

## **MEDIATION IN ENGLAND: ORGANIC GROWTH AND STATELY PROGRESS**

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### **I. INTRODUCTION<sup>1</sup>:**

Mediation is potentially a more civilised and more flexible means of resolving a civil dispute than the 'winner takes all' systems of arbitration and court adjudication. Furthermore, court proceedings are public, expensive, and adversarial; and arbitration, although, confidential, is often no less expensive and adversarial than court litigation.

Opportunities to mediate can arise at various stages: mediation can operate as a complete substitute for civil litigation, or it can take place after court proceedings have begun, and even after judgment has been given but an appeal is pending.

Mediation has become popular in England. The reasons for this are both organic and institutional. As for the 'organic' element, news has spread concerning the advantages of this technique: confidentiality; free choice of the mediator; the opportunity for flexible agreed solutions; the chance to gain a relatively speedy and inexpensive conclusion to a dispute. For all these reasons, the mediation process is now better understood, especially within the commercial sector. By contrast, court litigation and arbitration remain expensive and often hostile processes.

As for the 'institutional' spur to adopt mediation, Government has begun to encourage mediation. The main reason for this is that officials recognise that this process can resolve disputes less expensively than civil litigation. The court system also directly encourages litigants to pursue mediation in appropriate cases. In Civil

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<sup>1</sup> For more detailed discussion by the author, see Neil Andrews, *The Three Paths of Justice: Court Proceedings, Arbitration, and Mediation in England* (296 pp) (Springer: Dordrecht, Heidelberg, London, New York, 2011); Neil Andrews, *The Modern Civil Process* (Tübingen, Germany, 2008); Neil Andrews, *Contracts and English Dispute Resolution* (Tokyo, 2010); and his General Report on Arbitration for the World Congress of the International Association of Procedural Law, Heidelberg 2011, forthcoming (in English) in *Revista de Processo* (Brazil).

Procedure (Moscow) Mediation in England this encouragement involves selective judicial recommendation of mediation. The English courts also subject disputants to the general threat of adverse costs awards if parties unreasonably spurn sensible mediation overtures made by the opponent or by the court.

## II. ORGANIC REASONS FOR THE GROWTH OF MEDIATION:

In England resort to mediation has increased, including within the heartland of commercial disputes<sup>2</sup>. The Ministry of Justice for England and Wales (2010) reported on this:<sup>3</sup> *‘the market for mediation in the UK continues to grow. A recent mediation audit carried out by the Centre for Effective Dispute Resolution (CEDR) showed that there had been nearly 6,000 civil and commercial mediations carried out in 2009.<sup>4</sup> Based on the outcome of the 2007 Mediation Audit, the 2009 figure showed there was a doubling of mediation activity since 2007.’*

Although mediation enjoys support from officials, including the courts, the better view is that it has not been imposed on the civil and commercial population in a ‘top down’ fashion. Instead it has arisen because educated parties recognise the benefits of endeavouring to reach accord rather than submitting to outside judgment by judges or arbitrators.

Potential litigants have become aware that mediation can secure various economic gains, social benefits, and even psychological advantages, when compared to the other two main ‘paths of justice’, namely court proceedings and arbitration.<sup>5</sup> The following points will be uppermost in the minds of disputants when they peer down the barrel of court proceedings: (1) the perception (and nearly always the reality) that court litigation is unpredictable; (2) the judicial process (including extensive preparation for the final hearing) involves a heavy-handed fight for justice, which is a source of expense, delay, and anxiety; (3) court litigation offers little scope for direct participation by the parties, as distinct from legal representatives; (4) final judgment normally awards

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<sup>2</sup> K Mackie, D Miles, W Marsh, T Allen, *The ADR Practice Guide* (3rd edn, Tottel, London, 2007), especially ch’s 5, 6, 7.

<sup>3</sup> Ministry of Justice, ‘Implementation<Paper’ (London, 2010) (a consultation paper), at \*10+.

<sup>4</sup> [http://www.cedr.com/index.php?location=/news/archive/20100513\\_347.htm](http://www.cedr.com/index.php?location=/news/archive/20100513_347.htm)

<sup>5</sup> For development of these points, N Andrews, *The Three Paths of Justice: Court Proceedings, Arbitration, and Mediation in England* (Springer Publishing: Dordrecht, Heidelberg, London, New York, 2011).

victory to only one winner; (5) trial is open-air justice, visible to mankind in general; (6) litigation is private war—even if judges pretend that it is governed by elaborate rules and conciliatory conventions designed to take the sting out of the contest.

Costs and expense are in the forefront of most people's minds whenever litigation becomes even a remote prospect. Certainly in England, the rise of mediation, notably in high-value disputes, is largely attributable to the sheer expense of traditional court litigation. Bill Gates himself, and other modern-day descendants of Croesus, would hesitate to run the risk of engaging in protracted and complicated claims heard by the High Court.

The 'Woolf reforms' of 1999, which introduced the new English procedural code, the CPR, were expected to reduce the high cost of civil litigation.<sup>6</sup> But the situation has not improved. And it has been officially recognised that the new procedural code has not reduced the expense of litigation. As Buxton LJ in the Court of Appeal in *Willis v. Nicolson* admitted in 2007:<sup>7</sup>

The topic of costs is receiving consideration, following Lord Justice Jackson's 'Civil Litigation Costs Review', delivered in December 2009.<sup>8</sup> He endorsed the spread of mediation:<sup>9</sup>

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<sup>6</sup> AAS Zuckerman and R. Cranston (eds), *The Reform of Civil Procedure: Essays on 'Access to Justice'* (Oxford 1995); R. Cranston, *How Law Works: The Machinery and Impact of Civil Justice* (Oxford 2006), ch 5; Neil Andrews, *English Civil Procedure* (Oxford 2003), ch 2; Neil Andrews, 'A New Civil Procedural Code for England: Party-Control 'Going, Going, Gone'' (2000) 19 CJQ 19-38; S Flanders, 'Case Management: Failure in America? Success in England and Wales?' (1998) 17 CJQ 308; JA Jolowicz, 'The Woolf Report and the Adversary System' (1996) 15 CJQ 198; M Zander, 'The Government's Plans on Civil Justice' (1998) 61 MLR 383 and 'The Woolf Report: Forwards or Backwards for the New Lord Chancellor?' (1997) 16 CJQ 208; AAS Zuckerman, 'The Woolf Report on Access to Justice' (1997) 2 ZZP Int 31 ff.

<sup>7</sup> *Willis v. Nicolson* [2007] EWCA Civ 199, at [24]. 'The very high cost of civil litigation in England and Wales is a matter of concern not merely to the parties in a particular case, but for the litigation system as a whole. While disputants should be given every encouragement to settle their differences without going to court, that encouragement should not include the making of litigation prohibitively costly so that litigants are deterred irrespective of the merits of their case. One element in the present high cost of litigation is undoubtedly the expectations as to annual income of the professionals who conduct it. The costs system as it at present operates cannot do anything about that, because it assesses the proper charge for work on the basis of the market rates charged by the professions, rather than attempting the no doubt difficult task of placing an objective value on the work.'

<sup>8</sup> Sir Rupert Jackson, *Review of Civil Litigation Costs* (December, 2009: London, 2010); on which AAS Zuckerman, 'The Jackson Final Report on Costs—Plastering the Cracks to Shore up a Dysfunctional System' (2010) 29 CJQ 263.

<sup>9</sup> Jackson report, *ibid*, ch 36, at para 3.4.

### III. MEDIATION BY PRIVATE STIPULATION<sup>10</sup>:

Many companies now prefer to use international arbitration in combination with other ADR mechanisms. Such a combination of techniques will be specified in a ‘multi-tiered’ dispute resolution clause.<sup>11</sup>

The leading English decision concerning mediation clauses<sup>12</sup> is *Cable & Wireless v. IBM United Kingdom Ltd* (2002).<sup>13</sup> In this case the relevant clause was a so-called ‘tiered’ provision. It initially required the parties to endeavour to negotiate a resolution by considering the relevant dispute within their own organisations. The clause stated that mediation would be obligatory if these negotiations collapsed.<sup>14</sup> Thereafter, the parties to this clause contemplated that, if the dispute were still unresolved, proceedings before a court could take place. After negotiation had failed, one party decided to by-pass the stipulated stage of mediation, and prematurely brought a claim before the English High Court. The other party challenged this.

Colman J found that there had been a breach of the dispute resolution agreement, because a party had ‘jumped’ the mediation stage and proceeded straight to litigation. To remedy this, the judge placed a ‘stay’ upon those formal court proceedings. The stay would be lifted if a party returned to court and demonstrated that the mediation attempt had been unsuccessful. But, although the stay was appropriate in this case, the judge said that this would not always be so: ‘For example, there may be cases where a

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<sup>10</sup> D Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (2nd edn, London, 2010); K Mackie, D Miles, W Marsh, T Allen, *The ADR Practice Guide* (3rd edn, Tottel, London, 2007), ch 9; Centre for Effective Dispute Resolution at: [www.cedr.co.uk/library/documents/contract\\_clauses.pdf](http://www.cedr.co.uk/library/documents/contract_clauses.pdf); D Spencer and M Brogan, *Mediation: Law and Practice* (Cambridge University Press, 2006), ch 12 for Australian material.

<sup>11</sup> The School of International Arbitration, Queen Mary, University of London, report (2005), available on-line at: <http://www.pwc.com/Extweb/pwcpublishings.nsf/docid/0B3FD76A8551573E85257168005122C8>. I am grateful to Stephen York for this reference.

<sup>12</sup> D Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (2nd edn, London, 2010); K Mackie, D Miles, W Marsh, T Allen, *The ADR Practice Guide* (3rd edn, Tottel, London, 2007), ch 9; Centre for Effective Dispute Resolution at: [www.cedr.co.uk/library/documents/contract\\_clauses.pdf](http://www.cedr.co.uk/library/documents/contract_clauses.pdf); D Spencer and M Brogan, *Mediation: Law and Practice* (Cambridge University Press, 2006), ch 12 for Australian material.

<sup>13</sup> [2002] 2 All ER (Comm) 1041, Colman J. ‘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’

<sup>14</sup> Generally, K Mackie, D Miles, W Marsh, T Allen, *The ADR Practice Guide* (3rd edn, Tottel, London, 2007), 9.6.4.

reference to ADR would be obviously futile and where the likelihood of a productive mediation taking place would be so slight as not to justify enforcing the agreement. Even in such circumstances ADR would have to be a completely hopeless exercise.’

However, in some contexts, statute invalidates contracts which purport to exclude formal recourse to state-administered courts or tribunals. For example, in *Clyde & Co v. Bates van Winkelhof* (2011)<sup>15</sup> Slade J considered a clause within a partnership deed requiring a partner in a law firm to refer any disputes or differences arising from her work for the firm to mediation and then to arbitration. The partner had brought complaints to an Employment Tribunal alleging various statutory breaches by her law firm of equality law, and seeking compensation. Slade J concluded that the High Court could not grant an injunction compelling her to desist from pursuing these Employment Tribunal proceedings. Statute<sup>16</sup> clearly precluded ‘contracting out’ from this tribunal system of rights.

#### IV .THE PRIVATE ZONE OF MEDIATION DISCUSSIONS:

##### PRIVILEGED NEGOTIATIONS<sup>17</sup>:

It has long<sup>18</sup> been recognised that non-mediated settlement negotiations can be privileged. This is known as ‘without prejudice’ privilege<sup>19</sup>. The sibling doctrine of

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<sup>15</sup> [2011] EWHC 668 (QB), Slade J.

<sup>16</sup> Equality Act 2010, s 120 and the Equality Rights Act 1996, s 203.

<sup>17</sup> Literature concerning *privilege in the context of mediation or conciliation*: Neil Andrews, *English Civil Procedure* (2003), 25.45 to 25.48; Neil Andrews, *The Modern Civil Process* (Tübingen, Germany, 2008), 11.49 to 11.61; Neil Andrews, *Contracts and English Dispute Resolution* (Tokyo, 2010), 22.20 ff; H Brown and A Marriott, *ADR Principles and Practice* (3rd edn, London, 2011) (forthcoming); *Cross and Tapper on Evidence* (12th edn, Oxford University Press, 2010), 475; K Mackie, D Miles, W Marsh, T Allen, *The ADR Practice Guide* (3rd edn, Tottel, London, 2007), 7.2 ff; B Thanki (ed), *The Law of Privilege* (Oxford University Press, 2006), 7.24, 7.38 to 7.39; for USA and Australian sources, P Newman, in M Liebmann (ed), *Mediation In Context* (2000, London and Philadelphia), 188; D Spencer and M Brogan, *Mediation: Law and Practice* (Cambridge University Press, 2006), ch 9, noting esp at 329, Australian legislation on this topic; for general comment, Scottish Law Commission’s Report, ‘Evidence: Protection of Family Mediation [1992] SLC 136 (Report) (June 1992) (containing notes on the draft Bill); the Civil Evidence (Family Mediation) (Scotland) Act 1995; symposium in (1988) 12(1) Seton Hall Legis J.

<sup>18</sup> On the development of this privilege, D Vaver, ‘Without Prejudice’ communications-their admissibility and effect’ (1974) Univ Brit Col L Rev 85 (cited by Robert Walker LJ in *Unilever plc v. The Proctor & Gamble Co* [2000] 1 WLR 2436, 2445, CA).

<sup>19</sup> Neil Andrews, *English Civil Procedure* (2003), ch 25; H Brown and A Marriott, *ADR Principles and Practice* (3rd edn, London, 2011) (forthcoming); *Cross and Tapper on Evidence* (12th edn, Oxford University Press, 2010) 470 ff; D Foskett *The Law and Practice of Compromise* (7th edn, 2010), ch 22; C

privilege concerns 'mediation secrecy'. Here is a summary of this subtle and developing topic.

In this context of mediation, the parties normally adopt such protection by express agreement, but sometimes privilege rests merely upon implicit consensus.<sup>20</sup>

In *Cumbria Waste Management Ltd v. Baines Wilson* (2008) it was held that mediated settlement discussions between parties X and Y remain privileged if X or Y is unwilling to waive privilege<sup>21</sup>. It follows that in subsequent litigation between X and D, the third party D cannot obtain disclosure of the mediation discussions between X and Y unless both X and Y waive their privilege.

Conversely, the parties might waive privilege in their mediation communications. If so, when the court is required to assess costs in litigation subsequent to an unsuccessful mediation, Jack J in *Carleton v. Strutt & Parker* (2008) has declared that the courts will consider the 'unreasonableness' of positions taken during the mediation<sup>22</sup>.

However, the mediator possesses no independent immunity against being required to supply information to a court concerning the circumstances of a mediation. Instead the true analysis is that evidential privilege in this context is controlled by the parties to the mediation. Thus in *Farm Assist Limited (in liquidation) v. The Secretary of State for the Environment, Food and Rural Affairs (No 2)* (2009)<sup>23</sup> Ramsey J upheld a witness summons requiring a mediator to give evidence on the question whether a settlement achieved during the relevant mediation had been procured by duress by a party to that settlement. He distinguished:<sup>24</sup> (1) an express confidentiality clause, including a right of confidentiality in favour of a mediator (not the same as a head of privilege); (2) implied rights of confidentiality (not the same as a head of privilege); (3)

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Hollander, *Documentary Evidence* (10th edn, 2009), ch 16; M Iller, *Civil Evidence: The Essential Guide* (Sweet & Maxwell, 2006), 8-88 to 8-104; P Matthews and H Malek, *Disclosure* (3rd edn, London, 2010), ch 11; *Phipson on Evidence* (17th edn, 2010), 24-18 ff; C Passmore, *Privilege* (2nd edn, 2006), ch 10; B Thanki (ed), *The Law of Privilege* (Oxford University Press, 2006), ch 7; *Zuckerman on Civil Procedure* (2nd edn, 2006), ch 16; AFC Koo, 'Confidentiality of Mediation Communications' (2011) CJQ 192; J McEwan, 'Without Prejudice': Negotiating the Minefield' (1994) 13 CJQ 133.

<sup>20</sup> *Reed Executive plc v. Reed Business Information Ltd* [2004] EWCA Civ 887; [2004] 1 WLR 3026; *Aird v. Prime Meridian Ltd* [2006] EWCA Civ 1866; *Bradford & Bingley plc v. Rashid* [2006] UKHL 37; [2006] 1 WLR 2066; *Barnetson v. Framlington Group Ltd* [2007] EWCA Civ 502; [2007] 1 WLR 2443, at [34].

<sup>21</sup> [2008] EWHC 786 (QB) (HH Judge Frances Kirkham sitting as a High Court Judge).

<sup>22</sup> [2008] EWHC 424 at [72]; noted on this point by J Sorabji (2008) 27 CJQ 288, 291-2.

<sup>23</sup> [2009] EWHC 1102 (TCC); [2009] BLR 399; 125 Con LR 154.

<sup>24</sup> *ibid*, at [45] ff.



'without prejudice' communication privilege (a privilege held by the parties, but not by the mediator); and (4) an express clause precluding the parties from calling the mediator as a witness (this was held not to create a separate head of privilege or immunity). None of these was effective to shield the mediator.

*Brown v. Rice* (2007) confirms that a party to a mediated settlement, no less than an unmediated settlement, can adduce the contents of settlement negotiations both to prove whether a settlement was reached and to ascertain its terms.<sup>25</sup> The court will apply contractual principles to determine whether a binding settlement agreement has arisen during mediation.

Mediation agreements, as in *Brown v. Rice*, often prescribe that a binding settlement must be reduced to writing and signed by the parties, or by their authorised representatives. Such a formality clause also governs acceptance of an offer made during the conclusion of the mediation meeting(s) but expressed to be open for acceptance within a specified period after the meeting has ended (unless the need for writing and signature has been varied, waived or consensually overridden by another provision).

The UK Supreme Court in *Oceanbulk Shipping and Trading SA v. TMT Asia Ltd* (2010)<sup>26</sup> held that 'without prejudice' negotiations, which resulted in a settlement agreement, can be admitted for the purpose of ascertaining the factual matrix of the relevant agreement. In light of that background material, the court could then interpret the terms of the settlement. To decide otherwise would be to create an unprincipled distinction between interpretation of all other commercial contracts and interpretation of settlement agreements.

## **V.INSTITUTIONAL PROMOTION OF MEDIATION (1): GOVERNMENTAL ENCOURAGEMENT:**

Institutional support for mediation is now a common-place within England. Thus Senior Master Robert Turner (now retired) suggested that twenty-first century English

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<sup>25</sup> [2007] EWHC 625 (Ch) Stuart Isaacs QC.

<sup>26</sup> [2010] UKSC 44; [2010] 3 WLR 1424 (reversing [2010] EWCA Civ 79; [2010] 1 WLR 1803 (Longmore and Stanley Burnton LJ; Ward LJ dissenting). For another recent discussion *R v. K (A)* [2009] EWCA Crim 1640; [2010] QB 343, at [44] to [73].

court litigation has become the ‘alternative dispute resolution’ system<sup>27</sup>. Government recognises that mediation permits disputes to be resolved less expensively than civil litigation. Indeed, as we shall see, there have been various ‘pilot schemes’ to test whether the English court system should directly encourage litigants to pursue mediation in appropriate cases Sue Prince has made a study of these schemes<sup>28</sup>.

The Ministry of Justice (2010) has summarised the position concerning mediations which arise after civil proceedings have commenced<sup>29</sup>:

*National Mediation Helpline: towards the end of 2004, Her Majesty’s Courts Service (HMCS) set up the National Mediation Helpline (NMH)<sup>30</sup> to provide an accessible mediation service for higher value civil disputes. Since 2004, the Helpline has been expanded to enable the courts and judiciary to take a more pro-active approach in referring court users to this service. The NMH is served by a mix of local, regional as well as national mediation providers who had been accredited by the Civil Mediation Council (CMC).<sup>31</sup> Between January 2007 and December 2009 the NMH arranged 1892 mediations, of which 1244 settled – a settlement rate of 66%.*

*Small Claims Mediation service: The vast majority of hearings (73%) in the county courts involve small claims<sup>32</sup>. The Small Claims Mediation Service is a free service set up to help court users who already have an ongoing small claims case in the county court. Parties are generally unrepresented. In the 12 months to the end of April 2010, the service conducted more than 10,000 mediations, settling 72%, and the vast majority of mediations (>90%) are conducted by telephone, saving parties the time and expense of having to travel to a court building.*

The Government announced in March 2011 (press release of 29 March 2011 by the Ministry of Justice, London)<sup>33</sup> that it would like to expand resort to mediation. Its statement proposes this change:

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<sup>27</sup> Senior Master Robert Turner, Queen’s Bench Division, (who retired from that post in 2007, after 20 years), cited K Mackie, D Miles, W Marsh, T Allen, *The ADR Practice Guide* (3rd edn, Tottel, London, 2007), 5.

<sup>28</sup> S Prince, ‘ADR after the CPR’, in D Dwyer (ed), *The Civil Procedure Rules: Ten Years On* (Oxford University Press, 2010), ch 17.

<sup>29</sup> Ministry of Justice, ‘Implementation Paper’ (London, 2010) (a consultation paper), at \*5+ to \*9+.

<sup>30</sup> [www.nationalmediationhelpline.com](http://www.nationalmediationhelpline.com)

<sup>31</sup> [www.civilmediation.org](http://www.civilmediation.org)

<sup>32</sup> When the financial value of the claim does not exceed £5,000.

<sup>33</sup> <http://www.justice.gov.uk/news/press-release-290311a.htm>



*Increasing the use of mediation: We are proposing introducing automatic referral to mediation in small claims cases, automatic referral to mediation awareness sessions in higher-value cases and consulting on making mediated settlements enforceable by courts. This is to help people avoid the anxiety and expense of court where possible, although court will still be an option for those whom mediation cannot help...Last year, more than three quarters of claims in the civil system were settled after allocation, but before trial. This represents 87,000 cases which could potentially have been resolved earlier if mediation had been used more widely. (A consultation paper of 2011 supplies details)<sup>34</sup>.*

## **VI. INSTITUTIONAL PROMOTION OF MEDIATION (2): ENCOURAGEMENT WITHIN THE COURT PROCESS<sup>35</sup>:**

Leading judges continue to make speeches extolling mediation, including Lord Phillips, President of the Supreme Court<sup>36</sup>, and Lord Clarke, a former Master of the Rolls<sup>37</sup>.

The pre-action protocols state<sup>38</sup>: ‘litigation should be a last resort, and claims should not be issued prematurely when a settlement is still likely’<sup>39</sup> Furthermore, the Law Society for England and Wales in 2005 issued a ‘practice advice’ recommending that solicitors should routinely consider whether their clients’ disputes are suitable for ADR<sup>40</sup>.

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<sup>34</sup> ‘Solving disputes in the county courts: creating a simpler, quicker and more proportionate system’ (CP 6/2011: Ministry of Justice: Cm 8045) (29 March 2011).

<sup>35</sup> For a typology of court-assisted modes of ADR, WD Brazil and J Smith, ‘Choice of Structures’ (1999) 6 *Dispute Resolution Magazine* 8, cited in O Fiss and J Resnik, *Adjudication and Its Alternatives* (Foundation Press, New York, 2003), 468: court employs full-time in-house neutrals; or contracts with non-profit making organisations for such a programme; or directly pays firms to serve as neutrals; or orchestrates voluntary mediations; or refers parties to neutrals (whether selected by the court or by the parties) who charge; this last is the general English model, and furthermore, the parties select the neutral.

<sup>36</sup> Lord Phillips, ‘Alternative Dispute Resolution: An English Viewpoint’ (Judicial Communications office, London, 29 March 2008): [http://www.judiciary.gov.uk/NR/rdonlyres/6BBEAB74-204A-4AED-AC83-0624CC358794/0/lcj\\_adr\\_india\\_290308.pdf](http://www.judiciary.gov.uk/NR/rdonlyres/6BBEAB74-204A-4AED-AC83-0624CC358794/0/lcj_adr_india_290308.pdf)

<sup>37</sup> A Clarke, ‘The Future of Civil Mediation’ (Civil Mediation Council, London, May 2008: [http://www.judiciary.gov.uk/NR/rdonlyres/927B0C45-8C4D-4A3B-BDF7-5FEB7D8A0D1B/0/mr\\_mediation\\_conference\\_may08.pdf](http://www.judiciary.gov.uk/NR/rdonlyres/927B0C45-8C4D-4A3B-BDF7-5FEB7D8A0D1B/0/mr_mediation_conference_may08.pdf)

<sup>38</sup> Neil Andrews, *English Civil Procedure* (Oxford University Press, 2003), 3.13 to 3.18, 23.07, 26.63 to 26.66; for an empirical study, T Goriely, R Moorhead and P Abrams, *More Civil Justice? The Impact of the Woolf Reforms on Pre-Action Behaviour* (Law Society and Civil Justice Council, 2001).

<sup>39</sup> Practice Direction-Protocols, para 4.7.

<sup>40</sup> L Soc Gaz (2005) (16 June) 38-9.

The procedural code in fact proclaims that proceedings before the civil courts should be regarded as a matter of last resort to be pursued only when more civilised and ‘proportionate’ techniques have failed or could never be made to work. The CPR states that: ‘the courts increasingly take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still likely. Therefore, the parties should consider whether some form of alternative dispute settlement would be more suitable than litigation, and if so, endeavour to agree which form to adopt.’<sup>41</sup> There is also a general ‘tick box’ invitation in the Allocation Questionnaire (a procedural step occurring towards the beginning of court proceedings), enabling each party to indicate whether mediation might be an option.

Furthermore, the court system encourages pursuit of mediation. The English courts’ overall responsibility to administer civil justice includes ‘helping the parties to settle the whole or part of the case’<sup>42</sup> and ‘encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate.’<sup>43</sup> In addition to the ‘tick box’ mechanism contained in the Allocation Questionnaire (see preceding paragraph), resort to mediation is a question of direct communication between a judge (notably during the pre-trial stages, but occasionally after judgment during the process of giving permission to appeal).

Leverage to consider and to pursue mediation takes the form of a ‘stay’ upon current proceedings or the threat of an adverse costs order. Even in the absence of a mediation agreement, an English court can direct that the proceedings be stayed for a month at a time<sup>44</sup> while the parties pursue ADR or other settlement negotiations<sup>45</sup>. A stay merely places the proceedings in a state of suspense. Proceedings can be resumed when this becomes appropriate. The stay can be issued either at the parties’ request or on the initiative of the court. The matter is subject to the court’s discretion. There is no automatic right to a stay.

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<sup>41</sup> ‘Practice Direction-Protocols’ 4.7.

<sup>42</sup> CPR 1.4(2)(f).

<sup>43</sup> CPR 1.4(2)(e); Chancery Guide (2005), ch 17; *The Admiralty and Commercial Courts Guide* (9th edn, 2011), section G and appendix 7 (available on the CPR webpage under ‘Guides’).

<sup>44</sup> CPR 26.4(3).

<sup>45</sup> CPR 3.1(2)(f); CPR 26.4(1)(2).

However, this does not involve heavy-handed judicial insistence on mediation. Instead the English position involves selective judicial recommendation of mediation, normally after one party has requested mediation<sup>46</sup>.

In the Commercial Court (a part of the Queen's Bench Division, in the High Court), the practice is that a judge will not require the parties to mediate unless one party makes such a request and the suggestion seems to the judge to be reasonable. Parties to litigation in that court are regarded as 'sophisticated'. They enjoy legal advice concerning the range of dispute-resolution available to them. It would be unduly heavy-handed, therefore, for a judge to insist on a stay if neither party has an interest in mediation (2009 conversation with a Commercial Court judge). However, wider language appears in the *Admiralty and Commercial Court Guide* (2011), which does not rule out judicial initiative<sup>47</sup>: 'The Commercial Judges will in appropriate cases invite the parties to consider whether their dispute, or particular issues in it, could be resolved through ADR.' Where mediation seems appropriate, the court has devised a formula (rather misleadingly called an 'ADR Order') designed to achieve consensus on the nomination of a mediator, and to require reasons to be given to the court for failure to proceed to mediation<sup>48</sup>.

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<sup>46</sup> For sceptical discussion of any form of mandating or coercing resort to mediation, Matthew Brunsdon-Tully 'There is an A in ADR but Does Anyone Know What it Means Anymore?' (2009) CJC 218-36.

<sup>47</sup> *The Admiralty and Commercial Courts Guide* (9th edn, 2011), at G1.3.

<sup>48</sup> *ibid*, Appendix 7. It provides: *On or before [\*] the parties shall exchange lists of 3 neutral individuals who are available to conduct ADR procedures in this case prior to [\*]. Each party may [in addition] [in the alternative] provide a list identifying the constitution of one or more panels of neutral individuals who are available to conduct ADR procedures in this case prior to [\*]. On or before [\*] the parties shall in good faith endeavour to agree a neutral individual or panel from the lists so exchanged and provided. Failing such agreement by [\*] the Case Management Conference will be restored to enable the Court to facilitate agreement on a neutral individual or panel. The parties shall take such serious steps as they may be advised to resolve their disputes by ADR procedures before the neutral individual or panel so chosen by no later than [\*]. If the case is not finally settled, the parties shall inform the Court by letter prior to [disclosure of documents/exchange of witness statements/exchange of experts' reports] what steps towards ADR have been taken and (without prejudice to matters of privilege) why such steps have failed. If the parties have failed to initiate ADR procedures the Case Management Conference is to be restored for further consideration of the case. In Halsey v. Milton Keynes General NHS Trust [2004] EWCA Civ 576; [2004] 1 WLR 3002, at [30], Dyson LJ explained: 'An ADR order made in the Admiralty and Commercial Court in the form set out in Appendix 7 to the Guide is the strongest form of encouragement. It requires the parties to exchange lists of neutral individuals who are available to conduct 'ADR procedures', to endeavour in good faith to agree a neutral individual or panel and to take 'such serious steps as they may be advised to resolve their disputes by ADR procedures before the neutral individual or panel so chosen'. The order also provides that if the case is not settled, 'the parties shall inform the court < what steps towards ADR have been taken and (without prejudice to matters of privilege) why such steps have failed'. It is to be noted, however, that this form of order stops short of actually compelling the parties to undertake an ADR.'*

English courts are prepared, where appropriate, to register censure of a party's unreasonable refusal to engage in mediation. That refusal might be failure to accede to the opponent's call for mediation, or the court's own suggestion that mediation be contemplated. Indeed in the Court of Appeal in the *McMillan* case (2004) said that if both parties to an appeal spurn the judicial recommendation that mediation be considered, and instead they proceed straight to appeal without attempting mediation, each party will bear its own costs for that stage of the proceeding, with no opportunity for costs-shifting in favour of the victorious party to the appeal<sup>49</sup>.

In determining the unreasonableness of a party's refusal to pursue mediation, the Court of Appeal in *Halsey v. Milton Keynes General NHS Trust* (2004) listed the following criteria:<sup>50</sup> ‘*the nature of the dispute; the merits of the case; the extent to which other settlement methods have been attempted; whether the costs of the ADR would be disproportionately high; whether any delay in setting up and attending the ADR would be prejudicial; whether the ADR had a reasonable prospect of success.*’

It will be more common to apply a costs sanction against a party who not only refused to consider mediation but who also lost the substantive case (or appeal). This type of ‘refusenik’ might be ordered<sup>51</sup> to pay the other side's costs on an ‘indemnity basis’ rather than ‘standard basis’ (indemnity costs, although not punitive, are a full measure of compensatory costs; whereas standard basis costs are a substantial but incomplete measure of such compensation; and the difference between the two measures can be very large, given the high levels of costs incurred by parties in England)<sup>52</sup>.

As for costs sanctions against a party who has clearly won the relevant court proceedings, the ‘mediation offeror’ (who has lost the case) will bear the burden of

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<sup>49</sup> *McMillan Williams v. Range* [2004] EWCA Civ 294; [2004] 1 WLR 1858, per Ward LJ: ‘[29] Tuckey LJ gave this [direction] to the parties when he granted permission to appeal: ‘The costs of further litigating this dispute will be disproportionate to the amount at stake. ADR is strongly recommended.’ <The parties should have written to each other along the lines that, ‘Lord Justice Tuckey has very sensibly suggested ADR. My client thinks that is a splendid idea. Please can we get on with it as soon and as cheaply as possible?’...\*30+ ... In my judgment this is a case where we should condemn the posturing and jockeying for position taken by each side of this dispute and thus direct that each side pay its own costs of their frolic in the Court of Appeal. I would allow the appeal with no order for costs.’

<sup>50</sup> [2004] EWCA Civ 576; [2004] 1 WLR 3002, at [16] ff; for a strong application of this costs regime, in which the *Halsey* criteria were fully considered, *P4 Ltd v. Unite Integrated Solutions plc* [2006] EWHC 2924 (TCC), Ramsey J.

<sup>51</sup> *Virani Ltd v. Manuel Revert y Cia SA* \*2003+ EWCA Civ 1651; \*2004+ 2 Lloyd's Rep 14.

<sup>52</sup> On the difference between standard basis and indemnity costs, Neil Andrews, *The Modern Civil Process* (Tübingen, Germany, 2008), 9.12.

showing on the balance of probabilities that the mediation would have had a reasonable prospect of success, assuming the mediation offeree (who eventually won the case) would have participated in the mediation in a co-operative manner<sup>53</sup>. Satisfying this burden of proof will be an uphill task.

And so the question of a costs sanction against a victorious party is more likely to arise when the party to be sanctioned has rejected a judicial recommendation for mediation (as distinct from a suggestion made by the other side). In this context, robust costs sanctions are likely to be applied if the court (notably the Court of Appeal), when granting permission to appeal, has indicated that the parties should consider mediation. If one party fails to respond positively to such a judicial recommendation, the appeal court, when considering the question of costs at the conclusion of the appeal, might deny that party the costs of the appeal even if he has been successful on the merits of the appeal. In both *Dunnett v. Railtrack plc* (2002)<sup>54</sup> and *McMillan Williams v. Range* (2004)<sup>55</sup> a member of the Court of Appeal (Schiemann LJ in the *Dunnett* case, and Tuckey LJ in the *McMillan* case) issued an unsolicited recommendation that, instead of proceeding straight to appeal, both parties should pursue mediation. Dyson LJ in the *Halsey* case (2004) also noted the special status of a judicial recommendation:<sup>56</sup> ‘Where a successful party refuses to agree to ADR despite the court’s encouragement, that is a factor which the court will take into account when deciding whether his refusal was unreasonable. The court’s encouragement may take different forms. The stronger the encouragement, the easier it will be for the unsuccessful party to discharge the burden of showing that the successful party’s refusal was unreasonable.’

It is submitted that costs sanctions are unjustified if the relevant party to the appeal convinces the court that he has considered properly the opportunity to mediate but he has then chosen to bring or respond to the appeal for objectively satisfactory reasons. Once the court is satisfied that the party did properly consider the mediation option, there should be no scope for sanctions. The party who succeeds in the appeal (the appellant if the appeal is successful, or the respondent if the appeal fails) should receive the costs of that appeal from the defeated opponent, in accordance with the costs-shifting principle: to ‘sanction’ him for failure to attend or participate in a

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<sup>53</sup> *Halsey v. Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 WLR 3002.

<sup>54</sup> [2002] 1 WLR 2434, CA, at [13] ff.

<sup>55</sup> [2004] EWCA Civ 294; [2004] 1 WLR 1858, at [29], [30].

<sup>56</sup> *Halsey v. Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 WLR 3002, at [29].

mediation is both heavy-handed and unprincipled. Similarly, the defeated opponent should be ordered to pay costs on the standard basis, and not (by way of 'sanction') on the higher indemnity basis.

## VII.MEDIATION SCEPTICISM:

There are two arguments. The first is the sound and incontestable argument that mediation has its limits. The second is the bolder and controversial assertion that mediation should be treated with distrust.

As for the first argument, it must be accepted that mediation is possible only if both parties are willing to discuss their dispute, to examine the merits of their position in good faith, and ultimately to consider making concessions, whether tactical or magnanimous. Traditional court litigation will continue because it offers a strong form of dispute-resolution. The court's coercive powers are indispensable in some contexts, especially in claims against fraudulent or unco-operative persons. Moreover, court litigation also embodies many values, notably the principle of publicly accessible proceedings and reasoned decisions.

But then one must address the second argument. Banging the kettle drums of 'rights', 'entitlement', and 'perfect procedural justice', some oppose the growth of mediation. The gist of their opposition is the suggestion that mediation is an insidious phenomenon, that Government is promoting it for reasons of parsimony (saving expenditure on the more expensive system of court justice), and that it is apt to undermine people's true rights<sup>57</sup>.

Colleagues in, for example, Germany and Italy are surprised by the Anglo-American tradition of very high levels of pre-trial settlement and the relative paucity of adjudication by courts on the merits. And within the Anglo-American academic community, there have been strong criticisms of the trend towards privatised methods of

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<sup>57</sup> H Genn, *Judging Civil Justice* (Cambridge University Press, 2010), ch's 1 to 3; H Genn, 'Understanding Civil Justice' (1997) 50 CLP 155, 186-7 and Peter L Murray (Harvard), 'The Privatization of Civil Justice' (2007) 12 ZZP Int 283-303 (*Zeitschrift Für Zivilprozess International: Germany*); Peter L Murray, 'Mediation and Civil Justice: A Public-Private Partnership?' (2009) 14 ZZP Int 241; E Thornburg, 'Reaping What we Sow: Anti-Litigation Rhetoric, Limited Budgets, and Declining Support for Civil Courts' (2011) 30 CJQ 74.



promoting settlement by ordinary negotiation or procuring such compromises following mediation.

In particular, in her 2008 Hamlyn Lectures, Hazel Genn<sup>58</sup> criticised the assumption that mediation delivers ‘justice’. She prefers the view that mediation involves loss of the opportunity to receive substantive justice through the court system:<sup>59</sup> *‘What mediation is offering is simply the opportunity to discount [legal claims] in order to be spared the presumed misery and uncertainty of the adjudication process.’* Genn questions whether it should be government policy to augment the business of mediators and to reduce court lists. This is her important conclusion<sup>60</sup>:

*‘there is an interdependency between courts as publicisers of rules backed by coercive power, and the practice of ADR and settlement more generally. Without the background threat of coercion, disputing parties cannot be brought to the negotiating table. Mediation without the credible threat of judicial determination is the sound of one hand clapping. A well-functioning civil justice system should offer a choice of dispute resolution methods.’ And she adds: ‘We need modern, efficient civil courts with appropriate procedures that offer affordable processes for those who would choose judicial determination. This is not impossible. But it requires recognition of the social and economic value of civil justice, an acknowledgement that some cases need to be adjudicated, and a vision for reform that addresses perceived shortcomings rather than simply driving cases away.’*

Another vigorous and long-standing opponent of the modern rush towards privatised justice is Owen Fiss (Yale Law School). In his polemic, ‘Against Settlement’ (1984), he wrote<sup>61</sup>: *‘Settlement is for me the civil analogue of plea bargaining: consent is often coerced; the bargain may be struck by someone without authority...Although dockets are trimmed, justice may not be done.’* He added: *‘Like plea bargaining, settlement is a capitulation to the condition of mass society and should be neither encouraged nor praised.’*

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<sup>58</sup> H Genn, *Judging Civil Justice* (Cambridge University Press, 2010), ch 3.

<sup>59</sup> *ibid*, 119.

<sup>60</sup> *ibid*, 125.

<sup>61</sup> (1984) Yale LJ 1073; re-printed in D Galligan (ed), *Procedure* (Dartmouth, 1992) ch 16; see also O Fiss, *The Law As It Could Be* (New York, 2003). For references to the debate which Fiss’s 1984 article engendered in the US, O Fiss and J Resnik, *Adjudication and Its Alternatives* (Foundation Press, New York, 2003), 481, 488; and see J Resnik, ‘For Owen M Fiss: Some Reflections on the Triumph and Death of Adjudication’ (2003) 58 Miami U L Rev 173.

Certainly, the process of settlement is not perfect. Possible objections to settlement (including mediated settlements) are<sup>62</sup>: (1) parties to settlement might not fully understand their respective positions; (2) the parties might be significantly unequal in various ways; (3) a party might have procured the settlement by underhand dealing<sup>63</sup>; (4) a party's full civil entitlement should not be reduced by compromise<sup>64</sup>; (5) assessment of the 'merits' must be measured, precise, and exacting<sup>65</sup>; (6) the public search-light at trial should be shone upon serious wrongdoing.

As for factors (1) to (5), Hazel Genn has said: '*studies highlight the ways in which power influences the outcome of settlement negotiations* Factors which are important are: legal intelligence—getting the right lawyers and experts; financial resources-paying for the [same]; and having the psychological, social, and economic ability to endure litigation.'<sup>66</sup>

As for the sixth of these considerations, the openness of civil trial, an American commentator, Paul Carrington, has said: '*...what people bring to court is the refuse of our national and community life. Mendacity, greed, brutality, sloth, and neglect are the materials with which we work...*'<sup>67</sup>

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<sup>62</sup> For a convenient collection of literature addressing these points, H Genn, 'Understanding Civil Justice' (1997) 50 CLP 155, 186-7.

<sup>63</sup> eg, an aggrieved party to a compromise 'threw the contractual book' at the opponent, in an attempt to overturn the compromise, *Halpern v. Halpern* (No 2) [2007] EWCA Civ 291 (distribution of estate among family members; allegation that not all relevant assets were revealed and that the compromise should be regarded as vitiated on numerous suggested grounds; the report at [2007] 3 All ER 478 concerns a specific aspect of the case; consult the online version at [1] ff for the numerous contractual challenges); cf also for an allegation that a mediated settlement had been procured by duress, *Farm Assist Limited (in liquidation) v. The Secretary of State for the Environment, Food and Rural Affairs* (No 2) (2009) [2009] EWHC 1102 (TCC); [2009] BLR 399; 125 Con LR 154.

<sup>64</sup> One of Jeremy Bentham's anxieties: S Roberts, 'Settlement as Civil Justice' (2000) 63 MLR 739, 743 n 11, W Twining, 'Alternatives to What?' (1993) 56 MLR 380, 384 (examining various theorists' accounts of the civil process, notably, Bentham, Llewellyn, Fuller, and Damaska).

<sup>65</sup> For a stimulating account of accuracy and legality, JA Jolowicz, 'The dilemmas of civil litigation' in *On Civil Procedure* (Cambridge UP, 2000) ch 4.

<sup>66</sup> H Genn, 'Understanding Civil Justice' (1997) 50 CLP 155, 179; see also H Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (Oxford UP, 1987) (reviewed Neil Andrews [1989] CLJ 506 and other studies cited Genn (1997) *ibid*; see also H Genn, *The Paths to Justice: What People Do and Think About Going to Law* (Hart, Oxford, 1999); H Genn, 'Court-Based ADR Initiatives for Non-Family Civil Disputes: The Commercial Court and the Court of Appeal' (Department for Constitutional Affairs Research Reports 1/2002, 2002): [www.hmcourts-service.gov.uk/docs/adr\\_initiatives.pdf](http://www.hmcourts-service.gov.uk/docs/adr_initiatives.pdf) (this last piece in examined briefly in Section 5 of the author's paper on the Commercial Court and case Management).

<sup>67</sup> Paul D Carrington, 'Teaching Civil Procedure: A Retrospective View' (1999) 49 Jo of Leg Educ 311, at 328.

Sir Jack Jacob, writing in 1985, before the ADR movement had made a serious impact in mainstream English civil justice, endorsed the ideal of open access to courts for the widest range of disputes<sup>68</sup>: ‘*It should be a fundamental aim of civil justice to open wide the gates of the Halls of Justice and to provide adequate and effective methods and measures, practices and procedures, reliefs and remedies, to deal with all justiciable claims and complaints.*’ He added: ‘*Such an aim would produce greater harmony and concord in society and increase the understanding and respect of the community for law and the system of civil justice.*’

But this court-centred view seems debatable. England has not adopted Jacob’s aim. Avoidance of litigation and encouragement of pre-trial settlement are the bed-rock assumptions of the modern civil system of justice.

Nevertheless, one must acknowledge that it would be regrettable if matters can always be conveniently swept under the carpet by a last-minute settlement designed to avoid adverse publicity. Here are some examples taken from modern Britain: a senior female police-woman complains that her rise within the hierarchy has been obstructed by sexual discrimination<sup>69</sup>; a family wishes to complain that their son’s suicide within the British armed forces was the result of bullying by fellow soldiers<sup>70</sup>; a car-dealer’s standard-term warranty for repair of new vehicles is mischievously declared to have been ‘forfeited’ for a reason which is no longer tenable under competition law<sup>71</sup>; a tenant has failed for many years to induce his landlord, a large charity, to satisfy its

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<sup>68</sup> JIH Jacob, ‘Justice Between Man and Man’ (1984) 34 *Jo of Legal Education* 268 (cited H Genn, ‘Understanding Civil Justice’ (1997) 50 *CLP* 155, 185-6; Genn suggests that ‘our future prosperity has more to do with what is going on in offices and factories in the Far East than with whether Lord Woolf’s fast track will achieve its objectives.’ cf also Jacob’s statement in ‘Access to Justice in England’, by the same author, *The Reform of Civil Procedural Law* (London, 1982), 125, 126-7: ‘In a civilised society, there should be no room for barriers to justice, no second-class access to justice, just as there should be no second-class justice’ (re-printing of his contribution to M Cappelletti and B Garth, *Access to Justice, a World Survey* (Guiffre and Sijthoff, Italy, 1978) vol 1, bk 1); and Jacob’s later statement in *The Fabric of English Civil Justice* (1987) 277, ‘..there should be, not only equality before the law, but equality of access to the law and legal services<alike for rich and poor and those of moderate means, and that such access should extend to all civil claims and defences at all levels of the judicial process, without regard to the nature of the dispute or complaint or the relief or remedy claimed.’

<sup>69</sup> See the ‘Halford’ affair, July 1992, discussed Neil Andrews, *Principles of Civil Procedure* (London, 1994), 26.

<sup>70</sup> Such complaints have received publicity: for Parliamentary comment in 2006 on a QC’s report into one set of incidents, <http://www.publications.parliament.uk/pa/ld199900/ldhansrd/pdvn/lds06/text/60329-05.htm>.

<sup>71</sup> Typically, customer’s garage failing to fit replacement mechanical part bearing manufacturer’s ‘logo’, even though part in fact fitted has same objective specification as the manufacturer’s named part; facts told to the author: for the legal background to this, see the Office of Fair Trading’s comments at <http://www.oft.gov.uk/News/Press+releases/2003/PN+170-03.htm>.

repair obligations, and it appears that there have been similar complaints by other tenants against this landlord<sup>72</sup>.

Sometimes statute prohibits exclusion of formal recourse to state-administered courts or tribunals. Thus in *Clyde & Co v. Bates van Winkelhof* (2011)<sup>73</sup> the (English) High Court refused to uphold a clause requiring a partner in a law firm to refer any disputes or differences arising from her work for the firm to mediation and then to arbitration. The partner had brought complaints to an Employment Tribunal alleging various statutory breaches by her law firm of equality law, and seeking compensation. Statute<sup>74</sup> clearly precludes 'contracting out' from this open and public system of adjudication before a tribunal. By contrast, in *Fulham FC (1987) Ltd v. Richards* (2010)<sup>75</sup> Vos J held that a wide arbitration agreement could cover a dispute arising from a transfer of a football play club. The agreement to arbitrate did not infringe any element of public policy. Therefore, Vos J decided to stay related court proceedings, commenced under the Companies legislation to challenge the activities of the relevant company officials.

## VIII. CONCLUDING REMARKS:

The law and practice of mediation in England can already be described as developed, indeed sophisticated. Amongst the array of topics considered in this paper, the following nine points demand to be highlighted.

(1) Already mediation has become popular in England, and this is likely to increase for two reasons.

(2) First, many disputants now recognise that mediation is often more attractive than the formal processes of court adjudication or arbitration. These are the private vectors which drive demand for mediation. Because these are spontaneous responses by disputants, based on their private assessment of the merits of this style of dispute resolution, these factors have been called 'organic' in this paper.

(3) However, reinforcing these private and organic factors are the various forms of institutional support for the movement towards mediation.

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<sup>72</sup> Examples must be legion; eg, *English Churches Housing Group v. Shine* [2004] EWCA Civ 434.

<sup>73</sup> [2011] EWHC 668 (QB), Slade J.

<sup>74</sup> Equality Act 2010, s 120 and the Equality Rights Act 1996, s 203.

<sup>75</sup> [2010] EWHC 3111 (Ch); [2011] 2 All ER 112.

(4) Government is now actively promoting mediation. This is the process of official proselytizing and cajoling. However, mediation should not be imposed on parties if it is evident that there is insufficient shared willingness to engage in constructive discussion.

(5) State-controlled courts can support and promote the private processes of mediation and arbitration.

(6) In England this encouragement involves selective judicial recommendation of mediation.

(7) The English courts also subject disputants to the general threat of adverse costs awards if parties unreasonably spurn sensible mediation overtures made by the opponent or by the court.

(8) England has moved beyond any sense that mediation is an impoverished or 'second-best' form of civil justice. Within a mature system of civil justice there is a place for both formal and informal processes.

(9) To express this interaction between the public and private forms of civil justice, the author has elsewhere suggested, in lectures given in Pavia (2009)<sup>76</sup>, Sao Paulo, Curitiba (2010) and Rio (2011), that a helpful metaphor might be 'Civil Justice's Double Helix'<sup>77</sup>. The metaphor expresses the idea that one strand—consisting of ADR, including arbitration and mediation—and the other strand—the court process—are complementary and entwined. Together the two strands of the public court process and the alternative forms of private dispute resolution have considerable strength.

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<sup>76</sup> Neil Andrews, 'The Modern Civil Process in England: Links between Private and Public Forms of Dispute Resolution' (2009) 14 *ZZP Int Zeitschrift für Zivilprozess International: Germany* 3-32 also translated as 'La 'Doppia Elica' della Giustizia Civile: I Legami tra Metodi Privati e Pubblici di Risoluzione delle Controversie' in *Rivista Trimetrale di Diritto e Procedura Civile* (2010) 529-48 (I am grateful to Elisabetta Silvestri, Pavia, for this excellent translation).

<sup>77</sup> The 'Double Helix' structure of DNA was discovered by Francis Crick and James Dewey Watson (Nobel Prize 1962); the latter is an Honorary Fellow of Clare College, Cambridge, where the author is a Fellow; and there is a sculpture of the Double Helix within the college's grounds.