

# MEDIATION - ON THE RISE IN THE UNITED KINGDOM?

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The take up of mediation has been relatively slow in the United Kingdom. A study of the mediation pilot at the Central London County Court indicated that in only five percent of cases did the parties agree to mediate.<sup>1</sup> Lack of experience in mediation by lawyers, fear of showing weakness by accepting mediation, and resistance to the idea of compromise were cited as the main reasons for the low take up.<sup>2</sup> Public awareness of ADR in the United Kingdom is also acknowledged to be low.<sup>3</sup> There are wide-ranging efforts to turn this tide. This article provides an overview of the main factors which are either hindering the take up of mediation, or encouraging its use, in non-matrimonial cases in the United Kingdom. It will be shown that much of the recent impetus for ADR has come from Europe-wide initiatives.

## A Question Mark Over the Enforceability of Mediation Clauses

Australian Courts have on many occasions considered the issue of enforceability of mediation clauses. In the United Kingdom, however, case law is scant. The House of Lords in *Walford v Miles*<sup>4</sup> found that an agreement to negotiate is not enforceable as a court cannot determine the relevant obligations with sufficient certainty and cannot assess compliance. This view has been weakened by the House of Lords' decision in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*,<sup>5</sup> where the Court considered that it has a discretionary power to stay proceedings if there is a dispute resolution clause that is equivalent to an effective agreement to arbitrate, as in the case

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1 H Genn, *Central London County Court Mediation Pilot: Evaluation Report*, LCD Research Series, Number 5/98.

2 *Ibid* (v).

3 A survey on public awareness of various ADR schemes concluded that one quarter of the population had not heard of any of the schemes: Lord Chancellor's Department, *ADR Discussion Paper*, November 1999, para 5.8.

4 [1992] 1 All ER 453.

5 [1993] AC 334.

of an expert determination clause. The case was followed in *Cott UK Ltd v FE Barber Ltd*,<sup>6</sup> although on the facts of that case, there were grounds for refusing a stay.<sup>7</sup>

Despite weakening the view in *Walford v Miles* that agreements to agree or to negotiate are unenforceable for lack of certainty, the *Channel Tunnel* and *Cott UK* cases considered binding ADR procedures. As far as mediation is concerned, the English High Court considered the enforceability of a mediation clause in *Halifax Financial Services Ltd v Intuitive Systems Ltd*.<sup>8</sup> The Court considered that a mediation clause must be a condition precedent to the issue of litigation proceedings in order to be enforceable. The Court found that, as a matter of construction, the mediation clause in question failed this test. The ADR procedures were only triggered if one of the parties issued a written notice to the other. The relevant portion of the clause read: '... senior representatives of the parties will, within 10 business days of a written notice from either party to the other, meet .... and attempt to resolve the dispute without recourse to legal proceedings'. In addition, escalation within the ADR procedure was not compulsory, but was at the option of either party. The further relevant portion of the clause provided: '... if the dispute is not resolved as a result of such a meeting, either party may....propose to the other....that structured negotiations be entered into with the assistance of a.... mediator...'.<sup>9</sup>

As the *Halifax* decision turned on the construction of the clause in question, the issue of the enforceability of mediation clauses in the United Kingdom remains largely unresolved. Moreover, the *Halifax* decision was made prior to the introduction of the new Civil Procedure Rules ('CPR'), which encourage ADR (discussed further below). A decision on enforceability now could well adopt the approach taken by Australian courts.<sup>9</sup>

## The Impact of the Lord Woolf Reforms

In 1995 and 1996 Lord Woolf conducted a large-scale inquiry into improving access to justice in English courts. The Final Report proposed a new civil justice landscape, which would avoid litigation wherever possible; involve less adversarial and less complex litigation; and provide stricter case management by judges.<sup>10</sup> A unified code of procedural rules (the CPR) provided the centrepiece of the programme of reforms that followed Lord Woolf's inquiry.

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6 [1997] 3 All ER 540.

7 See J Lee, 'Enforcing an ADR Clause: *Cott UK Ltd v Barber Ltd*' (1999) *SJLS* 257 for a discussion of the case.

8 [1999] 1 All ER (Comm) 303.

9 Across the Continent, civil law countries consider that the parties' agreement to mediate must be upheld as a matter of contract. For example, consider the French case *Peyrin v Soci  th   Polyclinique des Fleurs*, unreported, and case comment at (1997) *Arb* 63(4) 302.

10 Lord Woolf, *Access to Justice: Final Report*, July 1996, 4-9.

The Rules came into effect on 26 April 1999 and apply to High Court and County Court proceedings in England and Wales. There is now a duty on courts to actively case manage by encouraging the parties to co-operate and to use ADR.<sup>11</sup> The Rules specifically provide a window of opportunity early in proceedings for parties to request a stay to attempt ADR.<sup>12</sup> The CPR have also introduced the possibility of cost sanctions if a party does not comply with the court's directions regarding ADR. In particular, a court when assessing costs can have regard to efforts made by the parties both before and during proceedings to settle the dispute.<sup>13</sup>

In *Dyson and Field v Leeds City Council* (22 November 1999), the Court of Appeal reminded the parties that they could order indemnity costs and a higher rate of interest on damages if the parties unreasonably rejected the court's suggestion that they should attempt ADR. In *Frank Cowl v Plymouth City Council* [2001] EWCA Civ 1935 Lord Woolf stated that sufficient should be known about ADR to make the failure to adopt it, in particular where public money is involved, indefensible. Although this was a public law case in the context of judicial review, Lord Woolf's disapproval of parties who do not properly address ADR options in the course of litigation has general application. Most recently, in *Dunnett v Railtrack* [2002] EWCA Civ 302, the Court of Appeal refused to award costs to the successful litigant (Railtrack) as it had refused to mediate when it was proposed at an earlier stage in the proceedings. The Court stated that the parties and their lawyers should be aware that it is one of their duties to consider ADR, especially when the court has suggested it. This is the first case in England where the judges have actually withheld costs from a successful party on account of a failure to mediate.

Although the Central London County Court, Patents Court and Commercial Court were at the forefront of case management and mediation, even before the introduction of the CPR, the civil justice reforms have encouraged further court mediation schemes. For example, mediation initiatives and ADR protocol have been introduced by the Technology and Construction Court (formerly the Official Referees Court), and the Leeds Combined Court, Mercantile Courts and the Court of Appeal also have mediation schemes in place.<sup>14</sup>

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11 CPR, r 1.4(2).

12 CPR, r 26.4(1).

13 CPR, r 44.5(3).

14 For an overview of the Central London County Court mediation scheme, refer to H Genn, *Central London County Court Mediation Pilot: Evaluation Report*, LCD Research Series Number 5/98. For a consideration of mediation efforts at the Commercial Court, refer to Commercial Court ADR Working Party, *Second Report*, 1998. In respect of the mediation scheme at the Patents Court, refer to Ford J, *The Patents Court ADR Programme*, (1996). In relation to the Leeds Combined Court ADR Programme, reference can be made to the Association of Northern Mediators, *Leeds Court Mediation and Notes of Meeting to Discuss Court Approved Mediation Scheme* (1999).

In Scotland there is also increasing support for court-referred mediation in non-matrimonial matters. A scheme is currently running in relation to small claims. Case management techniques are also developing in a number of County Court divisions, as well as in the High Court in Northern Ireland. In the High Court, for example, a four week period is allowed prior to fixing the trial date, in order to give parties an opportunity to explore settlement.<sup>15</sup>

Since the introduction of the CPR, there has been a dramatic decline in the number of proceedings instituted and also an increase in the number of settlements at an early stage of proceedings. There is, however, wide-spread belief that neither factor is attributable to mediation, but is largely due to the mechanism of the 'Part 36 offer', which allows parties to make offers of settlement, including prior to issue of proceedings, that have various cost consequences.<sup>16</sup>

A concern frequently voiced is that, notwithstanding the CPR, judges are failing to embrace mediation. Lawyers complain that judges are not even raising mediation as an option in many instances and, in some cases, that judges require a great deal of persuasion to grant a stay for mediation to take place.<sup>17</sup> Even in cases that are stayed for mediation, the courts make few efforts to monitor whether mediation does take place. Conversely, there is anecdotal evidence of judges who zealously embrace mediation. For example:

- A Commercial Court judge, in the face of opposition by the parties to the suggestion made by the judge that they should mediate, fixed a date for trial, but considered that neither party should receive any costs at the end of the trial as mediation was the most appropriate way to settle the dispute;
- A Mercantile Court Judge cross-examined a solicitor, in response to allegations that the solicitor's conduct in the mediation frustrated any attempt at settlement, for the purpose of considering whether cost sanctions should be imposed against the solicitor personally;
- A High Court Judge required additional parties to be joined in the action solely for the purpose of directing the parties to a mediation.

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15 For an overview of mediation schemes in Scotland, see R Mays and B Clark, *ADR in Scotland*, The Scottish Office, (1999); and in relation to Northern Ireland refer to Civil Justice Reform Group, *Review of the Civil Justice System in Northern Ireland: Interim Report*, April 1999.

16 CPR, rr 36.13 and 36.14.

17 CEDR, *Civil Justice Audit*, April 2000. Refer to the sections on 'Judges should initiate settlement discussions', 'Role of mediation' and 'Cases should not be stayed whilst settlement discussions are underway'.

A Report has recently been published on the mediation schemes at the Commercial Court and the Court of Appeal.<sup>18</sup> Between July 1996 and June 2000, 233 ADR orders had been made by the Commercial Court. Mediation was actually undertaken in just over fifty percent of these cases. Of those mediated, fifty-two percent settled at mediation; twenty percent settled some time after mediation; five percent went on to trial; and in twenty-three percent of the cases mediated the outcome is not yet known as the cases are still live. The most common reasons cited for refusing to mediate included inappropriateness for mediation; that the case was not ripe for mediation; and lack of faith in the mediation process. Concerns expressed about mediation by parties who had mediated included the shortcomings of neutrals; intransigence of opponents; and feelings of being pressured into ADR and to settle.

In relation to the Court of Appeal, between November 1997 and April 2000, 38 appeal cases had been mediated. Unlike the Commercial Court scheme, the reasons most frequently cited for refusing to mediate included policy reasons requiring a judgment; points of law requiring determination; and the past behaviour of opponents. About fifty percent of the cases that were mediated settled at the mediation or shortly afterwards. Of those that did not settle at mediation, sixty-two percent went on to appeal, indicating that different suitability considerations are likely to be relevant in the context of appellate cases.

Overall, the study of the mediation schemes at the Commercial Court and the Court of Appeal confirmed that voluntary take up of mediation is still low in England; that an individualised approach to the selection of cases for mediation is required; and that better court administration is required.

## **Government Efforts Set the Pace**

Apart from its impact via civil justice reform, the government has funded mediation schemes in a number of different areas, for example:

- The Environment Council offers an ADR service for public interest/environmental disputes;
- The Department of Health/National Health Service ('NHS') has been involved in a mediation pilot in several health regions;
- The Housing Ombudsman refers tenancy disputes in relation to Local Authority housing to mediation;
- The Scottish Citizens Advice Bureaux have piloted mediation services; and

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18 H Genn, *Court-based ADR initiatives for non-family civil disputes: the Commercial Court and the Court of Appeal*, LCD Research Series, No 1/02, March 2002, available at <<http://www.lcd.gov.uk/civil/cjustfr.htm#part4>>.

- The Planning Inspectorate has run a mediation pilot in the context of planning appeals cases.

The Lord Chancellor's Department issued an ADR Discussion Paper in November 1999, which has sparked debate on a number of mediation policy issues. More recently, the government has announced that all its departments will use litigation as a matter of last resort, preferring wherever possible to use mediation or arbitration. Standard government procurement contracts will also in future include ADR clauses.

A further recent initiative has been the introduction of Legal Aid for mediation in both matrimonial and non-matrimonial cases. In the context of non-matrimonial mediation, the funding covers advice and assistance in preparing for mediation, the representative's attendance at mediation and the mediation fees. In addition, Legal Aid can be refused if a case appears suitable for mediation and the parties refuse to attend.<sup>19</sup> In Scotland Legal Aid is not currently available for mediation in non-matrimonial disputes, although the Scottish Office has indicated a willingness to explore ways in which mediation in such cases could be encouraged through Legal Aid.<sup>20</sup> The position is similar in Northern Ireland, where the Civil Justice Reform Group has recommended the extension of Legal Aid to cover mediation in non-matrimonial cases.<sup>21</sup>

### **Commerce/Industry Leaders also Take Charge**

Various sectors of commerce have shown growing support for mediation in the United Kingdom. The Confederation of British Industry provided the initial support to set up the Centre for Dispute Resolution ('CEDR', recently renamed the Centre for Effective Dispute Resolution). The Centre's membership includes retailers, banks, insurance companies, engineering and construction firms, manufacturing, computer companies, gas and petroleum enterprises, utilities industries, publishing companies and electronics firms. More recently, the Commerce and Industry Group has provided support for the launch of another mediation organisation, InterMediation.

Genn's study of the Central London County Court mediation scheme indicated that in forty-five percent of the cases mediated, both parties were companies and in thirty-nine percent of cases mediated, at least one party was a company. The study also revealed that the rate at which both parties accepted mediation was highest when a

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19 In relation to the funding changes, refer to the *Funding Code*, 26 October 1999; *a New Approach to Funding Civil Cases*, October 1999; *Testing the Code*, October 1999; and *The Funding Code – Decision Making Guidance*, June 2000.

20 Scottish Office New Release, *McLeish Outlined Proposed Reforms to Scotland's Civil Legal Aid System*, 27 March 1998.

21 Civil Justice Reform Group, *Review of the Civil Justice System in Northern Ireland: Interim Report*, April 1999 and *Final Report*, June 2000.

company was a party.<sup>22</sup> A survey of 500 English companies in 1999 indicated that almost 40% had considered the appropriateness of mediation at the earliest possible stage, when negotiating their commercial deals and drafting contracts.<sup>23</sup> The Institution of Civil Engineers, the Electrical Contractors Association, the Institution of Chemical Engineers and the Steel Stockholder's Association have also considered mediation provisions for their standard forms of contract.<sup>24</sup>

The construction industry in the United Kingdom is the largest single user of mediation, followed by banks, the information technology industry and insurers. The increasing use of mediation in the construction industry has not been affected by the introduction of statutory adjudication for the resolution of construction disputes.<sup>25</sup> The Technology and Construction Solicitors' Association has published an ADR Protocol and a set of mediation rules to complement it. The Protocol reminds solicitors to advise their clients of ADR options.

Banks have been significant users in mediation in the United Kingdom for a number of years, and a specialist ADR organisation, the City Disputes Panel ('CDP'), was set up to meet demand for ADR services in the banking and finance industry. In particular, there was concern that the expense and length of financial litigation could adversely effect the pre-eminence of London as a world financial centre. A number of retail banks have also piloted mediation schemes. For example, Barclays Bank produced legal risk management guidelines, providing that ADR is normally the preferred way of resolving a dispute, and this was backed up by guidelines to the Bank's external lawyers, requiring them to consider an ADR option in each case. The Bank also trained over 50 staff to identify cases appropriate for mediation. These efforts are in line with the Banking Ombudsman's attempts to conciliate disputes before making its determinations. The Financial Services Authority (FSA), which will replace the Banking Ombudsman (and other Ombudsman schemes), will continue to use mediation as 'an honest broker' approach.<sup>26</sup> For selected civil cases, the FSA will also use a specific mediation scheme, administered by CEDR, which seeks to address concerns that the FSA could abuse its wide-ranging civil powers against individuals. The scheme does not apply where the FSA alleges unfitness or dishonesty of the opposing party, or in criminal cases.

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22 H Genn, *Central London County Court Mediation Pilot: Evaluation Report*, LCD Research Series, Number 5/98, 29.

23 J Duckers, 'Woolf at Door Over Mediation Reform: Lawyers in Fear of Losing Fees', *Birmingham Post*, 17 September 1999.

24 CEDR, *1990-5: 5 years of achievement*, (1995).

25 By way of the Housing Grants Construction and Regeneration Act 1996.

26 Financial Services Authority, *Consumer Complaints and the New Single Ombudsman Scheme*, November 1999, 30-1.

Internet banks, which do not currently fall within the jurisdiction of the Banking Ombudsman, have developed their own alternative mechanisms for resolving disputes with customers. For example, First-e refers disputes to a law firm for screening purposes, and cases may be referred to an external and independent mediator or adjudicator for resolution.<sup>27</sup>

Lloyds market insurers have signed an ADR pledge, a non-binding expression of commitment to ADR, called Market ADR Commitment ('MAC'). As part of the pledge, each signatory commits to having a senior executive who can be approached if a claims handler, for example, is being recalcitrant about mediation. Although MAC is a more recent initiative, some insurance companies have been promoting mediation in the United Kingdom for a number of years. For example, a legal expenses insurance company referred the bulk of the cases to mediation under the first mediation scheme run by the Law Society in the Bristol Courts.<sup>28</sup> A large number of referrals to mediation from the Commercial Court have been in the insurance and reinsurance sectors.

Despite these signs of culture change in the insurance industry, there is still a predominance of opinion in the industry that insurance disputes should be settled by direct negotiation, and that there is little place for mediation. For example, a survey of claims managers in 1999 indicated that 70% preferred negotiation to other forms of dispute resolution.<sup>29</sup> In order to tackle this kind of intransigence, insurance companies are developing systematic case management schemes, which require case managers to consider the mediation option, and to justify non-suitability in each case. For example, ITT London and Edinburgh claims to have saved more than £1 million in professional fees in 1998 alone as a result of mediation.<sup>30</sup> The Solicitors' Indemnity Fund ('SIF') had, in the 12 months to August 1999, 113 mediations, including one mediation which resolved over 180 claims. SIF has estimated cost savings of up to £3 million and a saving to the legal profession of over £30 million.<sup>31</sup> The International Underwriting Association of London ('TUA') and Lloyds' Underwriters' Association ('LUA') have formed a Working Party to promote mediation in the marine insurance market, in particular, for third party claims, insurance coverage disputes and intra-market disputes.

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- 27 J Fleming, 'Lawrence Graham is Dispute Resolver for Internet Bank', *Law Society Gazette*, 3 August 2000, 8.
- 28 M Davies *et al*, *Promoting Mediation: Report of Study of Bristol Law Society's Mediation Scheme in its Preliminary Phase*, 1996 Research and Policy Planning Unit, Research Study No 21, The Law Society, 217.
- 29 A Broad, 'Tackling the legal loop holes', *Post Magazine Supplement*, 28 October 1999, 5.
- 30 'Insurers join up', *Post Magazine*, 3 December 1998.
- 31 Solicitors' Indemnity Fund, *ADR Settlement Achieves Major Savings*, Press Release, June 1999.



In the context of information technology disputes, high profile cases that have been successfully resolved by mediation have provided impetus for mediation in this sector. There is also a range of mediation schemes in the sector, including a scheme by the Computing Services and Software Association ('CSSA'), which is available when a party to an information technology dispute is a member of the CSSA. The British Computer Society also provides mediator nomination services free of charge. The Society for Computers and the Law have set up a Working Party which is developing alternative dispute resolution procedures for information technology disputes. The Chartered Institute of Arbitrators has also developed conciliation rules for the resolution of computer software disputes. The mediation pledge idea was initially introduced in the United Kingdom by the information technology industry by way of the Millennium Accord, which was launched at the end of 1998, with the support of a number of a high profile companies in the information technology sector, in order to encourage the use of mediation for the resolution of potential Y2K disputes. Ultimately, 400 organisations signed the Accord. Nominet.uk, the organisation responsible for administering the .uk country code top-level domain, introduced a new Dispute Resolution Service in September 2001, based on ICANN's Uniform Domain Name Dispute Resolution Policy ('UDRP'). Informal mediation forms part of the new procedure, followed by an expert determination procedure if mediation is unsuccessful.

## **ADR Organisations Proliferate**

An indicator of the increase in commercial mediation activity has been the proliferation of commercial mediation organisations. CEDR and the ADR Group have been flagships for commercial mediation development in the United Kingdom. CEDR provides a wide range of mediation services, including mediation advice, assessment of suitability for mediation, appointment of mediators, drafting of mediation agreements, mediation case management and pre-mediation meetings. It offers extensive mediation and mediator training programmes, which have earned it National Training Awards. The Centre has also established an international platform, chaired by Lord Griffiths. It has also been developing mediation initiatives in Italy, Malta and Russia. In Russia, it is working with DIFID and the British Council to assess the suitability of ADR procedures and institutions (like ombudsman schemes and tribunals) for the resolution, in the first instance, of social welfare disputes. If successful, the Russian Government intends to consider ADR for a range of other disputes.

Whilst CEDR's membership is drawn from industry, the legal profession and academia, the ADR Group's membership is drawn solely from the legal profession and has a broad regional reach, called ADR Net. The Academy of Experts provides a mediation advisory service and also administers independent mediation schemes on behalf of various professional bodies, government departments, public corporations, private companies and trade associations. Its Faculty of Mediation also runs a

mediator training programme. The Chartered Institute of Arbitrators ('CIA') appoints mediators and conciliators and maintains a panel of mediators. It has administered a consumer mediation scheme for a number of years. International ADR organisations, in particular, the London Court of International Arbitration ('LCIA') and the International Chamber of Commerce ('ICC'), have recently revamped their mediation clauses and introduced med-arb procedures.

The non-matrimonial mediation organisations in the United Kingdom includes groups of barristers who offer mediation services (for example, The Centre for Business Arbitration and Littleton Mediation); organisations offering on-line mediation services (for example, Consensus Mediation); fixed-fee mediation companies (like Dispute Mediation); companies which are targeting small claims mediations (as in the case of the London Mediation Service); and mediators who focus on high value and complex disputes (as in the case of the Panel of Independent Mediators, 'PIMS'). InterMediation, sponsored by the Commerce and Industry Group, consists of mediators from the top 100 legal and accountancy firms.

### **Some Discrepancies**

In many jurisdictions mediation take up is greatest for personal injury and employment disputes. This has not been the experience in the United Kingdom. Personal injury cases account for the smallest share of mediations, according to CEDR statistics. In the Central London County Court mediation scheme there was also a very low take up of mediation in personal injury cases, namely in less than one percent of cases. The Association of Personal Injury Lawyers has explained the reluctance to mediate in terms of its expense and inappropriateness for complex cases, although it recognises that there is prejudice and ignorance about mediation amongst lawyers and insurance companies that deal with personal injury litigation.<sup>32</sup> Despite disappointing results in mediation schemes and the attitudes of personal injury practitioners, there have been developments which provide some optimism regarding the future use of mediation in this field. CEDR has launched a Personal Injury Mediation Scheme, providing 'strategic mediation' for catastrophic personal injury cases and 'time-limited mediation' for smaller personal injury claims, which involves fixed-cost three hour mediations.

In the context of clinical negligence claims, mediation developments have also been slow. A mediation pilot was conducted by the National Health Service (NHS) to identify the reasons for the poor take up of mediation. The pilot identified solicitors' lack of experience in mediation and the use of litigation tactics, like late disclosure of information, in mediation. The pilot also highlighted some of the advantages of mediation in this context, in particular that mediation can provide a range of

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32 'Personal Injury Groups slam forced mediation', *The Lawyer*, 20 October 1998.

settlement options, including financial terms, apologies, explanations of medical decisions and future treatment.<sup>33</sup> Subsequent to this pilot, a clinical negligence pre-action protocol was developed to provide a code of good practice to be followed in clinical negligence litigation. The protocol lists a range of alternative mechanisms for resolving clinical negligence disputes, including mediation, early neutral evaluation, expert determination and arbitration.<sup>34</sup> The NHS Litigation Authority has also instructed its panel law firms to consider the appropriateness of mediation in every case and to monitor the outcomes of mediation.<sup>35</sup> In July 2001 the Secretary of State for Health announced plans to produce in 2002 a White Paper setting out reforms to the system dealing with clinical negligence claims. Amongst the plans being considered is encouragement of the use of mediation. Reforms are considered to be critical as the cost of clinical negligence litigation in the United Kingdom frequently exceeds the damages awarded; lower success rates occur in this type of litigation than in any other type of personal injury litigation; and there is a greater lack of co-operation between parties in this kind of litigation than in many other types. It is hoped that, with mediation, the cost of NHS compensation, costs and legal fees, currently amounting to £4billion, will be reduced by at least 5% over the next two years.

In the employment field, the Advisory Conciliation and Arbitration Service ('ACAS') has for many years provided a range of ADR procedures, including conciliation, which most closely resembles mediation in the traditional sense; advisory mediation which involves joint workshops that provide a forum for parties to identify problems and brainstorm options; and dispute mediation which is not mediation in the traditional sense since the neutral makes recommendations as a basis for settlement. The difficulty has been that individual complainants are unlikely to have access to mediation if it is not included in the employer's grievance procedures. Persuading an employer to do so is difficult unless the employer is a union member, in which case the union may attempt to persuade the employer to participate. A further stumbling block for mediation in this context is the tight time limits for bringing certain kinds of employment claims. There has been recent reform in the context of unfair dismissal disputes, although the reforms promote arbitration, rather than mediation.<sup>36</sup>

### **The European Commission Jumps in Too**

With the increase in on-line business, questions of trust and confidence when buying on-line have arisen, as well as difficulties in seeking redress in cases of dispute when dealing with a foreign seller – difficulties caused by different language, customs and

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33 Mulcahy et al, *Mediating Medical Negligence Claims: An Option for the Future?* NHS Executive, (2000).

34 *Civil Procedure Pre-Action Protocols Clinical Negligence Protocol*, available at <<http://www.open.gov.uk/lcd/civil/procrules>>.

35 Legal Week National News, 'NHSLA announces mediation audit', *Legal Week*, 20 July 2000.

36 *Employment Rights (Dispute Resolution) Act 1998*.

laws. The European Commission has been at the forefront of encouraging mechanisms that might overcome such difficulties. It has sought to ensure that Member States make available out-of-court dispute resolution schemes, including on-line schemes, for disagreements between on-line businesses and their customers. The Commission has also made recommendations on the principles which should apply to bodies providing out-of-court settlement, for example that neutrals should be independent and impartial; that the ADR process should be transparent; that the ADR process should only be binding on the parties if they consent; and that the parties should have a right to representation.<sup>37</sup> The Commission's aim is to create a single contact point, or a clearing house, in each Member State, and to ensure that all clearing houses operate as the 'EEJ-Net', the European Extra – Judicial Network. This Network will provide information to consumers who wish to access an out-of-court dispute resolution body in another Member State.<sup>38</sup> A database will be created to list the out-of-court dispute resolution procedures which satisfy the Commission's criteria. Bodies which satisfy the criteria are already listed for Belgium, Denmark, Finland, Greece, Italy, Portugal, Spain, Sweden, the United Kingdom and the Netherlands.<sup>39</sup> A range of consumer and trade organisations provide trust seals combined with mediation, such as BBB Online, Webtrader and TrustedShops. A trust seal is a seal of approval which identifies businesses that adhere to special dispute resolution procedures, with the aim of offering on-line customers confidence about the handling of their complaints. For example, Webtrader is a two year project, which commenced in early 2000, and is funded by the European Commission and managed by a number of independent consumer organisations in the Netherlands, Belgium, Italy, France, Spain, Portugal and the United Kingdom. A mediation programme will deal with national cross-border disputes between enterprises bearing the Webtrader logo and their customers. If mediation is unsuccessful, arbitration will follow.

The Commission also envisages that, over time, on-line ADR will proliferate. A number of on-line dispute resolution systems already exist in Europe. For example, IRIS, a French initiative, provides on-line mediation for the resolution of disputes of a non-commercial nature. Ford Motor Co. has, in conjunction with the Chartered Institute of Arbitrators ('CIA') in London, launched an on-line arbitration scheme for Ford customers in Europe who buy a Ford car online.<sup>40</sup> Word&Bond has devised an on-line dispute resolution platform.<sup>41</sup> The ECODIR (Electronic Consumer Dispute

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37 Refer to Commission Recommendation 98/257/EC of 30 March 1998 (which applies to arbitration) and Commission Recommendation of 4 April 2001 (which applies to mediation) although it lays down similar principles to those in the 1998 Recommendation.

38 Council Resolution of 25 May 2000 on a Community-wide Network of Professional Bodies for the Extra – Judicial settlement of consumer disputes.

39 European Commission, *Out of Court Bodies Responsible for the Settlement of Consumer Disputes*, also available at <<http://europa.eu.int/comm/dg24/policy/developments>>.

40 The Institute operates the scheme via its website at <[www.arbitrators.org](http://www.arbitrators.org)> with a link from the Ford online shopping site at <[www.fordjourney.com](http://www.fordjourney.com)>.

41 For more information, refer to <<http://wordandbond.com>>.

Resolution) is a European body that aims to provide consumers and businesses with the possibility of finding a solution to their disputes on-line. The project is based on experience developed by the Canadian Research Centre, the CyberTribunal (now eResolution). The system, once available, provides for a three-step dispute resolution process, starting off with negotiation, followed by mediation and, if mediation is unsuccessful, a recommendation by the mediator on how the dispute might be resolved.<sup>42</sup> There is also an on-line ADR system being developed by European Chambers of Commerce and Industry. There are 82 Chambers of Commerce and Industry, with more than three million business members, participating. The rationale is that Chambers of Commerce and Industry are well placed to act as trusted third parties and as neutral facilitators. Businesses will be offered a trust mark to display on their websites provided that they agree to adhere to a code of conduct backed up by an on-line ADR mechanism. This should involve two steps. First, there will be automated complaint treatment, an automated process which involves only the parties, who aim to reach agreement by communicating directly online; and, secondly, on-line mediation will take place if the dispute has not been resolved by automated complaint treatment. It is hoped that the scheme will be fully operational by 2002. A recent study of on-line dispute resolution indicates, however, that much more work needs to be done. None of the providers surveyed satisfied all consumer concerns and the main problems identified included limited language options, non-transparency, high cost, little assistance with unco-operative businesses and bias towards businesses.<sup>43</sup>

The European Commission is funding a Grotius ADR Programme, a European programme, which involves research and surveys of the use of ADR across the Continent; education of mediators, lawyers, judges and business people about mediation; and recommendations to the European Commission on the development of ADR. One of the recent recommendations is that an ADR Directive should forge an integrated framework for out of court dispute resolution. Apart from the efforts being made by the European Commission, the OECD has also issued guidelines that acknowledge the important role of ADR in Europe.

### **Quality and Standards – the Debate Goes On**

In the context of non-matrimonial disputes, ADR organisations in the United Kingdom provide their own mediation training and accreditation criteria and set their own codes of conduct for their mediators. The differences in approach among organisations are wide-ranging. There have been recent efforts to adopt uniform standards in United Kingdom mediation practice. A Joint Mediation Forum, which includes representatives from commercial, community and family mediation organisations, has been established and is attempting to develop a standard code of

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42 For further information refer to <[www.ecodir.org](http://www.ecodir.org)>.

43 Consumer International, *Disputes in Cyberspace*, (2000).

conduct for mediators, together with uniform training standards.<sup>44</sup> The Law Society of England and Wales has also developed mediation training standards, a code of conduct for solicitor mediators and a set of mediator competencies.<sup>45</sup> It is currently setting up a panel of solicitor mediators, with the aim of providing the public and solicitors with confidence that the panellists have good mediation training and will adhere to a code of conduct.

That a review of mediation standards in the United Kingdom is necessary was apparent from the results of Genn's study of the Central London County Court mediation scheme, which highlighted real concerns about the quality of mediators and the lack of consistency in the views held by mediators on critical issues like ethics and accountability.<sup>46</sup> The Lord Chancellor's ADR Discussion Paper raised the issue of whether regulation of the mediation profession is required, whilst recognising that regulations should not stifle innovation or competition in a developing field. Of the 59% of respondents to the paper who addressed this issue, 37% favoured self-regulation in the United Kingdom, whereas 22% saw a role for government regulating mediation practice.<sup>47</sup> At this stage, the Lord Chancellor's Department has announced a plan to introduce a Quality Mark for providers of legally-funded mediation services.

### **What has Human Rights got to do with it?**

The European Convention on Human Rights has been incorporated into English law by the Human Rights Act 1998. Article 6 prohibits restrictions on access to courts and also imposes a requirement of procedural fairness. Although the Article has provided some lively debate in the context of mediation, it is unlikely to provide a means for challenging the enforceability of mediation clauses or referrals by courts to mediation. For example, in *Elanay Contracts v The Vestry*<sup>48</sup> the court found that the Article 6 requirement that a party should have a reasonable opportunity to present its case has no application to adjudication on the basis that an adjudicator's decision is not a final determination. As mediation also does not involve any determination by a mediator, Article 6 is unlikely to provide a basis for requiring procedural fairness in mediation. Where parties have contractually agreed to mediate, it could be argued that they have

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44 The Law Society of England and Wales ADR Working Party has withdrawn from the Forum as it considers the differences in mediation practice, for example, in the context of commercial and family mediation, do not lend themselves to uniform standards. Although the Forum has been meeting for a couple of years, it does not appear to be any closer to developing a uniform code of conduct or training standards.

45 There is a different set of training standards and code of conduct for family and commercial mediators.

46 H Genn, *Central London County Court Mediation Pilot: Evaluation Report*, LCD Research Series, 5/98, (vii) and 143.

47 Lord Chancellor's Department, *ADR Discussion Paper: Summary of Responses*, August 2001 para 82.

48 30 August 2000, HHJ Harvey QC.

contracted out of Article 6, which is the approach taken by the Court in a recent case relating to an arbitration clause.<sup>49</sup> A further issue is whether, if Courts were to direct parties to mediate, particularly in cases where the parties object to mediation, this would infringe the Article 6 rights of access to a court. Although the courts have not yet considered the issue, it could be argued that:

- mediation complements access to the courts, and if mediation fails the parties can resume litigation;
- it is the reference to mediation that is required, not participation in the process itself, so that further access to the courts is not extinguished, but merely postponed;
- if mediation were built into the court process then it would become a potential step in litigation and it cannot amount to denial of access to the courts.

### **Solicitors as Gatekeepers**

Intransigence by solicitors has been identified as the reason, more than any other, for the slow take up of mediation in the United Kingdom. The Bristol Law Society Mediation Scheme revealed a widely-held view by the solicitors interviewed that they risked their relationships with clients in pressing for mediation which might prove unsuccessful<sup>50</sup>. Genn's study of Central London County Court Mediation Pilot found that the demand for mediation was lowest when both parties were legally represented. Genn's study also revealed that one personal injury claimant firm wrote to the court at the beginning of the mediation scheme to advise that it would not refer any cases to the scheme.<sup>51</sup> A survey of 500 top companies in the West Midlands in June 1999 revealed that more than 60% had not received any advice from solicitors on mediation and eight percent had ever had discussions with their lawyers about resolving a dispute through mediation.<sup>52</sup>

A CEDR poll highlighted differences in attitude towards mediation between in-house and external lawyers. The poll indicated that 78% of the in-house solicitors surveyed considered that mediation should be required at some stage if a business dispute is litigated, although only 40% of external solicitors agreed. In addition, 56% of in-house solicitors considered that courts should award costs against parties who refused to

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49 *Mousaka v Golden Seagull* (Commercial Court, 20 July 2001).

50 M Davies *et al*, *Promoting Mediation: Report of a Study of Bristol Law Society's Mediation Scheme in the preliminary phase*, 1996 Research and Policy Planning Unit, Research Study No 21, The Law Society, 21.

51 H Genn, *Central London County Court Mediation Pilot: Evaluation Report*, LCD Research Series, No 5/98, 20 & 135.

52 J Duckers, 'Woolf at door over mediation reform: Lawyers in fear of losing fees', *Birmingham Post*, 17 September 1999; and Centre for Dispute Resolution, *Press Release: New Survey warns clients want better mediation advice*, 9 June 1999.

take part in mediation, whereas only 26% of external solicitors agreed.<sup>53</sup> A survey of 700 United Kingdom law firms in 2000 revealed that lawyers themselves admitted lack of knowledge about, and lack of experience in, mediation as a major reason for low take up of mediation.<sup>54</sup> The NHS mediation scheme also indicated that, even in cases where lawyers were keen to mediate, they 'did not want to look silly in front of their clients'.<sup>55</sup> There are also fears by lawyers that, following an experience of mediation, clients will consider that their lawyers are unnecessary for dispute resolution.<sup>56</sup>

Law societies throughout the United Kingdom are taking steps to correct these problems. The Law Society of England and Wales has set up an ADR Working Party, developed mediator training standards and a code of conduct, and is designing panels of solicitor mediators. It is also currently considering a Settlement Week to be held in 2002, along the lines of similar attempts in Australia. The Society has also produced a Guide to ADR as a basis for ADR workshops around the country. In Scotland the Law Society has commenced a mediation service, called ACCORD, whose panel consists of accredited solicitor mediators. ACCORD mediators are bound by the Law Society's code of conduct for ADR and can obtain assistance via ACCORD's guidance for accredited mediators.<sup>57</sup> The Law Society of Northern Ireland also has a mediation service aimed at the business community, although take up of the scheme has been poor, notwithstanding that a Law Society survey in 1995 revealed that 23% of respondents who had consulted a solicitor about a problem considered ADR attractive.<sup>58</sup>

It is considered that, unless the legal profession embraces mediation, lawyers will lose out in the mediation services market to other professionals. An increasing number of accredited mediators come from a range of non-legal backgrounds, including accounting, surveying, engineering, IT, banking and medical. The Institute of Chartered Accountants for England and Wales has stated that ADR is becoming an essential part of the accounting profession's role<sup>59</sup> and the litigation departments of accountancy firms are widely promoting mediation to their clients.<sup>60</sup>

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53 CEDR, *Civil Justice Audit*, April 2000.

54 The survey was conducted by the author, and the results published in Miryana Nestic & Laurence Boule, *Mediation: Principles, Process, Practice* (2001).

55 Mulcahy *et al*, above n 33, 59.

56 Also revealed by the author's 2000 survey of 700 UK law firms. The results are published in Nestic and Boule, above n 54.

57 ACCORD, *An introduction to ACCORD*. Refer also to R Mays and B Clark, *ADR in Scotland*, The Scottish Office, (1999).

58 The Law Society of Northern Ireland, *Dispute Resolution Service*; and Civil Justice Reform Group, *Review of the Civil Justice System in Northern Ireland: Interim Report*, April 1999.

59 CEDR, 'Accountants must take note of ADR', *Resolutions*, Issue 18, Winter 1997.

60 For example, Arthur Anderson's claims and disputes practice; Morrison Stoneham Dispute Resolution Team; and Levy Gee.



A failure by lawyers to embrace mediation is also of concern in light of Practice Rule 1 of the Solicitor's Practice Rules 1990, which requires English solicitors to have regard to, and imposes a duty to act, in the best interests of the client, which suggests that solicitors should consider discussing with clients the range of ADR options available. Furthermore, Solicitors' Practice Rule 15 and the Solicitors' Client Care Code require English solicitors to give the best information possible to clients on the implications of starting litigation, which again suggests that relevant CPR provisions should be discussed with clients. In view of the CPR, it may not be long before an English solicitor is criticised, sanctioned in costs or interest, or found to be negligent if mediation has not been considered with the client ahead of, or at the latest during, litigation.

## **The Road Ahead**

The CPR have provided a framework for court referral to mediation in England and Wales. The Lord Chancellor indicated in April 2000 that his Department will support court mediation pilots, although it is not yet clear to what extent any schemes will provide for court-annexed mediation. The Lord Chancellor's ADR Discussion Paper set out a number of possible options for the future; including the following:

- Mediation schemes, using court facilities, might be attached to every civil and high court trial centre, along the lines of the Central London County Court mediation scheme;
- For smaller claims, an off the peg mediation scheme could keep costs proportional to the value of the claim. Such a scheme may require court staff to administer the mediation and arrange mediators. It is likely that such a scheme would involve time-limited mediations and fixed fees;
- For higher value cases, private mediation is likely to be appropriate and the court's role, as in the Commercial Court mediation scheme, is likely to be confined to identifying appropriate cases for mediation and providing parties with lists of mediation organisations.<sup>61</sup>

Issues of court referral to mediation, funding in mediation, mediation training and standards and a range of legal issues in mediation require more consideration and debate in the United Kingdom if the transition is to be made from mediation practice to mediation profession. To a large extent, mediation in the United Kingdom has been supply driven, with initiatives coming from government and a range of professional, trade and community organisations. Much of the focus over the next year or two is

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61 Lord Chancellor's Department, *ADR Discussion Paper*, November 1999, paras 6.14, 6.17, 6.18 and 6.19.

likely to be on what can be done to increase awareness, and in turn use, of mediation by solicitors and the public.