dispute at senior management level.

At the fifth stage, if the matter remains unresolved 14 days after the DRA's report, then a short-form arbitration may be employed. This should take place within 28 days from termination of senior managements' efforts. An arbitrator is selected by the parties or, if they cannot agree, then the DRA will select an arbitrator. The contract provides the rules for the short-form arbitration, which includes the following key elements:

- one issue or a limited number of issues, conducted with one day per issue
- each party is given the opportunity to present
- each party to have an equal amount of time
- the arbitrator has seven days to make a written award which is final and binding
- disputes over time or money are resolved using 'final offer' arbitration, where the arbitrator must select one or the other figure.

According to Wall, the Queen Mary Hospital project raised 'numerous problems yet there have been no disputes'.[58] The Architectural Services Department has used the DRA on other projects and apparently now does so systematically on all major projects, as does the Hong Kong Housing Authority.

ICE Conciliation

ICE conciliation first appeared in Clause 66 of the 6th edition of the ICE Standard Conditions of Contract. The ICE Conciliation Procedure 1999[59] is essentially assisted negotiation: trying to reach an agreed solution using a conciliator who is either appointed by the parties (if agreed) or by the ICE if either party applies to the ICE for such an appointment. The conciliator can, like a mediator, communicate privately with each party without revealing those communications to the other party. The job is to explore with the parties their interests, strengths and weaknesses and perceived needs in order to identify possible areas of accommodation or compromise.

The key difference between mediation and conciliation is that, if it does not prove possible to settle, the conciliator will go on to make a recommendation as to how, in his opinion, the matter should be settled. This recommendation is not to include any information that either of the parties provided in confidence to the conciliator. The recommendation is not binding on the parties unless both parties sign their agreement to this in writing..

Project Mediation

'Contracted Mediation', or 'Project Mediation', attempts to fuse team-building, dispute avoidance and dispute resolution into one procedure. A project mediation panel is appointed at the outset of the project. This impartial panel consists of one lawyer and one commercial expert, who are both trained mediators. The panel assists in organising and attends an initial meeting at the start of the project; and may conduct one or more workshops at the same point, or during the course of the project, as necessary.

The only publicly reported project where project mediation has been used was the Jersey Airport taxiway.[60] The contract sum was approximately £15m, and the project mediation panel cost approximately £15,000. A variety of disputes were resolved and the project finished one day ahead of schedule and approximately £800,000 below budget. Much of the project's success was attributed to the use of the contracted mediation process.

Project Mediation was launched in an updated form by CEDR Solve in December 2006. It has three documents:

1 Non-binding guidance notes;

2 The Model Project Mediation Protocol; and

3 The Model Project Mediation Agreement.[61]

The aim of CEDR's Project Mediation package is to help support the successful delivery of the project by identifying and addressing problems before they turn into disputes about payment and delay. Its three main components comprise:

1 Access to two mediators for the duration of the project. Ideally one should be legally qualified and the other have a relevant commercial background; they should visit the project site regularly to discuss progress and to identify with the parties any actual or potential communication problems as early as possible. Project Mediators are (unlike members of DABs) able to request private advice and opinions from project participants; the cost basis for this is a monthly retainer and hourly rate for each Project Mediator;

2 A half-day Project Mediation Workshop, prior to commencement, attended by all the project decision-makers, including the project

managers and leaders, consultants and designers, as well as key subcontractors and suppliers, one of whom should ideally be joined to the Project Mediation Agreement to ensure their participation in the process and in mediations at any time throughout the project. The aim of the workshop is to explain the role of mediators and to familiarise the parties and the mediators with the aims of the project, the project parties and any key suppliers.

3 Formal mediation, using the CEDR Solve rules, if informal communications between the Mediators and the parties fail. The advantage of this over any decision reached by a DAB is that it is not disclosable in later proceedings.

It has been argued that Project Mediation is a cheaper alternative to DAB dispute resolution methods (on which see below) under the FIDIC forms of contract.[64] This is because detailed statements of case, evidence and experts may not be necessary; instead, the parties can simply exchange summary position statements and supporting documents, followed by a one-day mediation. CEDR makes the point that Project Mediation may be suitable for small to medium projects, where the cost of a DAB panel would be disproportionate to the contract value.

Since CEDR's Project Mediation was launched, there has been consistent interest shown, with over 200 enquiries. 30% were from organisations such as banks, investment corporations and pharmaceutical companies, who were planning or funding large projects. 60% were from law firms. A lot of interest has been from overseas (25%). However, actual take-up of the scheme has been limited, suggesting it may be used as and when disputes arise, rather than proactively.

Dispute Boards

The term 'Dispute Boards' (occasionally 'Disputes Boards') – collectively, DBs – is relatively new. It is used to describe a dispute resolution procedure which is normally established at the outset of a project and remains in place throughout the project's duration. It may comprise one or three members who become acquainted with the contract, the project and the individuals involved with the project in order to provide informal assistance, recommendations about how disputes should be resolved and binding decisions. Whether a DB consists of one person or three, its members are remunerated throughout the project, most usually by way of a monthly retainer, which is then supplemented with a daily fee for travelling to the site, attending site visits and dealing with issues that arise between the parties by way of reading documents and attending hearings and producing written recommendations or decisions, if and as appropriate.

The term has more recently come into use because of the increased globalisation of adjudication during the course of projects, coupled with the increased use of Dispute Review Boards (DRBs), which originally developed in the domestic USA major projects market. DRBs were apparently first used in the USA in 1975 on the Eisenhower Tunnel and have grown in frequency on domestic USA construction projects, but they have also been used internationally. However, the World Bank and FIDIC opted for a *binding* dispute resolution process during the course of projects, and so the Dispute Adjudication Board (DAB) was born. A DAB can make written decisions that bind the parties and must be implemented immediately during the course of the project; by contrast, the DRB system only provides a recommendation that is not binding on the parties.

Dispute Review Boards

A DRB usually comprises a panel of three impartial professionals, employed by the employer and contractor to assist in avoiding disputes and resolving disputes that may arise in respect of a project. The panel should ideally have some specialist knowledge of the type of project. In order to be effective, the panel needs to be put in place on or around the outset of the project, so that it can follow the progress of the project and deal with issues as they arise.

DRB provisions are most usually included within the main construction contract, or may be incorporated later by variation or change order. There will also need to be a tripartite agreement between the DRB members and the employer and contractor, dealing with the remuneration of the panel as well as establishing the procedural rules and applicable terms, such as confidentiality and the rights and obligations of the DRB members, the employer and contractor.

Although the DRB procedure is formal, involving an exchange of written positions, evidence and a hearing, the outcome – a written recommendation from the DRB – is non-binding. The parties are, therefore, not obliged to comply with it. A fundamental point, then, about DRBs is that the panel must have the respect of the employer and the contractor and must reach reasoned recommendations that the parties can understand and respect, in order to maximise the chances that the parties will in fact choose to comply.

DRBs initially developed in the USA. According to the Dispute Review Board Foundation (DRBF),[65] the first documented use of an informal DRB process was on the Boundary Dam and Underground Powerhouse project north of Spokane, WA during the 1960s. Problems occurred during the course of the project, and the contractor and employer agreed to appoint two professionals each to a four member 'Joint Consulting Board', in order that this Board could provide non-binding suggestions. As a result, the recommendations of the Joint Consulting Board were followed; these included several administrative procedural changes and the settlement of a variety of claims, as well as an improvement in relationships between the parties. The project was also completed without litigation.

The DRBF has catalogued more than 1200 projects in North America alone which have used DRBs, representing more than US$90bn worth of project work. In these, DRBs have issued over 1500 recommendations, all but a handful being adopted by the parties.

Dispute Adjudication Boards

The use of DABs has developed in parallel with DRBs. In the international arena, FIDIC led the way by the introduction of DABs in its 1999 suite of contracts. To gain benefit from a DAB, it should be constituted at the start of the contract, so that its members will visit the site regularly and be familiar not just with the project but with the individual personalities involved in it. In those FIDIC forms which include a DAB, the appointment of its members is dealt with in clause 20.2.

On most major projects a DAB will comprise three persons, although one alone may be used for smaller projects. If three are used, then each party may nominate one member for approval by the other. The parties then agree upon the third member, who becomes the chairman. In practice, each party may propose three potential members, from which the other party will select one; and once two members have been selected, they often together identify the third (with the approval of the parties). That third person might become the chairman, although, once again with the agreement of all concerned, one of the first two could serve instead. A default appointing authority is also provided, in case this machinery fails to operate.[67]

The parties are obliged contractually to refer any dispute whatsoever that arises in connection with or out of the contract, including the opening up and reviewing of notices and certificates. If the DAB comprises three members, then the DAB is deemed to have received the notice of dispute when this is received by the Chairman alone. This means that the parties can simply direct all of their correspondence to the Chairman, with copies to the other members, as well as to the other party and the engineer.[68]

Once a dispute has been referred to the DAB, the employer and the contractor are obliged to provide such additional information and further access to the site and its facilities as the DAB may require in order for the DAB to make its decision. The contractor is to continue to proceed with the works in accordance with the contract (unless abandoned, repudiated or terminated). The DAB is obliged to provide its written decision within 84 days after receipt of the reference. The DAB must provide a reasoned award, which must be issued under clause 20.4 of the contract. This expressly states that the DAB is not acting in an arbitral capacity, which makes clear that the written decision of the DAB is not to be treated as an award, so cannot be said to be immediately and finally conclusive. Neither will the DAB's decision enjoy the status of an arbitrator's award in respect of enforcement. However, both parties are contractually obliged to properly comply with every DAB decision: its decisions are therefore immediately mandatory, unless or until revised by an arbitral award, litigation or settlement. It will, therefore, be enforceable under the contract; depending upon the local law, it may be possible to enforce payment required by a DAB decision in the local court, without opening up the merits of the decision or risking the court action being stayed because of the existence of the arbitration clause.

If either party is dissatisfied with the decision of the DAB, then that party may give notice of its dissatisfaction to the other party. However, this must be done within 28 days after receiving the DAB's decision. If the DAB does not render its decision within 84 days of receipt of the reference, then either party may simply serve a notice of dissatisfaction. A notice of dissatisfaction must set out the dispute and reasons for the dissatisfaction. Matters that are the subject of a notice of dissatisfaction which are not resolved amicably in accordance with clause 20.5 may then be referred to international arbitration under clause 20.6.

The crucial point about the notice of dissatisfaction is that the decision of the DAB becomes final and binding upon both parties unless a written notice of dissatisfaction is served within 28 days of receipt of the DAB's decision. In the absence of such a notice the parties have clearly agreed contractually that they will accept the DAB's decision as final and binding upon them. For projects and disputes subject to statutory adjudication – in the UK, under Part II of the Housing Grants, Construction and Regeneration Act 1996 – DABs in the form described above may now have little relevance, except so far as the law permits parties to tailor their contractual procedures to suit their needs, provided they still comply with all the items on the procedural 'shopping-list' of the 1996 Act.

Multi-tiered dispute resolution

Multi-tiered dispute resolution clauses have been defined as clauses which:

> … [provide] for distinct stages, involving separate procedures, for dealing with and seeking to resolve disputes.

The mechanisms chosen can include negotiation, mediation, adjudication (including DABs or DRBs) expert determination and/or arbitration. Examples of multi-tiered dispute resolution procedures are found in the current FIDIC Red, Yellow and Silver Books,[70] but are also

common in bespoke contracts for large scale projects. Prestigious projects that have used such techniques include the Channel Tunnel and Hong Kong Airport.

In large scale projects the potential risks disputes bring with them are much larger. By providing for a tiered system of dispute resolution techniques it is hoped that disputes will be dealt with as soon as they arise and that the majority of disputes will be filtered out, or at least reduced in scale, as early on in the dispute resolution process as possible. This should serve to limit any damage to a commercial relationship which can occur due to litigation.

For the construction of the Hong Kong airport three different dispute resolution processes were provided, depending on the type of contract: infrastructure projects, the new underground line and the new airport itself. For the infrastructure projects, any disputes between the Hong Kong Government and the Contractor were first to be referred to an engineer. The next step was referring the matter to mediation and finally adjudication. For the construction of the new underground line, the process began again by referring disputes to the engineer. This step was followed by mediation and/or arbitration. Finally, for the airport itself, the dispute first went to an engineer, after which the parties could appeal to the Project Director. If the parties were still dissatisfied, then they had ten days in which to consult the DRB. The final step in the process was arbitration.

Keith Brandt observes that there were very few referrals to the DRB:

> The DRB made six binding decisions, with only one case being taken to arbitration. A relatively low number of referrals suggests that the existence of the DRB deterred the referral of disputes and it may be that it encouraged a settlement of matters between the parties without further third party intervention.[71]

The London Olympics 2012 has also chosen a multi-tiered dispute resolution system. In 2008 the ODA set up an Independent Dispute Avoidance Panel (IDAP) of ten construction professionals under the chairmanship of Dr Martin Barnes. Those disputes not resolved by the IDAP will then be referred to an Adjudication Panel, comprising eleven adjudicators under the chairmanship of Peter Chapman.[72]

1 Martin Shapiro, *Courts: A comparative and political analysis*, Chicago, University of Chicago Press (1981).
2 See www.mediate.co.uk (accessed 6 January 2010).
3 Amanda Bucklow, 'The "Everywhen Mediator": The Virtues of Inconsistency and Paradox: the Strength, Skills, Attributes and Behaviours of Excellence and Effective Mediators', (2007) 73 Arbitration 40; see also www.amandabucklow.co.uk
4 Amanda Bucklow, 'The Law of Unintended Consequences, or Repeated Patterns?', (2006) 72 Arbitration 348.
5 Bucklow n 3 44.
6 Bucklow n 3 47.
7 See Margaret Drews, 'The Four Models of Mediation', (2008) 3(1) DIAC Journal of Arbitration in the Middle East 44-46.
8 Karl Mackie, David Miles, William Marsh and Tony Allen, *An ADR Practice Guide: Commercial Dispute Resolution*, London, Bloomsbury Professional (3rd ed, 2007).
9 Mackie et al n 8 50. The chart is derived from one by Professor Green of Boston University (1993).
10 See Michael Palmer, 'Mediation in the Peoples' Republic of China: Some General Observations', in Karl Mackie (ed), *A Handbook of Dispute Resolution: ADR in action*, London, Routledge (1999) 221-230; and Nicholas Gould, Phillip Capper, Giles Dixon & Michael Cohen, *Dispute Resolution in the Construction Industry*, London, Thomas Telford (1999) 51.
11 Low Sui Pheng, 'The Influence of Chinese Philosophies on Mediation and Conciliation in the Far East', (1996) 62 Arbitration 16 and Gould et al n 10 21.
12 See Thomas J Stipanowich, 'What's Hot and What's Not', DART conference proceedings, Lexington KY (USA) October 1994; and Gould et al n 10 51.
13 See www.adrgroup.co.uk (accessed 10 January 2010).
14 See www.cedr.co.uk (accessed 10 January 2010).

15 See now *The ICE Conciliation Procedure 1999* and *The ICE Construction Mediation Procedure 2002*, both available via www.ice.org.uk/bookshop (accessed 9 July 2009). The *Conciliation Procedure* is also reproduced at Gould et al n 10 170-173.
16 Gould et al n 10 21.
17 Peter Fenn and Nicholas Gould, 'Dispute Resolution in the United Kingdom Construction Industry', DART conference proceedings, Lexington KY (USA) October 1994.
18 The Civil Procedure Rules (SI 1998/3132, as heavily amended); see Rt Hon Lord Justice Waller (Editor-in-Chief), *Civil Procedure* 'The White Book', London, Sweet & Maxwell (2009 edition). The current text of the CPR and new amendments can also be downloaded from www.justice.gov.uk/civil/procrules_fin (accessed 9 July 2009).
19 Mackie et al n 8 61-64.
20 Anthony Lavers and Penny Brooker, 'Commercial lawyers' attitudes and experience with mediation' Web Journal of Current Legal Issues (27 September 2002); 'Construction lawyers' experience with mediation post-CPR' (2005) 21 Construction Law Journal 19; and 'Mediation outcomes: lawyers' experience with commercial and construction mediation in the UK' (2005) 5 Pepperdine Dispute Resolution Law Journal 161.
21 *Dunnett v Railtrack plc* [2002] EWCA Civ 303, (Practice Note) [2002] 1 WLR 2434. For an overview, see Shirley Shipman, 'Court Approaches to ADR in the Civil Justice System' (2006) 25 Civil Justice Quarterly 181; for comparisons with New South Wales (where the courts, as in South Australia, have clear statutory powers to order mediation against the will of the parties), see Brenda Tronson, 'Mediation Orders: Do The Arguments Against Them Make Sense?' (2006) 25 Civil Justice Quarterly 412.
22 Professor Dame Hazel Genn et al, *Twisting arms: court referred and court linked mediation under judicial pressure*, Ministry of Justice Research Series 1/07 (May 2007) 134-135, downloadable from www.justice.gov.uk (accessed 9 July 2009).
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24 Henry Brown and Arthur Marriott, *ADR Principles and Practice*, London, Sweet & Maxwell (2nd ed, 1999) 121.
25 Amanda Bucklow n 3.
26 See Bucklow n 3 46.
27 See Bucklow n 3 46.
28 33.33% of respondents had 4-7 years' experience as mediators; 26.66% had 8-11 years' experience; and 40% had 13-17 years' experience.
29 Andrew Boon, Richard Earle and Avis Whyte, 'Regulating Mediators?', (2007)10 Legal Ethics 26; and Philip Howell-Richardson, 'Europe's changing mediation landscape', The In-House Lawyer, issue 162 (July/August 2008).
30 Boon et al n 29 38.
31 See for example, CEDR's website, which states that 'the market dictates that most mediators who get work have some form of accreditation' at www.cedr.com/training/forthcoming/mst.php (accessed 10 January 2010).
32 Laurence Boulle and Miryana Nesic, *Mediation: Principles Process and Practice*, London/Dublin/Edinburgh, Butterworths (2001) 437.
33 See www.civilmediation.org (accessed 10 January 2010).
34 See www.nationalmediationhelpline.com (accessed 10 January 2010).
35 See www.imimediation.org (accessed 10 January 2010).
36 Directive 2008/52/EC of the European Parliament and the Council on certain aspects of mediation in civil and commercial matters, OJ L 136/3 (24 May 2008), adopted under article 61(c) TEC and deriving from the Green Paper on alternative dispute resolution in civil and commercial law, COM (2002) 196 (April 2002). 'Cross-border' is defined in article 2; Recital 8 unsurprisingly confirms that member-states may extend the application of the principles contained in the Directive to situations with no cross-border element.
37 Like other EC measures on civil justice (the Brussels Convention, the Brussels I, Rome I and Rome II Regulations), the new Directive does not apply to revenue, customs or administrative matters, nor to state liability for acts and omissions in the exercise of State authority (article 1(2)). Nor, under the 'Maastricht compromise', does the Directive apply to Denmark; the UK and Ireland have the power – exercised in this case – to 'opt in'. On these EC powers in relation to civil justice, now and under the Treaty of Lisbon (2007), see Philip Britton, *The Right Law for Construction? Choice of Law: Rome I and Rome II*, SCL Paper 148 (August 2008) 14-16 and 43-47.
38 Article 3; Recital 11 says that the Directive 'should not apply to… processes of an adjudicatory nature such as… arbitration and expert determination…'.
39 Article 1(1).
40 See www.mediate.co.uk (accessed 10 January 2010).
41 Commission Recommendation 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes, OJ L 109/56 (19 April 2001).
42 Boulle and Nesic n 32.
43 See Lord Chancellor's Department, *Alternative Dispute Resolution – a Discussion Pape*r (1999), Section 8 – Quality Control.
44 See Boon et al n 29 34.
45 Note that article 7 of the Mediation Directive n 36 attempts to protect the confidentiality of the mediation process by normally protecting the mediator and those involved in the administration of a mediation from being required to give evidence about the mediation in separate civil proceedings or an arbitration. This merely confirms, but in a different legal form, what would normally be the position in English law, if the terms on which a mediation happens give the process a 'without prejudice' status and prohibit disclosure in court of any information about what happened during it: see eg the CEDR *Model Mediation Agreement* (10th ed, 2008), clauses 5-8 – downloadable from www.cedr.co.uk (accessed 10 January 2010).

46 Eg the CEDR *Model Mediation Agreement* n 45 clause 8.
47 Boon et al n 29 35.
48 See Boulle and Nesic n 32 465.
49 See Lord Chancellor's Department, *ADR Discussion Paper* n 43: Summary of Responses, paragraph 81.
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59 See n 15.
60 'Stopping disputes before they start', Commercial Lawyer, February 2001 10.
61 CEDR *Project Mediation Protocol and Agreement* (1st ed, December 2006) downloadable from www.cedr.com (accessed 9 July 2009). Nicholas Gould played a lead role in drafting this documentation.
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63 *CEDR Model Mediation Procedure* (10th ed), downloadable from www.cedr.co.uk (accessed 10 December 2009).
64 Simon Tolson and Nicholas Gould, 'Project Mediation: It's like Partnering with Teeth', downloadable from www.fenwickelliott.co.uk (accessed 9 July 2009), also *Building*, 8 December 2006.
65 See the DRBF website at www.drb.org (accessed 9 July 2009).
66 Eg FIDIC (International Federation of Consulting Engineers), *Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer* (the new Red Book, 1999); *Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant and for Building and Engineering Works Designed by the Contractor* (the new Yellow Book, 1999 - now (2010) under review); and *Conditions of Contract for EPC/Turnkey Projects* (the Silver Book, 1999), all obtainable from www1.fidic.org (accessed 9 July 2009).
67 See Nicholas Gould, *Establishing Dispute Boards: Selecting, Nominating and Appointing Board Members*, SCL Paper 135 (January 2006).
68 Clause 20.4 and Procedural Rule 4.
69 Michael Pryles, 'Multi-tiered Dispute Resolution Clauses', (2001) 18(2) Journal of International Arbitration 159; see also Tanya Melnyk, 'The Enforceability of Multi-tiered Dispute Resolution Clauses: The English Law Position', (2002) 5 International Arbitration Law Review 113.
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71 Keith Brandt, 'The Use and Development of Mediation Techniques in UK and International Construction Projects', Paper given at the CIArb Hong Kong conference 'East greets West: New Opportunities for Dispute Resolution' (2 February 2002), Society of Construction Law (February 2002) 10-11.
72 See www.london2012.com/press/media-releases/2008/04/ (accessed 10 December 2009); also Ellis Baker, *Is it all necessary? Who benefits? Provision for multi-tiered dispute resolution in international construction projects*, SCL Paper 154 (January 2009) 22.

Part III: COURTS & MEDIATION

10 Introduction

A distinctive feature of traditional litigation, which applies to construction disputes as to any other type of civil case, is that most categories of state courts have unlimited jurisdiction. This means that a court will accept any case brought before it, relying on the defendant to object if s/he has grounds for doing do (wrong court, wrong legal system, claim bound to fail, action out of time etc). A would-be litigant may therefore have a right – often treated as having constitutional or fundamental status – to take a civil case to court and to expect the court to give judgment on his/her claim according to the law. Article 6(1) of the European Human Rights Convention adopts precisely this principle as its starting-point:

> In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly …[1] [*a short list of exceptions to the requirements of a public hearing and judgment follows*]

However, this is no longer, if it ever was, the whole story. In civil cases parties may agree on alternative procedures to attempt to resolve disputes before these get to court – at the limit, instead of ever going to court at all. And in the interests of efficient and cost-effective management of civil cases (with an eye to best use of their own and of the parties' resources), courts no longer assume that traditional litigation, heading towards trial and judgment, is the normal – or even the ideal – method of reaching an outcome on every claim brought before them. Empowered by rule-changes bringing in 'active case management', we now have what Professor Frank EA Sander of Harvard Law School called 'the multi-door courthouse'. Under this approach, a court screens incoming claims, to determine which dispute resolution method would best suit each.[2] Screening is based on a number of factors, including the cost of the dispute, the need for speed, the nature of the dispute, the relationship between the disputing parties and the amount involved. The court then matches the appropriate dispute resolution mechanism to each case – whether a particular 'track' of traditional litigation or some other less formal procedure.[3]

As a result, the courts themselves now encourage, or may even require, the parties to undertake mediation. There are two key methods that the law can use to coerce parties to a dispute to mediate. First, mediation can simply be made mandatory (as in Ontario – section 15 below). The parties are by law required to go through the process of mediation before their case can move forward within the court, although there is of course no certainty or requirement that mediation will lead to a settlement. Second, the disadvantages of not agreeing to mediation can be made so apparent that the parties and their representatives are educated over time to agree to, and indeed actively propose, mediation. This is the approach that has generally been adopted to date by the courts in England & Wales (with the exception of the ARM scheme in the Central London County Court, as originally planned – section 13 below). In some versions of these innovations, it is the court itself which organises the form of ADR which is offered – or imposed: this is often called 'court-annexed mediation'.

This Part of the report therefore looks at the ways in which the relationship between courts and ADR is now a more complex and subtle one than twenty years ago. The main focus is on England & Wales, but with insights from ADR initiatives in the USA and Canada in sections 14 and 15 below.

11 ADR chosen by the parties: England & Wales

If the parties have made contractual provision for the use of a form of ADR as a method of dispute resolution (either in advance or *ad hoc*, once a dispute has arisen), most common law courts will give effect to that as the expression of the parties' shared will. As a result, litigation started by one party on the substance of a dispute covered by such an ADR clause will be 'stayed' at the initiative of the other party. There can of course be preliminary issues about the meaning and effect of the ADR clause, which the court will have to determine (Does it apply to the so called 'dispute' which has now arisen? Is its meaning sufficiently clear for the court to give effect to it? Is the clause unenforceable because unfair? Does it properly stand in the way, either temporarily or permanently, of litigation on the same issues?).

Most jurisdictions treat arbitration clauses, at least in an international context, with special respect, in order to give effect directly or indirectly to the autonomous nature of the legal regime for international commercial arbitration. But the issues are not fundamentally different where a form of ADR is chosen which is not – or not only – arbitration, like the multi-tiered dispute resolution provisions now common in major construction projects. In the House of Lords in *Channel Tunnel Rail Group v Balfour Beatty Construction*,[4] Lord Mustill (with whom all the other Lords concurred) made the 'sanctity of contract' point clearly:

> … those who make agreements for the resolution of disputes must show good reasons for departing from them… having promised to take their complaints to the experts and go if necessary to the arbitrators, that is where the appellants should go.[5]

Applying exactly the same approach, the English courts will also enforce an agreement to mediate, where it has been contractually agreed, provided that the procedure is clear enough: this therefore operates as the parties validly 'opting out' of the right each would otherwise have enjoyed to go to court.

In *Cable & Wireless Plc v IBM United Kingdom Ltd* [6] the Commercial Court was asked to stay court proceedings while the parties undertook the ADR processes provided in the parties' contract. Colman J held that the ADR provisions did have binding effect, imposing an obligation on each party to go through the process of initiating a mediation, selecting a mediator and at least presenting the mediator with its case and documents. Since the clause described the means by which the parties should attempt to resolve a dispute, this required them to participate in the procedures they had agreed. The key feature of the ADR aspects of the procedure, in the court's eyes, was that they were sufficiently certain for a court readily to ascertain whether they had been complied with. At the policy level, and bearing in mind *Dunnett v Raitrack*,[7] the judge added:

> … the English courts should not be astute to accentuate uncertainty (and therefore unenforceability) in the field of dispute resolution references. There is now available a clearly recognised and well-developed process of dispute resolution involving sophisticated mediation techniques provided by trained mediators in accordance with procedures designed to achieve settlement by the means most suitable for the dispute in question.

However, a note of caution comes from the recent case of *Balfour Beatty Construction Northern Ltd v Modus Corovest (Blackpool) Ltd*.[9] Here Coulson J characterised the mediation agreement as *'nothing more than an agreement to agree'*. Unlike the mediation agreement in *Cable & Wireless*, it was too uncertain to be enforced by the court, so that one could not say that the party which had started court proceedings had done so in breach of an agreement to mediate. Even if there had been a binding obligation to mediate, the judge said that he would only stay a claim and counterclaim in favour of mediation if he concluded that:

(a) The party making the claim and or counterclaim was not entitled to summary judgment on that claim and/or counterclaim, ie that there was an arguable defence on which the other party had a realistic prospect of success; and

(b) The best way of resolving that dispute was a reference to mediation.[11]

12 ADR encouraged – or required – by the courts: England & Wales

In 1993 the Commercial Court adopted a new practice permitting it to encourage ADR by making an order directing the parties to attempt it; the parties then had to inform the court of the steps taken if it failed (this is the scheme referred to by Lord Woolf in the quotation below). Although the scheme was not mandatory, the aim was to impose substantial pressure on the parties to mediate; between 1996 and 2000 233 ADR Orders were made.[12] In 1996 the Court of Appeal established a voluntary ADR scheme; and the Central London County Court implemented a Voluntary Mediation pilot scheme (VOL), followed by one called Automatic Referral to Mediation (ARM) – both are discussed in section 13 below.

One of Lord Woolf's key recommendations, reviewing the whole of the civil justice system in his two *Access to Justice* reports,[13] was that *all* courts should adopt procedures which would encourage ADR, especially at an early stage before matters had reached litigation. In the introductory chapter of his final report, he wrote:

> Two other significant aims of my recommendations need to be borne in mind: that of encouraging the resolution of disputes before they come to litigation, for example by greater use of pre-litigation disclosure and of ADR, and that of encouraging settlement, for example by introducing plaintiffs' offers to settle, and by disposing of issues so as to narrow the dispute. All these are intended to divert cases from the court system or to ensure that those cases which do go through the court system are disposed of as rapidly as possible. I share the view, expressed in the Commercial Court Practice Statement of 10 December 1993, that although the primary role of the court is as a forum for deciding cases it is right that the court should encourage the parties to consider the use of ADR as a means to resolve their disputes. I believe that the same is true of helping the parties to settle a case.[14]

The Civil Procedure Rules

Giving effect to Lord Woolf's ideas, the aim of encouraging mediation (both before litigation is started and afterwards) is reflected in the Civil Procedure Rules, which first came into force in 1999, and in the Pre-Action Protocols (PAPs) that accompany them. The Rules' overriding objective – almost a textbook illustration of the 'multi-door courthouse' idea – is set out in CPR Part 1:

> **Rule 1.1: The overriding objective**
>
> (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
>
> (2) Dealing with a case justly includes, so far as is practicable—
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate—
>
> (i) to the amount of money involved;
> (ii) to the importance of the case;
> (iii) to the complexity of the issues; and
> (iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

Rule 1.2: Application by the court of the overriding objective

The court must seek to give effect to the overriding objective when it—
(a) exercises any power given to it by the Rules; or
(b) interprets any rule.

Rule 1.3: Duty of the parties

The parties are required to help the court to further the overriding objective.

All parties to litigation have an obligation to assist the court to further the overriding objective. Assistance includes clearly setting out the unresolved issues, identifying key documents and in particular attempting to avoid litigation by settling the dispute. This assistance is expected from the parties – even before proceedings are commenced in the court – by the requirement on them to follow the general approach outlined in the *Practice Direction on Pre-Action Conduct* (2009),[16] as well as any Pre-Action Protocol in force for their specific category of case. Paragraph 8.1 of this Practice Direction expressly provides:

> … 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…

Paragraph 4.4(3) makes clear that if a party unreasonably refuses to consider ADR, the court may consider this as non-compliance with the expected pre-action standards of behaviour, with possible costs implications against that party. The Court of Appeal confirmed in *Halsey v Milton Keynes General NHS Trust*[17] that a reference to ADR would usually be understood by the courts as being a reference to some form of mediation by a third party.

The Pre-Action Protocol in construction

The *Pre-Action Protocol for the Construction and Engineering Disputes*[19] applies to all disputes in that category, including professional negligence claims against architects, engineers and quantity surveyors. A claimant must comply with this PAP before commencing proceedings in the court, subject to some exceptions. Paragraph 1.4 relates to compliance:

> The court will look at the effect of non-compliance on the other party when deciding whether to impose sanctions.

This PAP provides, uniquely at present among all such Protocols, for a pre-action meeting; and expects that the parties will at that meeting consider whether some form of ADR is more suitable than litigation.[20] This accords with the Court of Appeal's recognition in *Burchell v Bullard* that mediation should act as a track to a just result running parallel with the court system.[21] One impact of the TCC PAP is to force parties to incur substantial costs at an early stage ('front-loading').

As part of his 2009 review of costs in general in civil litigation, Jackson LJ floated for discussion the possibility of delaying the pre-action process in the TCC until after – rather than before, as now – the issue of the claim form; and involving the court in supervising compliance with the *Protocol* in real time, rather than after the event.[22] In his *Final Report*, Jackson LJ does not recommend delaying the operation of the TCC PAP until after a claim is issued (as some respondents wanted); but suggests that its operation be further reviewed in 2011. Meanwhile,

however, the judges' supervisory powers in relation to compliance with the PAP should be extended.

The report also strongly supports greater use of, and encouragement by the courts of, mediation in civil cases generally, but without changing the rules themselves:

> I do not believe that parties should ever be compelled to mediate. What the court can and should do (in appropriate cases) is (a) to encourage mediation and point out its considerable benefits; (b) to direct the parties to meet and/or to discuss mediation; (c) to require an explanation from the party which declines to mediate, such explanation not to be revealed to the court until the conclusion of the case; and (d) to penalise in costs parties which have unreasonably refused to mediate.[23] [*footnote omitted*].

Mediation within litigation

Once legal action has formally been started, rule 26.4 CPR gives the court the power, on application by one of the parties or on its own motion, to stay the proceedings for a month (extendable) 'while the parties try to settle the case by [ADR] or other means'.[24] The issue of ADR will normally be raised by the judge at the first Case Management Conference (CMC) with the parties. The 'teeth' for both Pre-Action Protocols and ADR come from rule 44.5 CPR on costs: '*the efforts made, if any, before and during the proceedings in order to try to resolve the dispute*' are among the factors to which the court must have regard.

Brown & Marriott consider these powers in relation to ADR '*fraught with difficulty, both conceptual and procedural*',[25] but the courts' rhetoric vigorously supports intervention in this way, as part of active case management, itself defined as including 'encouraging the parties to use an [ADR] procedure if the court considers that appropriate and facilitating the use of such procedure'.[26] Hence in *Dunnett v Railtrack plc*[27] the Court of Appeal reminded parties and their lawyers that they have a duty to explore ADR, to assist the court in achieving the overriding objective of the CPR:

> … if they [*lawyers*] turn down out of hand the chance of alternative dispute resolution when suggested by the court, as happened in this case, they may have to face uncomfortable costs consequences.[28]

Hammering the point home, the Court of Appeal awarded the respondents Railtrack no costs at all, though the appellant Mrs Dunnett failed to overturn the first-instance County Court judgment dismissing her claim. This costs decision came about principally because she had followed advice from Schiemann LJ, at a hearing ahead of her appeal, by suggesting ADR to Railtrack; its solicitors, on instructions, had '*turned this down flat*'.

A year later came *Shirayama Shokusan Co Ltd v Danovo Ltd*,[29] litigation in the Chancery Division to resolve disputes between the Saatchi Gallery and others with interests in County Hall in London, principally its Japanese tenants. The defendants asked Blackburne J to make a mediation order, following a model in the *Admiralty and Commercial Courts Guide*.[30] Under this, the parties were to submit their disputes to mediation, ahead of the hearing of an application for summary judgment (not therefore stayed). They were to endeavour in good faith to agree the name of an independent mediator, if necessary telling the court why mediation did not succeed (excluding matters covered by privilege).

The judge was confident that he had power to make the order, even though the claimants opposed it; he thought it had no human rights implications. At a second hearing three months later, the same judge was asked to order a formal stay of the litigation, in order to make possible (but not to require) the participation in mediation of a representative of five of the claimants,

who could not fly in from Japan by the original mediation deadline. He identified competing considerations:

> On the one hand there is that party's right of access to the court for the adjudication of his claim, a concept which as Brooke LJ observed in *Woodhouse v Consignia plc*[31] has a particular resonance under article 6 [*of the Convention*] …
>
> On the other hand there is the wider public interest in making the best use of the court's time and resources and in promoting the resolution of disputes by consensual means, rather than by the adversarial processes inherent in a court adjudication, where such out-of-court resolution has a realistic prospect of achievement.[32]

To take the further step requested would risk, he thought, violating both parties' rights under article 6(1) of the Convention, because it would require the ongoing litigation to be stayed indefinitely; so he refused to make the order sought.

In parallel, *Halsey v Milton Keynes General NHS Trust*[33] reached the Court of Appeal, with the benefit of submissions from the Law Society, ADRg, the CMC and CEDR. The court's long judgment, delivered by Dyson LJ, moved a step back from the original order in *Shirayama*:

> … to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to court … it seems to us likely that *compulsion* of ADR would be regarded as an unacceptable restraint on the right of access to the court and, therefore, a violation of article 6 [*of the European Human Rights Convention*].' [34]
> [*original emphasis*]

But the court confirmed that the successful party may be deprived of some or all of its costs, if it unreasonably refused to agree to ADR, 'without prejudice' negotiations being disregarded. The judgment goes on to suggest factors relevant in deciding when such a refusal will be unreasonable, summarised by Jack J in *Hickman v Blake Lapthorn* [*here slightly shortened*]:[35]

(a) A party cannot be ordered to submit to mediation, as that would be contrary to article 6 of the European Convention[36]…

(b) The burden is on the unsuccessful party to show why the general rule of costs following the event should not apply, and it must be shown that the successful party acted unreasonably in refusing to agree to mediation. It follows that, where that is shown, the court may make an order as to costs which reflects that refusal.[37]

(c) A party's reasonable belief that he has a strong case is relevant to the reasonableness of his refusal, for otherwise the fear of costs sanctions may be used to extract unmerited settlements.[38]

(d) Where a case is evenly balanced… a party's belief that he would win should be given little or no weight in considering whether a refusal was reasonable: but his belief must [not] be unreasonable.[39]

(e) The cost of mediation is a relevant factor in considering the reasonableness of a refusal.[40]

(f) Whether the mediation had a reasonable prospect of success is relevant to the reasonableness of a refusal to agree to mediation, but not determinative.[41]

(g) In considering whether the refusal to agree to mediation was unreasonable it is for the unsuccessful party to show that there was a reasonable prospect that the mediation would have been successful.[42]

(h) Where a party refuses to take part in mediation despite encouragement from the court to do so, that is a factor to be taken into account in deciding whether the refusal was unreasonable.[43] Public bodies are not in a special position.[44]

The Court of Appeal in *Burchell v Bullard* further emphasised the importance of mediation. Ward LJ put it this way:

> *Halsey* has made plain not only the high rate of a successful outcome being achieved by mediation but also its established importance as a track to a just result running parallel with that of the court system. Both have a proper part to play in the administration of justice. The court has given its stamp of approval to mediation and it is now the legal profession which must become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediate. 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.[45]

The impact of this series of cases is worth noting on the take-up of court-annexed mediation: the VOL and ARM schemes in the Central London County Court (described in section 13 below). *Dunnett v Railtrack* appeared to increase demand for the VOL scheme, running at the time, dramatically .[46] However, after *Halsey* made clear that mediation could not be ordered by the courts, the ARM scheme suffered from a low uptake. Professor Genn notes in her May 2007 report that *Burchell* came out after the end of the ARM scheme, suggesting that this decision might otherwise have increased ARM's uptake. So judicial policy on costs awards, specifically the extent to which failure to mediate will be taken into account when making a costs award, may have – as the judges intend – a very real impact on whether parties will decide to mediate. However, the figures from these two schemes also indicate that the threat of sanctions may not necessarily be effective in increasing the numbers of cases which settle.[47] The caselaw has not stood still, with a series of more recent decisions on when a refusal to mediate will be regarded as unreasonable: these are summarised in Appendix 3.

The arrival of the EC Mediation Directive[48] adds little to this legal landscape, except to echo the tensions already inherent in English practice. Article 5(1) reads like a simplified version of rule 26.4 CPR:

> A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute…

Article 5(2) adds, in effect cross-referring to article 6(1) of the European Human Rights Convention:[49]

> This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, *provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.* [*emphasis added*]

Positively, this suggests that the costs sanctions used in England to push (or drag) litigants towards ADR are in principle acceptable; negatively, it restates, rather than resolving, that tension between traditional court access and the resolution of disputes via ADR which English civil procedure already embodies. Member-states are to transpose the Directive into domestic law by 21 May 2011 (with one exception); in the UK, few statutory changes appear necessary, except in the law of limitation, where member-states must ensure that periods no longer expire during a mediation process to which the Directive applies.[50]

13 Court-annexed mediation in London

Central London County Court: Voluntary Mediation (VOL)

In April 1996 the Central London County Court, with the agreement of the Lord Chancellor, established a pilot mediation scheme, initiated in the light of Lord Woolf's *Access to Justice* reports.[51] Parties were sent personalised letters as soon as the defence was entered, offering them the opportunity of having their case mediated at the court by a trained mediator. The letter invited legal representatives (where applicable) to discuss the offer with their client and inform the court within 14 days whether or not they proposed to take up the offer of mediation. Mediations were time-limited to three hours, the parties each paying a token fee of £25 to cover expenses. The mediators conducted the mediations on a pro bono basis and were organised by four providers.

By the end of the initial study period in March 1998, offers of mediation had been made in around 4500 cases; but only 160 cases had actually mediated through the pilot scheme. In reviewing this period, Professor Genn and her colleagues made the following key findings:

1. The uptake rate for mediation was around 5% throughout the two years of the pilot, but was virtually non-existent among personal injury cases;
2. Uptake was highest among disputes between businesses;
3. The majority of cases settled at the mediation (63%) and settlement at mediation was highest (76%) where neither party had legal representation;
4. Compared with non-mediated cases, mediated cases had a higher settlement rate overall, whether or not the mediation itself was successful;
5. The average level of recovery was lower in mediated cases than non-mediated cases, suggesting a discounting of mediated claims;
6. Mediated settlements occurred earlier than non-mediated settlements;
7. Successful mediation was perceived by solicitors and litigants to reduce legal costs, while unsuccessful mediation tended to increase costs; and
8. Parties and solicitors expressed a high level of satisfaction with the mediation process.[52]

The VOL scheme continued after 1998, though reduced court resources were allocated to it and the court fee increased from £25 to £100 per party. However, demand for the scheme increased significantly following the case of *Dunnett* v *Railtrack* in 2002.[53] Information from the court mediation database for the period between the start of 1999 and the end of 2004 suggests that 984 cases entered the VOL scheme, of which 865 were actually mediated.[54] Debt and breach of contract for goods or services remained the largest category of cases entering the scheme, with personal injury cases counting for only 4% of all mediated cases.

Between January 1999 and September 2005 the proportion of cases that reached a settlement following mediation was 44% overall.[55] However, there was a downwards trend in the settlement rate each year. From the top rate of 62%, achieved during the period May 1996 to March 1998, it fell below 50% in 2000 and remained there for the rest of the period reviewed. Professor Genn thinks that pressure from the judiciary might have drawn in unwilling parties, who participated in the mediation through fear of costs penalties, rather than as a result of

inherent interest in the mediation process and a desire to negotiate towards settlement.[56] There was no significant difference between the four providers of mediators in terms of settlement rates.

In terms of parties' perception of the impact of the mediation on time and costs overall, one third of respondents said that mediation had saved costs (38%), about one in five thought that mediation made no difference to costs (21%), 12% said there had been no costs involved and 29% said that costs had been increased. However, of those respondents whose cases had not been settled 45% thought their costs had been increased. One in five thought that they had saved costs. Almost one in three of those that thought they had saved costs thought they had saved £10,000 or more.

As for time savings, about a quarter of respondents thought that the mediation had made no difference to the time involved in dealing with their dispute. However, a third thought that time had increased, but 42% that time had been saved. There were significant differences between those who had settled at mediation and those who had not. Three quarters of respondents who had settled their cases through mediation thought that it had saved time (73%), while only 17% of those whose cases did not settle thought mediation had saved time. When cases did not settle in mediation, a little over half (56%) thought that mediation increased time spent on the case.[57]

Central London County Court: Automatic Referral to Mediation (ARM)

The ARM pilot scheme ran for one year from April 2004 to March 2005 in the Central London County Court. 100 cases per month were randomly allocated to mediation at the point at which a defence had been entered in the case. Trained mediators from one of four mediation organisations were allocated for a three-hour mediation at a fee of £100 per party.[58] Although cases were automatically referred to mediation, parties were given an opportunity to object and to request that the case be restored to the normal process, this request then being reviewed by a District Judge. The pilot coincided with the publishing of the judgment in *Halsey*,[59] but *Burchell*,[60] underlining that costs consequences would result from a failure to mediate, did not get handed down until April 2005, after the end of the scheme.

The pilot scheme showed that the settlement rate followed a broadly downward trend, from as high as 69% for cases referred in May 2004 to a low of 37% for cases referred in March 2005. The settlement rate was 55% when neither party objected to the mediation but only 48% when both parties were persuaded to attend, having both originally objected to the referral. However the majority of ARM cases were settled out of court without ever having to go to a mediation.

Professor Genn noted that this statistical analysis of mediation outcomes revealed no simple factor that predicted the likelihood of settlement. She believed that the explanation was more likely to be found in subjective factors such as the attitude and motivation of the parties, the skill of the mediator or a mix of these factors, rather than case type, complexity, value or legal representation.[61] There was a general view that an unsuccessful ARM mediation increased legal costs by around £1000-2000. Successful mediations were however generally thought to save a lot of legal costs, especially where a trial had been avoided.

The ARM scheme also sought to evaluate the parties' perception of mediation. Those involved in unsettled mediations were much more negative. Their explanations for failure focussed on the behaviour of the opponent, including intransigence and unwillingness to compromise. Others felt their mediator demonstrated a lack of skill and that a three-hour time limit was

simply too short. Those who had been compelled to attend frequently expressed discontent about the ARM scheme, arguing that bringing unwilling parties to mediation was inappropriate and costly. Naturally, where mediations had been successful, the evaluations were more positive, with explanations of the outcome focusing on the skill of the mediator, the opportunity to exchange views and reassess ones own position and opponents' willingness to negotiate and compromise. One of Professor Genn's conclusions from comparing the ARM and VOL schemes was that the willingness of the parties to negotiate a compromise is obviously critical for the success of a mediation. Facilitation and encouragement, together with selected and appropriate pressures, are more likely to be effective then blanket coercion to mediate.

TCC: the Court Settlement Process

As a result of the sheer range of dispute resolution mechanisms available to the parties, the encouragement of earlier settlement of disputes and the introduction of a right to statutory adjudication by the HGCRA, the TCC has seen what may be an overall decline in its business in the last decade (though the current recession does not seem to have accelerated this downward trend).

Table 4: The London TCC workload

YEAR[64]	CLAIMS RECEIVED[65]	CLAIMS DISPOSED AT TRIAL[66]	INTERIM APPLICATIONS
1999	483	64	1466
2000	443	68	1325
2001	452	61	1441
2002	500	49	1391
2003	381	41	1403
2004	341	7	668
2005	364	38	926
2006	392	48	1066
2007	407	38	838
2008	366	39	992

Early in 2005, Judge Toulmin CMG QC began to consider whether judges in the TCC should provide an ADR service;[67] the court published a proposal entitled *Court Settlement Process* (CSP) at the end of the same year. This was an attempt by the TCC to add an additional tool to the dispute resolution kit for construction.[68] The idea was to make use of the expertise the judges of the TCC have as a result of the specialist nature of the cases brought before them. This expertise might, it was argued, assist the parties in reaching a settlement.

At the initial draft stage, concerns were raised about the scheme. For example, the CIArb considered that mediation was not a judicial function and for a judge to take part could be seen as a breach of natural justice. It was also concerned that the process could compromise the court's impartiality and neutrality, threatening public confidence; and argued that the qualities needed from a judge (the ability to consider, weigh and determine the issues) are very different to those making a good mediator (the ability to facilitate negotiations).[69] This objection overlooked the fact that TCC judges had already been willing for many years to undertake Early Neutral Evaluation of cases already before the court (subject to the necessary procedural safeguards). The Technology and Construction Solicitors Association (TeCSA) was against the proposal whilst the Technology and Construction Bar Association (TECBAR) was neutral.

Others were broadly supportive. Philip Norman of Pinsent Masons suggested that the proposal was not so much mediation but rather an opportunity for the TCC judges to 'bang the parties' heads together':[70]

> … the process will be useful where litigation progresses to trial solely because of the characters involved (clients and lawyers alike), whose participation has avoided early settlement. A judge's views will bring into sharp focus the merits, and more importantly the litigation risk in each party's case.

Following fine-tuning in the light of comments on the consultation draft, the pilot scheme started operation before some of the London TCC judges in June 2006.[72] The CSP is officially described as '*a confidential, voluntary and non-binding dispute resolution process*',[73] in which the parties to the dispute seek to reach an amicable settlement. Under it, the TCC judge already responsible for case management in the case can decide (either on his own initiative or at the request of the parties) to offer a Court Settlement Conference. If the parties agree, the date and length of time needed for the conference (not usually longer than a day) will then be fixed and embodied in a Court Settlement Order. The CSP is private and confidential and any documents produced for that process are privileged.[74] This is in effect the same judge offering a basic mediation service, the parties being free as part of the process to communicate with the judge in private (unless they agree otherwise). The process is therefore in some ways closer to ICE conciliation and/or a Dispute Review Board (but with only one member) than to mediation in the classic sense. Each side normally bears its own costs for the CSP, as well as sharing equally the fees payable to the court.

If the Court Settlement Conference is successful, then the parties will enter into, and sign, a Court Settlement Agreement. Any agreements reached which are not recorded in such an agreement will not be binding on the parties. If a settlement cannot be reached, then the judge may send the parties an assessment, setting out his views on the dispute – including on the parties' prospects of success on individual issues, the likely outcome of the case and what an appropriate settlement would be. This will of course be confidential to the parties. If the Court Settlement Conference is unsuccessful, the onwards management of the case will then be taken by a different judge: the settlement judge will take no further part in the case and is under clear duties of confidentiality in relation to every aspect of the CSP.

After the initial pilot scheme, the CSP has in fact been continued in London on a permanent basis, with a plan to extend it to the TCC's other centres. Although there is as yet no published detailed evaluation of the scheme, an internal report by Akenhead J, summarised in the TCC's 2008 Annual Report,[75] suggests a slow take-up at the start but a high settlement rate (78%) in those cases which have been through the CSP. The results of the King's College London survey support this view. Only five respondents used the scheme; but all these mediations were successful.[76] Of these, only two commented on why they had used this approach. One wrote: '*Parties have agreed to mediate* [the Judge] *suggested the TCC Mediation scheme and the parties agreed*'. Another commented that it was '*raised by Judge at the Case Management Conference*'.

The low uptake may perhaps suggest a reluctance to use TCC judges, given the small number of judges in the court, though attitudes to potential conflicts of interest are more relaxed in the UK than in the USA. Their effectiveness in operating a form of ADR should hardly be a surprise, given their long experience with the specialised subject-matter of TCC litigation and the authority which their status also brings; and all TCC judges taking part in the CSP had mediation training in 2006 (though not all are yet accredited as such). Further, a low take-up of the CSP is not itself an indication of the scheme's failure, since every TCC judge will usually raise 'the ADR question' – especially if the parties fail to do so – at the first Case Management

Conference (CMC). The parties may already have made their own plans for ADR; or may do so then, by choosing an alternative to the CSP. An aspect of the scheme on which hard evidence would be valuable relates to cost – and cost-saving. It is easy to see how parties to the CSP may incur lower costs (including the fees payable to the TCC) than for a private sector mediation with a mediator of comparable status and in a neutral venue like St Dunstan's House.[77] In addition, they gain the efficiency of a mediator who is by definition already familiar with the issues, the parties, their representatives and the background to the case.

14 USA: the Civil Justice Reform Act

The Civil Justice Reform Act of 1990 (CJRA) was enacted by Congress in order to implement civil justice expense and delay reduction plans that would 'facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes'. The CJRA also designated ten of the 94 Federal District Courts as pilot districts to test the effectiveness of the principles contained within the Act and guidelines for cost and delay reduction, as well as demonstration programmes in five other districts to test systems of '*differentiated case management and other methods of cost and delay reduction (including ADR)*'.[78]

The results of the implementation of these principles were then independently evaluated, as the CJRA required, by the Rand Corporation and summarised in *The Rand Report*.[79] This is one of the earliest statistical studies regarding the use of mediation, at a time when the process itself was still very much in an early stage of development. *The Rand Report* included an analysis of mediation and early neutral evaluation, based on a sample of six districts (one of which was not originally a pilot district) which had a sufficient number of cases of mediation and early neutral evaluation to enable detailed evaluation.[80]

Each of the districts had different ADR programs. New York (Southern) had a mandatory mediation scheme with the referral occurring after the case management track was assigned. The emphasis was on settlement and a typical session would last five hours over two days. Pennsylvania (Eastern) also had mandatory mediation but this was referred 90 days from filing and involved a single 90-minute session only. The subject-matter during this session was not just settlement but also case management issues. Oklahoma (Western) also provided for mediation but it could be mandatory or voluntary depending on the judge's discretion. Settlement was the only focus of this session, which lasted four hours; but the parties were charged a fee of $660 split between them. Texas (Southern) was again voluntary or mandatory depending on the judge, with settlement the only item on the agenda; but here a much longer eight-hour session was provided. Texas charged $1800, split between the parties. The remaining two states had a system of Early Neutral Evaluation, rather than mediation.

According to the report, there was no strong statistical evidence that the mediation or neutral evaluation programs, as implemented in the six districts studied, significantly affected time to disposition, litigation costs, or attorney views of fairness or satisfaction with case management. The only statistically significant finding was that the ADR programme appeared to increase the likelihood of a monetary settlement. A plausible explanation for this was that '*the mediation process is designed to facilitate settlement and does indeed increase the number of cases that settle*'; despite this, the researchers were unable to make a policy recommendation: they concluded there were '*no major program effects, either positive or negative*'.[81]

The report's conclusions were extensively criticised at the time, commentators noting that the ADR programs analysed varied in almost every aspect of design and quality.[82] This was an

inherent problem, acknowledged by Rand: the Act was loosely worded and allowed districts to experiment with different forms of case management. It also lacked effective mechanisms for ensuring that the policies adopted by the districts were actually carried out. Indeed, it noted that one of the mediation schemes:

> … violated most of what is known about building successful court ADR programs. The court required no training for its lawyer-mediators, excluded settlement-empowered clients and insurers from mediations and held short and perfunctory mediation sessions.

15 Canada: Ontario

The ADR Centre of the Ontario Court of Justice (General Division) was the first court-connected ADR programme in Canada. It was introduced in the Toronto Region as a pilot programme in October 1994, to test whether the availability of ADR improved the conduct of civil cases. Four out of every ten cases were referred to the ADR Centre; for these, two-hour mediation sessions were then scheduled within two or three months of the filing of the statement of defence. An evaluation of the Centre was completed in November 1995, reporting a high settlement rate (40%) in the very early stages of cases (normally within 2-3 months of the filing of the defence) and broad and strong approval for the availability of ADR as part of the litigation process. It concluded that referral to ADR provided a cheaper, faster and more satisfactory result for a significant number of the referred cases.[84]

These positive results played an important part in the broader Civil Justice Review which followed,[85] launched jointly by the Chief Justice of the Ontario Court (General Division) and the Attorney General for Ontario in 1995 '*to provide a speedier, more streamlined and more efficient structure which will maximize the utilization of public resources allocated to civil justice*'.[86] It produced two reports, the first in March 1995[87] and the Supplemental and Final Report in November 1996.[88] Both accepted in principle the concept of court-connected ADR.[89] However, the second report advocated an interventionist solution:

> '… mandatory referral of all civil, non-family, cases to a three hour mediation session, to be held following the delivery of the first statement of defence, with a provision for 'opting-out' only upon leave of a Judge or Case Management Master.'

As a result, a system of mandatory mediation was introduced in January 1997 in all non-family civil cases.[91] The goal was to change the progress of civil proceedings in Ottawa and Toronto and to then roll it out to the rest of Ontario within four years; this became Rule 24.1 of the Rules of Civil Procedure. Its key features were:

- Mediation had to take place within 90 days after the first defence was filed, unless the parties obtained a court order abridging or extending the time. For standard track cases, parties could consent to a postponement of up to 60 days;
- Parties could opt out of mediation only by obtaining a court order; and
- If the parties did not select a mediator within 30 days after the first defence, the court would appoint one.

The report evaluating the pilot application of Rule 24.1, published in March 2001,[92] made four key findings:

1 Overall, mandatory mediation cases were completed earlier than control group cases.[93] '*Dramatically higher percentages of cases were disposed of in*

the mandatory mediation sample (1016 cases) than in the control group (791 cases) at the six-, nine- and twelve-month marks: 25% vs 15% at six months, 38% vs 23% at nine months, and 49% vs 34% at twelve months.'[94] However, the hypotheses that mandatory mediation may have a greater impact on disposition percentages at the early stages, and that mandatory mediation reduced time to disposition in all categories, were not supported by the data. There were in fact more substantial differences between mandatory mediation and control group cases at the nine and twelve-month marks than at the six-month mark.[95]

2 Both Ottawa and Toronto reported cost savings. A clear majority of the litigants questioned said that mediation had a major positive impact on reducing costs: 85% of the 274 responses reported either some or major positive impact. As for the lawyers' responses, Ottawa lawyers were more likely to report substantial savings than those in Toronto, but both groups identified at least some savings in a similarly high percentage of the cases (80% in Ottawa and 78% in Toronto).[96] The report concluded that settlement at mediation clearly reduces litigation costs. As for the impact of a failed mediation, the report said: '… *as the data were available for so few cases that did not settle, it cannot be concluded that litigation costs will increase when settlement does not occur*'.[97]

3 The statistics showed that four out of ten cases which were subject to mandatory mediation completely settled at or within seven days of the mediation.[98] A significant proportion of these mediations (4.1% in Ottawa, 3.5% in Toronto) settled after the mediation itself. In an additional one or two out of every ten cases, some issues were settled, but not all.

4 The evaluation of the pilot project showed strong support for the mandatory mediation mechanism, not only in terms of quantitative research but also with regards to participants' satisfaction with the process. A majority of lawyers were satisfied with such things as mediators' understanding of the legal and factual issues, their skills in moving the parties towards a settlement and their choices about meeting with individual parties before or during the mediation.[99]

The pilot project also illustrated a statistically significant relationship between the number of Rule 24.1 mandatory mediations conducted by a particular mediator and the likelihood that they would facilitate partial or complete settlement. The report noted that this could either be because the more experienced mediators were more effective facilitators of settlement, or because they were likely to be selected by counsel who were more familiar with the process and therefore more inclined to use it with the aim of reaching a settlement. Moreover, within the group of cases that achieved settlement[100] (whether complete or partial), mediation was significantly more likely to result in complete settlement if selected by the parties, rather than assigned by the local coordinator (45.2% compared to 31.3%).[101]

As recommended, Rule 24.1 was made permanent in Toronto and Ottawa in July 2001 and expanded to Windsor in 2003. However, the additional case management, in the universal form in which it had been introduced in 2001 (Rule 77), led to a severe backlog of all civil cases; and mandatory mediation had itself become a major cause of delay.[102] A more selective case management system was therefore introduced in Toronto in 2005 via a Practice Direction,[103]

which then became Rule 78 of the Rules of Civil Procedure. As one of the many changes, mediation was not dropped (as the Bar would have preferred); and was even extended to cases under the simplified procedure (claims for C$50,000 or less). However, the original time limit within which mandatory mediation must take place (90 days of filing of a defence) was replaced by (at the latest) 90 days of the action being set down for trial.[104] Hence the mandatory mediation – meant originally to take place at an early stage – might be postponed to any later point prior to trial. Arguably, '*mandatory mediation thus lost the focused function in the civil justice process it had when Rule 24.1 was first introduced*'.[105] Thus it is still hard to draw a clear conclusion on the efficiency of court-annexed ADR in Ontario.[106]

1 For a survey of the impact of article 6(1) on English law, see Satvinder Singh Juss, 'Constitutionalising Rights Without a Constitution: The British Experience under Article 6 of the Human Rights Act 1998' (2006) 27 Statute Law Review 29.
2 Charles B Renfrew, 'The American experience with dispute resolution in all its forms' (1997) 16 Civil Justice Quarterly 145.
3 Thomas J Stipanowich, 'The Multi-Door Contract and Other Possibilities' (1997) 13 Ohio State Journal of Dispute Resolution 303.
4 *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, 61 BLR 1 (HL).
5 *Channel Tunnel* n 4 353.
6 *Cable & Wireless plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm), [2003] BLR 89; compare A*iton Australia Pty Ltd* v *Transfield Pty Ltd* [1999] NSWSC 996, 153 FLR 236, where the New South Wales Supreme Court laid down a demanding series of conditions for the granting of a stay in favour of contractual ADR.
7 *Dunnett v Railtrack plc* n 27.
8 *Cable & Wireless* n 6 [2003] BLR 89, 95.
9 *Balfour Beatty Construction Northern Ltd v Modus Corovest (Blackpool) Ltd* [2008] EWHC 3029 (TCC), [2009] Construction Industry Law Letter 2661.
10 *Balfour Beatty* n 9 [17].
11 *Balfour Beatty* n 9 [18].
12 Professor Hazel Genn, 'Court-based initiatives for non-family civil disputes: the Commercial Court and the Court of Appeal', London, Lord Chancellor's Department (2002); downloadable from www.hmcourts-service.gov.uk/docs (accessed 21 January 2010).
13 Lord Woolf, *Access to Justice*, Interim Report (June 1995) and Final Report (2 vols) (July 1996), London, HMSO, also from www.dca.gov.uk/civil/final/ (accessed 10 December 2009).
14 *Access to Justice* n 13, Final Report, ch 1, paragraph 7(d).
15 The Civil Procedure Rules (SI 1998/3132, as heavily amended); see Rt Hon Lord Justice Waller (Editor-in-Chief), *Civil Procedure* 'The White Book', London, Sweet & Maxwell (2009 edition). The current text of the CPR and new amendments can also be downloaded from www.justice.gov.uk/civil procrules_fin (accessed 9 July 2009).
16 *Practice Direction on Pre-Action Conduct*, in *The White Book* n 15, also downloadable from the MoJ website n 15 (accessed 10 December 2009).
17 *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 1 WLR 3002. For views strongly critical of *Halsey*, see Lightman J, 'Breaking Down the Barriers', *The Times* 31 July 2007.
18 *Halsey* n 17 [5].
19 *Pre-Action Protocol for the Construction and Engineering Disputes* (2nd edition 2005, revised 2007); and *Practice Direction: Technology and Construction Court Claims* (supplementing CPR Part 60). Both are included within 'The White Book' n 15 but are also downloadable from the MoJ website n 15 (accessed 10 December 2009).
20 *Pre-Action Protocol for the Construction and Engineering Disputes* n 19, paragraph 5.4.
21 *Burchell v Bullard* [2005] EWCA Civ 358, [2005] BLR 330: see the quotation from Ward LJ linked to n 45.
22 Rt Hon Lord Justice Jackson, *Review of Civil Litigation Costs: Preliminary Report*, vol 1, ch 34, section 4, downloadable from www.judiciary.gov.uk/about_judiciary/cost-review (accessed 13 July 2009).
23 Rt Hon Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (December 2009), especially chs 29 (sections 4-6), 35 (section 4) and 36 (the quotation in the main text is from ch 36, para 3.4). In relation to the TCC, the *Final Report* says that '*mediation should be promoted with particular vigour for those low value construction cases in which conventional negotiation is unsuccessful*' (ch 29, para 6.1).
24 This is mirrored in Ireland by the Rules of the Superior Courts (Commercial Proceedings) 2004 (but these confer no specific power to impose a costs sanction for refusing to participate in ADR); the role of courts in relation to ADR, including English caselaw, is discussed in chapters 9 and 11 of the Law Reform Commission (Ireland) Consultation Paper, *Alternative Dispute Resolution* (LRC CP 50 - 2008), ch 3 – downloadable from www.lawreform.ie (accessed 10 January 2010).
25 Henry Brown and Arthur Marriott, *ADR Principles and Practice*, London, Sweet & Maxwell (2nd ed, 1999) at paragraph 3-035.
26 CPR, r 1.4(2)(e).

27 *Dunnett v Railtrack plc* [2002] EWCA Civ 303, (Practice Note) [2002] 1 WLR 2434. For an overview, see Shirley Shipman, 'Court Approaches to ADR in the Civil Justice System' (2006) 25 Civil Justice Quarterly 181; for comparisons with New South Wales (where the courts, as in South Australia, have clear statutory powers to order mediation against the will of the parties), see Brenda Tronson, 'Mediation Orders: Do The Arguments Against Them Make Sense?' (2006) 25 Civil Justice Quarterly 412.
28 Brooke LJ, with whom Robert Walker and Sedley LJJ concurred, at [15].
29 *Shirayama Shokusan Co Ltd v Danovo Ltd* [2003] EWHC 2006 (Ch), [2004] 1 WLR 2985 (first hearing) and 2992 (second hearing).
30 Appendix 7 of the *Guide* (6th ed, 2002); the current edition (7th ed, 2006) retains the ADR Order as Appendix 7 – downloadable from www.hmcourts-service.gov.uk.
31 [*Our footnote*] *Woodhouse v Consignia plc* [2002] EWCA Civ 275, [2002] 1 WLR 2558 [42].
32 *Shirayama* n 29 [39] (report of the second hearing).
33 *Halsey* n 17.
34 *Halsey* n 17 [9].
35 *Hickman v Blake Lapthorn* [2006] EWHC 12 (QB), [2006] 3 Costs LR 452 [21].
36 *Halsey* n 17 [9].
37 *Halsey* n 17 [13].
38 *Halsey* n 17 [18]; Jack J's summary in the transcript says 'cost', but *Halsey* itself says 'costs'.
39 *Halsey* n 17 [19].
40 *Halsey* n 17 [21].
41 *Halsey* n 17 [25].
42 *Halsey* n 17 [28].
43 *Halsey* n 17 [29].
44 *Halsey* n 17 [34].
45 *Burchell v Bullard* [2005] EWCA Civ 258, [2005] BLR 330 [43].
46 See Genn et al n 52 200.
47 See Genn et al n 52 205.
48 Directive 2008/52/EC of the European Parliament and the Council on certain aspects of mediation in civil and commercial matters, OJ L 136/3 (24 May 2008), adopted under article 61(c) TEC and deriving from the Green Paper on alternative dispute resolution in civil and commercial law, COM (2002) 196 (April 2002).
49 Recital 27 specifically mentions fundamental rights and the Charter of Fundamental Rights of the EU.
50 The 2008 Directive n 48 article 8. In line with normal EC law principles, insofar as the Directive intends to confer rights on individuals additional to those already available under national law – not obviously the case, at least in relation to England & Wales and the themes of this report – then these will come into effect via new national measures or, in the absence of correct and complete implementation by a member-state, after the deadline for this has expired: see eg *Pubblico Ministero v Ratti* (case 148/78) [1979] ECR 1629 (ECJ). A member-state which fails effectively to transpose a Directive into national law may also face infringement proceedings launched by the European Commission under article 226 TEC.
51 *Access to Justice*: n 13.
52 Professor Dame Hazel Genn et al, *Twisting arms: court referred and court linked mediation under judicial pressure*, Ministry of Justice Research Series 1/07 (May 2007) 21-22, downloadable from www.justice.gov.uk (accessed 9 July 2009).
53 *Dunnett v Railtrack plc* [2002] EWCA Civ 303, (Practice Note) [2002] 1 WLR 2434.
54 Genn et al n 52 134.
55 Genn et al n 52 143.
56 Genn et al n 52 151.
57 Genn et al n 52 181.
58 Genn et al n 52 26.
59 *Halsey* n 17.
60 *Burchell* n 45.
61 Genn et al n 52 III.
62 Genn et al n 52 199.
63 TCC, *Annual Reports* for the years ending 30 September 2006-2008 inclusive; individually downloadable from www.hmcourts-service.gov.uk/infoabout/tcc/annual_reports.htm (accessed 10 December 2009).
64 The year runs from 1 October to 30 September, but the 2008 *Annual Report* n 63 notes that monthly fluctuations in the numbers of new claims may cause this twelve month period to suggest a trend which is unreal. The monthly figures from January 2006 to December 2008, included in the same report, reveal seasonal fluctuations but do not suggest any long-term downward trend in new claims in the London TCC.
65 This figure includes claims issued but never served, so potentially inflates the 'new cases' total (by how much, we do not know).
66 This figure does not include cases where a trial was started but the case settled before judgment.
67 TCC, *Annual Report for the year ending 30 September 2006* n 63.
68 Philip Norman, 'Another String to the Bow? The Court Settlement Process'(2006) 22 Const LJ 425.
69 Philip Norman n 68.
70 Philip Norman n 68.
71 Philip Norman n 68.
72 TCC, *Annual Report for the year ending 30 September 2007* n 63.
73 TCC, 'Court Settlement Process', downloadable from www.hmcourts-

service.gov.uk/docs/tcc_court_settlement_process.pdf (accessed 10 December 2009).

74 See the CSP n 73.

75 TCC, *Annual Report for the year ending 30 September 2008* n 63 12.

76 None of the respondents to Form 2 in the King's College London survey (cases which had gone onwards to judgment) had used the CSP.

77 The facilities at St Dunstan's House may not quite match those of the hotel suites often used for mediations; and the after-hours refreshments may not be comparable either. But the price is certainly far lower. The TCC moves to the Rolls Building, with the Commercial Court and Chancery Division, in 2011.

78 'The Civil Justice Reform Act of 1990 – Final Report: Alternative Proposals for reduction of cost and delay assessment of Principles, Guidelines and Techniques', submitted to the Judicial Conference of the United States, transmitted by Leonidas Ralph Mecham, Secretary (May 1997) 1.

79 *The Rand Report* for these purposes is the collection of reports compiled for the 1997 Judicial Conference to analyse and reflect upon the empirical data analysis provided by the Rand Corporation. These include 'The Civil Justice Reform Act of 1990 - Final Report' n 78; and James Kakalik et al, 'An Evaluation of Mediation and Early Neutral Evaluation under the Civil Justice Reform Act', The Institute for Civil Justice (1997).

80 Kakalik et al n 79 xxvii.

81 Kakalik et al n 79 xxiv

82 See eg Pamela Chapman Enslen, 'Insights on Participant Satisfaction May Be Real Significance of RAND Report' (Summer 1997) Dispute Resolution Magazine 14; CPR Judicial Project Advisory Council of the CPR Institute for Dispute Resolution and Other ADR Experts, *Statement of Concerns Regarding the RAND ADR Study* (1997); also Craig A McEwen and Elizabeth Plapinger, 'RAND Report Points Way to Next Generation of ADR Research' (Summer 1997) Dispute Resolution Magazine 10. See also Donna et al, 'Report to the Judicial Conference Committee on Court Administration and Case Management: A Study of Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990', Federal Judicial Center (1997); and Elizabeth Plapinger 'Twilight of CJRA Means Unsure Future for ADR' (22 September 1997) National Law Journal B25.

83 See Statement by Center for Public Resources Issues (March 1997); and Francis O Spalding, 'The Rand Report, the Federal Judicial Center Study and Alternative Dispute Resolution in United States District Courts', available at www.fos-adr.com/ (accessed 10 December 2009).

84 Dr Julie Macfarlane, *Court-Based Mediation for Civil Cases: An Evaluation of the Ontario Court (General Division) ADR Centre*, Toronto, Queen's Printer for Ontario (November 1995).

85 Ontario Civil Justice Review, *Supplemental and Final Report* n 87, chapter 5.2.

86 Ontario Civil Justice Review, *Supplemental and Final Report* n 88, Executive Summary.

87 Ontario Civil Justice Review, *First Report* (1995), downloadable from www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/ (accessed 10 December 2009).

88 Ontario Civil Justice Review, *Supplemental and Final Report* (1996), downloadable from www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/ (accessed 10 December 2009).

89 Ontario Civil Justice Review, *Supplemental and Final Report* n 88, chapter 5.2.

90 Ontario Civil Justice Review, *Supplemental and Final Report* n 88, chapter 5.2.

91 Sue Prince, 'Mandatory Mediation: the Ontario Experience' (2007) 26 Civil Justice Quarterly 79, 83.

92 Robert G Hann and Carl Baar, with Lee Axon, Susan Binnie and Fred Zemans, *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report – The First 23 Months*, Toronto, Ontario (2001), downloadable from www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/eval_man_med_final.pdf (accessed 10 December 2009).

93 A set of cases – a mix of case-managed cases that did not undergo any mediation – had been established as the control group for comparison with cases governed by Rule 24.1.

94 Hann et al n 92 chapter 3.3.

95 Hann et al n 92 chapter 3.4.

96 Hann et al n 92 chapter 4.2.

97 Hann et al n 92 chapter 4.3.

98 Besides, two out of ten mandatory mediation cases achieved partial settlement: see Hann et al n 92 chapter 5.2.

99 Hann et al n 92 chapter 6.2.

100 Hann et al n 92 chapter 5.2.

101 Hann et al n 92 chapter 5.2.

102 See The Honourable Warren K Winkler, 'Civil Justice reform – the Toronto Experience' (The Warren Winkler Lectures), University of Ottawa (Faculty of Law), 12 September 2007, downloadable from www.ontariocourts.on.ca/coa/en/ps/speeches/civiljusticereform.htm (accessed 8 January 2010).

103 *Practice Direction – Backlog Reduction/Best Practices Initiative*, Ontario Courts, November 2004.

104 In simplified procedure cases and in wrongful dismissal cases, mediation is to occur within 150 days after the close of the pleadings.

105 Sue Prince n 91 94.

106 See also *Evaluation of Civil Case Management in the Toronto Region: A Report on the Implementation of the Toronto Practice Direction and Rule 78* (February 2008), downloadable from www.ontariocourts.on.ca/coa/en/ps/reports/rule78.pdf (accessed 8 January 2010).