The Advantage of Using Commercial Mediation over Commercial Litigation

Name: Bilal Farooq
Project submitted in partial fulfillment of the post graduate degree of LLM
Candidate Number: 1011377
Supervisor: Tariq Khan
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Abstract

Commercial litigation is the one oldest methods of resolving a dispute between parties, which dates back many centuries. The normal way to resolve a dispute was primarily through the courts, the way to the courts is principally through the lawyers. Many lawyers recognise that following the court route for every dispute would mean it would be too costly, of legal resources, of court time. As a result of commercial litigation becoming costly, time consuming method of resolving dispute, there has been much discussion and many attempts, not only to find ways of making the court process more accessible and affordable to ordinary people, but also to divert disputes away from the courts, into various recognised forms of alternative dispute resolution such as commercial mediation. This has led to many disputant over the recent years using other forms of dispute resolution, which are cost effective and to which people are to an extent satisfied. Therefore the emergence of other forms of dispute resolutions has led to commercial litigation once being a household name, and a famous renowned process for resolving disputes in the shadows of other dispute resolutions, which to an extent are more preferred and seem as the most suitable forms of resolving disputes. For example commercial mediation in comparison to commercial litigation can be see less cost effective, less formal, lets the disputants decide upon the outcomes, less rigid, whereas commercial litigation on the other hand it expensive, time consuming an emotional and distressful process and is more formal and not flexible.
Table of Cases

- *Cable & Wireless plc v IBM United Kingdom Ltd [2002] EWHC 2059 (Comm)*
- *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334*
- *Dyson and Field v Leeds City Council 22 November 1999*
- *Dunnett v Railtrack EWCA Civ 302*
- *Egan v Motor Services (Bath) Ltd [2007] EWCA Civ 1002*
- *Elanay Contracts v The Vestr 30 August 2000, HHJ Harvey QC*
- *Frank Cowl v Plymouth City Council EWCA Civ 1935*
- *Halifax Financial Services Ltd v Intuitive Systems Ltd [1999] 1 All ER (Comm) 303*
- *Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576*
- *Hurst v Leeming [2001] EWHC 1051*
- *Leicester Circuits v Coates Brothers plc [2003] EWCA Civ 333*
- *McLoughlin v O'Brian [1983] 1 AC 410*
- *Mousaka v Golden Seagull (Commercial Court, 20 July 2001)*
- *Royal Bank of Canada Trust Corporation v Secretary of State for Defence [2003] EWHC 1479 Ch*
- *Walford v Miles [1992] 1 All ER 453*
# Table of Statutes

- **Access to Justice Act 1999**
- **Civil Procedure Rules 1997**
- **Civil Procedure Rules 1998**
- **Human Rights Act 1996**
- **Article 6**
Acknowledgement

In producing this dissertation, I’m grateful for the support and help from numerous people. I would like to thank these people for aiding me in difficult times in producing this piece of work that I hope is interesting and enlightening.

I would like to say a special thank you to Tariq Khan for putting up with me and for his exceptional advice and guidance. I am indebted to my family, for encouraging and inspiring me through the difficult times. I would also like to say a special thank you to my friends for their helpful advice, contributions and for being excellent friends.

I am extremely grateful, to everyone else who made contributions towards this study and hope that my efforts will be successful and to those interested in reading this dissertation.
Chapter 1

Introduction

This is an introduction to my dissertation. The title of the dissertation is “The advantage of using Commercial mediation over Commercial Litigation” However, this title may change as the dissertation takes shape and also if the central subject’s research starts to focus on one aspect more than the others.

Commercial litigation is not the best method of resolving disputes as a result this has led onto other forms of disputes which are more suitable such as commercial mediation. Commercial mediation is where a mediator is appointed to help the parties to reach an agreement, which each party considers acceptable. Commercial mediation can be ‘evaluative’, where the mediator gives an assessment of the legal strengths of a case, or on the other hand be a ‘facilitative’, where the mediator concentrates on assisting the parties to define the issues. Commercial mediation and Commercial litigation are different but are both alternative forms of resolving disputes. Commercial mediation has slowly become increasingly popular in resolving disputes because of the difficulties of trying to resolve disputes through court hearings.

Commercial litigation can be drawn back centuries and years, in relation to the backdrop against examination of dispute institutions has taken place over the decades since 1960, but there are three important elements. Firstly is the historical dominance of state-sponsored adjudication, and commercial litigation, in the theory and practice of the civil justice. Secondly is the context as to which, commercial litigation has acquired status as the approved mode of dispute resolution. Lawyers have through its practice achieved over generations a near monopoly over dispute management. Thirdly is the manner to which lawyers have utilised the civil procedure as the vehicle for their negotiation strategies, bringing about the profound entanglement of ‘settlement’ and ‘litigation’. In regards to this ideology of settlement it remains virtually invisible and submerged, in practice pursued through the use of the procedural framework prescribed for bringing a dispute to trial and judgement.

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1Dispute Processes, ADR and the Primary Forms of Decision Making, Simon Roberts and Michael Palmer, 2008
In the 1960s and 1970s it was then enunciated as an ‘access to justice’ movement. At that point in time it represented the contemporary expression of concerns about the costs, delays and general inaccessibility if adjudication, and called for quicker, cheaper, more readily available judgement with procedural informality as its hallmark.

M Cappalletti and B G Garth: Access to Justice, Volume 1: A World Survey (1978) Sijthoff & Noordhoff, Milan pp 6-9 stated that: In the liberal ‘bourgeois’ states of the late 18th and 19th century the procedures for civil litigation reflected the essentially individualistic philosophy of rights then prevailing. A right of access to justice protection meant essentially the aggrieved individuals formal right to litigate or defend a claim.

The dissertation will look at role of commercial mediation and commercial litigation and an in-depth analysis of both and their importance to alternative dispute resolution system. I will critically examine why there has been a shift from the traditional courts onto commercial mediation. The dissertation will analyse the specific problems posed by court hearing as compared to compared commercial mediation. I will also examine commercial mediation and commercial litigation to the other countries, in a comparison contrast. Upon this give detailed recommendations and reforms and then entail a conclusion with opinions and facts.

\(^2\)Dispute Processes, ADR and the Primary Forms of Decision –Making, Simon Roberts and Michael Palmer, 2008

\(^3\)Dispute Processes, ADR and the Primary Forms of Decision –Making, Simon Roberts and Michael Palmer, 2008
Chapter 2

Literature Review

The research carried out in order to establish the main objectives of the dissertation has centred on law journals from authors such as Elizabeth Thornberg, Shirley Shipman and Roderick Murphy, Hazel Genn and textbooks on the English Legal System by authors such as Catherine Elliott and Frances Quinn, and Michael Palmer & Simon Roberts governmental websites, other websites, law journals and newspapers. This is a non exhaustive list and without any doubt, will grow as the dissertation takes shape.

The books to be used include:

Michael Palmer & Simon Roberts: Dispute Processes, ADR and the Primary Forms of Decision Making, 1998. This book includes more of an in depth analysis and information of litigation which Catherine Elliott and Frances Quinn: English legal system: essential cases and materials, 2009, did not. This book also gives an international perspective of Commercial Mediation in China and USA which is of relevance as this would be helpful in my chapter four. It also gives more an analytical approach and includes more articles, books and academic views on the main issues such as F.E.A Sander:’Varieties of Dispute Processing’ (1976) 70 Federal Rules Decisions 111, which talks about the range of available alternatives and gives an conclusive view on it. The articles mentioned in the book are also relevant because it can help in more research and information in regards to my dissertation chapters. Furthermore it includes figures which will be of relevance in regarding the percentage of Defendants paying settlement or judgement against them by hearing this includes mediation cases and the percentage figures which can be analysed and see how over the years there has been an increase or decrease.

Karl Mackie, David Miles and William Marsh: Commercial Dispute Resolution, an ADR Practice Guide, 1995. This book includes civil procedure rules and issues such as disclosure but this will need to be checked to make sure this information is up to date as the book is old. It all includes information on mediation which is basic and
describe, rather than an analytical view. It also includes general on mediation and litigation.

**Laurie S. Coltri, Alternative Dispute Resolution, A conflict diagnosis approach, 2010.** This book is detailed and contains in depth analysis of Commercial mediation and commercial litigation. It includes academic views and consideration and facts and figure in regards to the rise of commercial mediation and commercial litigation. It also includes information in regards to reforms and recommendations.

**Catherine Elliott and Frances Quinn: English legal system: essential cases and materials, 2009.** This book is an in-depth study of the theory of behind the law, with an emphasis on recent and modern aspects of the subject. There are two chapters which relate to my dissertation topic within this book, chapter 22 and 25. These include materials which will give me general guidance and trails for further research. It includes the civil procedure rules such as 1.4 which requires courts to undertake case management. It includes information and analysis on Lord Woolf’s inquiry and his recommendation in his report ‘Access to justice’, which was published in 1996. This book gave a basic structure and information on ADR which can be led onto further development and research on my dissertation topic. It also gives figures and facts from April 1998 to March 2002 in regards to my chapter 2 on how mediation has taken over litigation, and shows the increase in number of commercial mediation.

**David Kelly and Gary Slapper: The English legal system, 2010, gives an insight into ADR as a general concept and the various forms of resolutions, and academic views and reports that have been published in this area of law.**

Other title books are **Laurie S. Coltri: Alternative dispute resolution: a conflict diagnosis approach, 2010, which also give insight to this area of law.** The other books in the growing library will help with the basic background to ADR.

In relation to journals there is:

**Roderick Murphy: the courts and alternative dispute resolution, Arbitration 2010, Shirley Shipman: Compulsory mediation: the elephant in the room, Civil Justice Quarterly 2011, Elizabeth Thornberg: Reaping what we sow: anti-**
litigation rhetoric, limited budgets, and declining support for civil courts, Civil Justice Quarterly 2011, Trevor Cook: An alternative way forward, European Lawyer 2010. These are some of the journals in this area of law. These journals were helpful with the understanding and basic background to ADR in regards to commercial mediation and commercial litigation. How commercial mediation has developed over the years and how the courts was a preferred method of resolving disputes but has been on the decline in recent years. The articles also contain the views of various academics in regards to each of these topics area and their opinion. The most important sources are databases such as Lexis Nexis, Lawtel and Westlaw which contain a comprehensive quantity of law journals and are easily accessible and can be searched with relative precision. As to websites the intended websites will be government websites which will have the latest primary sources such as statutes and also other websites and newspapers such as the Times, Guardian which can be used to show the extensive information on mediation and litigation and latest cases that might be relevant to the dissertation.

Websites were also very helpful in making me understand commercial mediation litigation process and some of its legal theories such as: http://www.cedr.com/?location=/library/articles/20110124_290.htm, http://www.acas.org.uk/index.aspx?articleid=1680, these website are just a few which can be used for basic background and understanding of commercial mediation and commercial litigation. Most important websites are the government websites which have up to date information on commercial mediation and commercial litigation and useful statutes which are very helpful. Also views from experts on the topic of mediation and litigation and what are the views of leading academics on commercial mediation and commercial litigation in relation to which is better form and why, and how commercial mediation is taking over commercial litigation and what the future holds for the two.

The books, journals and websites can be all placed in chronological order to show how the law has compounded and any new developments on the subject. However, the books will not only emphasis on the chronological aspect but each book will help examine each aspect of mediation and litigation. The law journals and case law will
also be used for analysis to offer a balanced view on the offer the view from another perspective.
Chapter 3

Research Methodology

The intended methodology is to use the quantitative approach. The subject is a specialised and focused subject with much of the research available through books and the internet. Nevertheless, the quantitative approach will also be employed to some extent in using already collected data from research carried out by other authors to help illustrate the advantage of commercial mediation over commercial litigation and how it has developed over the years and making sure that the data collected represents the views of the majority in a non-bias view.

The dissertation will draw on the past history as illustrated in cases and the subsequent case law to demonstrate the law as it stood in the past and how cases played a role in steering the public’s view and therefore legislature towards its present state.

It will examine the nature of ADR and more importantly how commercial mediation has taken over commercial litigation, which is the question set for my dissertation. This will then lead onto present law and the most recent cases and figures which will inevitably follow through to proposed laws and the present will be examined using text books, journals, article and websites. Which in essence will explain the law as it stood in the past, its present form and what is the future with using commercial; mediation and its advantage over commercial litigation, and if and how commercial litigation is on the decline.
Structure

The structure of my dissertation is that it will have an introduction, five chapters and a conclusion. The first chapter of my dissertation will be on the history of commercial litigation and commercial mediation, explain what each of these alternative forms of disputes is and their roles. The second chapter will be on how commercial mediation has taken over commercial litigation, with figures and facts. Chapter three will be comparing commercial mediation to commercial litigation, which will include views of academics, figures and facts and advantages and disadvantages of the two forms of disputes and drawing conclusions and distinctions between the two. The fourth chapter will be a comparison with the two forms of ADR and how they are represented in other countries, and compare it to the UK. The fifth chapter will be on the future of commercial mediation and commercial litigation and any recommendations. I will then have my conclusion which will draw up the whole issue of the advantage of commercial mediation over commercial litigation. However, this structure and chapters may change as the dissertation takes shape.
Chapter 4

The Dissertation

Chapter 4.1- The Historical Concept and Functions of Commercial Mediation and Commercial Litigation

In the main and in a range of literature on commercial mediation the two common threads stay perceptible. Commercial mediation is a type of assisted negotiation that uses third party, to help disputants negotiate their settlement. This third party, who is called the mediator, is typically impartial with respect to the disputants and neutral as to the settlement reached\(^4\).

Commercial mediation is distinguished from other ADR processes in two principle ways: firstly in other forms of ADR, such as arbitration and nonbinding evaluation, the process ends with the neutral issuing a decision, whereas in commercial mediation a decision or evaluation either does not occur at all or is simply part of the overall assisted negotiation process. Secondly, in commercial mediation, the disputants retain the power to settle, or not.

In commercial mediation, participants meet with a mediator to attempt to negotiate a settlement of their dispute. If the parties to mediation settle their dispute, the settlement is usually written down. Even if the disputants are unable to settle all the elements of their dispute, frequently they are able to settle some of their issues or come to a temporary agreement. Commercial mediation can be ‘evaluative’, where the mediator gives an assessment of the legal strengths of a case, or on the other hand be a ‘facilitative’\(^5\) where the mediator concentrates on assisting the parties to define the issues.

\(^4\) This is true, at least, for mediation as practiced in most Western nations. In many non-Western cultures, mediation is conducted by a prominent and powerful community elder or another appointee with explicit preferences and biases. Enlightening research on this topic is collected in Shapiro (1981), Alternative Dispute Resolution: A Conflict Diagnosis Approach 2nd Edition, Laurie S. Coltri

\(^5\) English Legal System 10th Edition, Catherine Elliot and Frances Quinn, 2009
Although mediator tends to receive a very limited attention in classical social theory, a defining analysis was provided early in the twentieth century by the German sociologist Greorg Simmel his passages of his great Soziologie (1908 [1950]), pointed that the mediator is always present in the social world yet though they may not be named as such and their role may perhaps stay unexamined. The constellation yielding the mediator, he disagreed and argued that it is a structural feature, commonly observable across cultures in all groups of more than two elements. Looking at the nature of bilateral relations and upon the fundamental ways in which these transformed by the presence of a third party, he noted: ‘dyads…have very specific features…the addition of a third person completely changes them’ (1908 [1950]: 138). Furthermore, he went on, to delineate the mediator as non-aligned facilitator, distinguished from the partisan supporter on the one hand and the arbitrator with determinative authority on the other (Extract 6.1).

Even though Simmel thus firmly fixes ‘the third’ in a non-aligned, non-determinative role, mediation still represents an exclusive, fugitive label, presently resorted to all too easily and with little precision in the context of contemporary transformations in the management of disputing. While a contrast with the partisan supporter, on the one hand and the arbitrator, on the other, helps to provide an identity for the mediator in rough and ready terms, ‘mediation’ is label claimed by interveners of widely different rank and ambition. Commercial mediation may be attempted by anyone from the hesitant neighbour to an authoritative professional, and, as Simmel’s primary analytic distinction indicates, ‘help’ may range from minimal assistance with communications to an extensive and expert advisory role.

Simmel approaches this problem of what is in non-alignment by contrasting the position of the mediator with that of the partisan (1908 [1950]: 149-150). For Simmel, a defining characteristic of the mediator is that he or she is not a partisan:

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6 Dispute Processes, ADR and the Primary Forms of Decision –Making, Simon Roberts and Michael Palmer, 2008
7 Dispute Processes, ADR and the Primary Forms of Decision –Making, Simon Roberts and Michael Palmer, 2008
8 Dispute Processes, ADR and the Primary Forms of Decision –Making, Simon Roberts and Michael Palmer, 2008
9 Dispute Processes, ADR and the Primary Forms of Decision –Making, Simon Roberts and Michael Palmer, 2008
either because the mediator stands outside the interests of the parties: or because, although engaged, he or she stands in a structurally intermediate position. As an example of the latter situation, he offers the situation of the bishop acting as an intermediary between the secular government of the state within which his diocese is situated and the Pope in Rome (Extract 6.2).¹⁰

In simplistic terms mediation can be said to be resolving a dispute without going to court, which litigation primarily involves. Commercial mediation helps people talk together and help them make their own decisions in regards to the next steps with the assistance of a neutral mediator. Commercial mediation can be seen as process which is of highly confidential and private. Commercial mediation allows you to feel comfortable and state the importance of your case, and the manner in which it has affected yourself. In mediation you are given the opportunity to put across your views and stance in regards to the situation that has occurred, and say the information you feel is relevant for the other party to understand. Moreover you can feel free to ask questions in relation to your situation and you can hear what the other party has to say in respect what you have to say. Commercial mediation is seen as the one and only chance people have in talking directly to each other and to talk things through. It can be said that 70%¹¹ of people whom mediate reach an agreement, which catches many by surprise. The advantage of this is that it saves valuable time money and the more significantly they make their own decisions. Although in mediation an agreement is not reached it still can be said that it leaves people in more of an advantage on their next steps and in a better situation in regards to what to do in the future.

Upon this definition of mediation as negotiation facilitated by a third party, the process of mediation varies widely: It is not one size fits all. The variations in mediation practice profoundly affect the sorts of situations mediation is suitable for handling. There are two qualities of mediation practice, known as facilitative-evaluation distinction¹². This concept was set forth by the legal scholar Leonard L. Riskin in his article ‘Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed” (Risken 1996). This conceptual distinction has

¹⁰ Dispute Processes, ADR and the Primary Forms of Decision –Making, Simon Roberts and Michael Palmer, 2008
become “part of the standard mediation nomenclature” for those seeking to understand mediation and how it functions (Goldfien and Robbennol 2007, 280.13.

In terms of differentiating between facilitative and evaluative, in facilitative mediation the mediator’s main function is to promote effective negotiation. Facilitative mediators use techniques designed to, in their expert opinion. Primarily they lay the basic rules for effective communication, to help participants discover their interests and those of their counter parts, guide the disputants in the steps of cooperative negation, and intervene at all stages of the conflict cycle to keep the conflict as non-competitive as possible. The strictly facilitative mediator assiduously avoids any evaluation of the merits or strengths of either disputant’s case.

In regards to evaluation mediation, the mediator works to narrow the gap between the demands of each disputant by expressly evaluating the merits, or weaknesses of each disputants position and by strategically communication these evaluations’ to the disputants (Goldfien and Robbennol 2007, citing Riskin 1996, 24, fn.8).14 In a sense, then, evaluative mediation is an intervention based on the notion that negotiation is a process of positional bargaining. The evaluative mediator attempts to minimise the effective distances between the disputant’s positions and to create overlap if possible. Most scholars such as Schwatz 1999 presume that evaluative mediation means that the mediator conducts, and issues to the parties, some sort of evaluation of the merits of the disputants legal case. Others use the term evaluation in a far broader sense, to mean any evaluation by the mediator, including making judgements about the information given by the clients (Lowry 2000).15

Although commercial mediation would require the consent of the parties concerned in the matter, if there was a situation where one of the parties did not designate its willingness, it would still be probable to approach a mediation organisation or a mediator whom would help in the aspect of negotiating the initial agreement. On the approval the relevant mediator would be selected in respect of the case credentials and what it concerned and related to. Upon the initial agreement a time and venue would

be sorted out between the parties where they can tell their side of the story, express their feeling and concerns and the issues they have. The mediator would in essence have separate meeting with each parties and sessions were both parties would be present. So this would give the mediator better chances to facilitate the case smoothly and try to make a successful outcome of the case, help them resolve their differences. Commercial mediation can be said to be highly confidential in that mediator will not under any circumstance replicate or entail to the other party anything that the other party has said unless it has been granted permission to do so. The fact that this process is of extremely confidential it means that the parties can feel safe to discuss any aspect of their case without hesitation and more in full confidence. The mediator can eventually after reviewing the case and upon hearing both of the views of the parties can initially help the parties to understand their own and moreover each other positions.

In any case if an agreement is not reached between the parties during the process of mediation, the parties would not be bound by any agreement to which they discussed during the mediation process. If there was to be a successful outcome from the mediation process between the two parties an agreement would be binding once an agreement is drawn up and signed by the parties concerned. Upon this if the agreement is not fulfilled it may be enforced contractually or by another mediation. It can be said that in most of the case the agreements are honoured thoroughly, efficiently and precisely due to the parties have in essence worked thoroughly hard to achieve a settlement, and the terms were within their control unlike a court decision.

One of the complications in relation to commercial mediation is that in getting the parties to agree is the best option available to them. In some circumstances disputes can become difficult in that they can become extremely personal and the other issue that is of the legal system in the sense of there being various flaws, this could entail, finding faults and loop holes. This problem therefore eventually leads the start of the litigation process between the two parties. This primary fascia is the party wanting to prosper winning against the other party, which can include personal achievement for the party, and self satisfaction.
A further issue to contemplate when going into commercial litigation is the nature of relationships between the parties. Commercial litigation as discussed is very stressful process, whilst other forms of ADR can be more appropriate. In a situation concerning yourself and a neighbour or business partner who disagree on an issue, but are otherwise friendly, should opt for mediation instead of a full-blown lawsuit, which could leave tension between you and your neighbour for example\textsuperscript{16}. And have longer lasting effects and implications. Larry Fenelon, who assisted on the chapter on ADR and the Commercial Court in \textbf{Dowling},\textsuperscript{17} stated that litigation, by its nature, is adversarial and generally detrimental to commercial relationships.

Commercial litigation it can be said this is a process in which the courts make a binding decision on the parties involved in the dispute in a determinative process operating at the level of legal rights and obligations\textsuperscript{18}. Commercial litigation has a vast history dating back many centuries and years. Commercial litigation is mainly common in civil and tort law suits and engages generally two parties, consisting of the plaintiff i.e. the individual bringing the charge and the defendant being the person whom the action has been commenced against\textsuperscript{19}. It can be said that commercial litigation to an extent is conventionally used and conventionally accepted, even though mediation and litigation both represent different value assumptions and structural approaches in regards to dispute resolution. The primary object to taking the case to court is to remedy an injustice and enforce a right. Court hearings have not been seen as the best form of resolving a dispute. The fact that it holds many disadvantages has led to other forms of alternative dispute resolutions being preferred. The main uses of these at present consist in family, consumer, commercial, construction and employment cases, since Lord Woolf's reforms of the civil justice system, can mean that the other alternative forms of resolving disputes can play a more fundamental role in solving disputes. \textbf{The Civil Procedure Rule (CPR) 1.4} requires the court to undertake case management which states to include: 2(e) encouraging the parties to use an ADR procedure if the Court considers that

\footnotesize{\textsuperscript{16}\url{http://law.freeadvice.com/litigation/litigation/litigation.htm} \textsuperscript{17}Stephen Dowling, The Commercial Court (Dublin: Thompson Round Hall, 2007) \textsuperscript{18}Mediation - Principles Process Practice, Boulle L. 2005 \textsuperscript{19}\url{http://biztaxlaw.about.com/od/glossaryl/g/litigation.htm}}
appropriate and facilitating the use of such procedure; 2(f) helping the parties to settle the whole or part of the case.\(^{20}\)

Also, CPR 26.4 allows the court to grant a stay for settlement by ADR or other means either when one or all of the parties requested this, or when the court considers this would be appropriate. If a party fails to use ADR where the court thinks this would have been appropriate then it can be penalised through a costs order (CPR rule 44.5).

The Court of Appeal in the case of Dyson and Field v Leeds City Council\(^{21}\) once again reminded the parties 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 the case of Frank Cowl v Plymouth City Council\(^{22}\), which was a public case in the context of judicial review, Lord Woolf stated that the participants ought to be informed about ADR, to make the failure to adopt it, in particular where public money is involved, indefensible. Lord Woolf's disapproval of parties that do not properly address ADR options in the course of litigation has general application. A more recent example of this is the case of Dunnett v Railtrack,\(^{23}\) the Court of Appeal in this case 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 in this case said the parties and their lawyers should be attentive, as it is one of their formalities to consider ADR, especially when the court has suggested it. This was one the first case in England in which the judges held costs from a successful party on account of a failure to mediate.

Upon the introduction of the CPR rules, there has been a sensational down turn in the amount of proceedings and there has been an significant increase in the amount of settlements at an early stage of proceedings. There is a sensation that none of these factors are attributable to mediation, but are mainly due to the mechanism of the 'Part 36 offer' which is a form that permits the parties to make an offer of settlement, entailing prior to issue of proceedings that have various consequences.\(^{24}\) There have

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\(^{20}\)English Legal System 10th Edition, Catherine Elliot and Frances Quinn, 2009

\(^{21}\)22 November 1999

\(^{22}\)EWCA Civ 1935

\(^{23}\)EWCA Civ 302

\(^{24}\)CPR, rr 36.13 and 36.14.
also been concerns in regards to judges failing to promote commercial mediation. Lawyers complain that judges are not even raising commercial mediation as an alternative in various occasions, in some instances that judges need a lot of persuasion to grant a stay for mediation to take place. In cases were commercial mediation has stayed the courts have made little if any at all effort to monitor whether mediation does take place. On the other hand, there is subjective evidence of judges who zealously embrace commercial 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. In regards to a High Court Judge required additional parties to be joined in the action solely for the purpose of directing the parties to mediation.

The Human Rights Act 1998 has incorporated The European Convention on Human Rights into English Law. Article of The Human Rights Act 1998 prohibits restrictions on access to courts. The Article however provides a debate in regards to mediation; it is to an extent improbable to deliver a means for perplexing the enforceability of mediation clauses or referrals by courts to commercial mediation. This can be seen in the case of Elanay Contracts v The Vestry where the court held that Article 6 requirement of a party should have a reasonable opportunity to present its case that has no application to adjudication on the basis that an adjudicator's decision is not a final determination. In respect of mediation it does not involve any determination by a mediator; therefore Article 6 is improbable to provide a basis for requiring procedural fairness in commercial mediation. In situations where the parties have contractually agreed to mediate, it can be debated that they have contracted out of Article 6, an approach which was taken by the courts in a recent case relating to an arbitration clause. A additional matter arises is whether, if Courts were to direct parties to mediate, predominantly in cases where the parties object to mediation, this would infringe the Article 6 rights of access to a court.

25 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’.
27 30 August 2000, HHJ Harvey QC.
28 Mousaka v Golden Seagull (Commercial Court, 20 July 2001)
In the case of **Halsey v Milton Keynes General NHS Trust**,\(^\text{29}\) the Court of Appeal held that the courts do not, however have the authority to force parties to try ADR, as this might amount to a breach of a person’s right to a fair trial under Article 6 of the European Convention on Human Rights.

‘It is one this to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court.’\(^\text{30}\)

In countries such as Australia and USA the courts are prepared to force the parties to try ADR.

Commercial litigation cannot be compared to another form of alternative dispute resolution procedure. This is because it can only be conducted in a court of the state and the parties who litigate are the ones who are subservient to the court. Any party can commence proceedings against anyone else. Commercial litigation is another form of alternative dispute resolution which people use to resolve their matter\(^\text{31}\). Commercial litigation is a method that people and corporate entities use in resolving their disputes. In commercial litigation where the case goes to court the parties primarily rely on a judge or a jury to resolve and decide their matter. Commercial litigation is contested through the courts, mainly in the county court and less frequently in the High Court. This process is primarily governed by the **Civil Procedure Rules 1997**, which entail the regulations concerning the action required and the timing in regards to the relevant stages.

Disputes can be regarding financial and property issues as well as contract disagreements. Commercial litigation cases have their own facts and circumstances depending upon the case but as a whole they are primarily the same. Every year there are a number of cases that are filed, but not all proceed the way in reaching the final verdict. Many commercial litigation cases do not progress to trial phase due to the

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\(^{29}\) [2004] EWCA Civ 576

\(^{30}\) English Legal System 10th Edition, Catherine Elliot and Frances Quinn, 2009

\(^{31}\) [http://www.hg.org/litigation-law.html](http://www.hg.org/litigation-law.html)
opponents being able to come to an agreement by using the other alternative forms of ADR that being commercial mediation and arbitration, thus meaning avoiding the cost and time implication which are involved in litigation. Although at times this being the case commercial litigation lawyers still remain critical in regards to bringing a resolution of a dispute, and are essential in suits when counsels represents the opposing side.
Chapter 4.2

Commercial Mediation as an Alternative of Commercial Litigation

The commercial court has taken a robust approach to the use of ADR since it issued a practice statement in 1993. This was pursued further in 1996 with a further direction allowing judges to consider whether a case is suitable for ADR at outset, and to invite the parties to attempt a neutral non-court settlement for their dispute. In the case of Court of Appeal, the Master of the Rolls now would write to the parties urging them to consider ADR and asking them for their reasons for declining to the use of it.

In respect of the civil justice reforms, the general requirement placed on the courts to actively manage cases includes ‘encouraging the parties to use an alternative dispute resolution procedure if the court considers that to be appropriate and facilitating the use of such procedure’\(^\text{32}\). **CPR Rule 26.4** allows the judges to stop court proceedings if they think the dispute is to be more relevant to an alternative form of dispute resolution. **CPR 44.3 (2)** provides that ‘if the court decides to make an order about costs (a) the general rule is that the unsuccessful party will be ordered to pay the costs if the successful party; but (b) the court may make a different order\(^\text{33}\).’ **Rule 44.3 (5)** provides that the conduct of the parties includes ‘(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol.\(^\text{34}\)’ If a court does think that an issue could have been settled out of court under **CPR rule 44.5**, it can penalise the party who insisted on the court hearing by awarding them reduced or no costs should they win the case.

**Lord Woolf** held responsible lawyers, the judiciary and government for diminishing the impact of his 10-year-old reforms to the CPR Rules. He went to say that lawyers, ‘made an industry’ of various parts of the reform which had been designed to speed up the court process. The main aim of this reform was primarily to improve access, by significantly reducing the time and cost of litigation. He went on to say commercial litigation was intended to be used as a ‘last resort’, but this was ‘not generally the

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\(^{32}\) Gary Slapper and David Kelly, The English Legal System, 11\textsuperscript{th} Edition, 2009

\(^{33}\)\url{http://webarchive.nationalarchives.gov.uk/+/http://www.justice.gov.uk/civil/procrules_fin/contents/parts/part44.htm#IDAD21EC}

\(^{34}\)\url{http://webarchive.nationalarchives.gov.uk/+/http://www.justice.gov.uk/civil/procrules_fin/contents/parts/part44.htm#IDAD21EC}
attitude of the profession’.  Many large City law firms have not worked to reduce fees by going to commercial mediation, but instead snared business in the ‘blackmailing situation’ of costly litigation. The fundamental objective of Lord Woolf’s reform was to provide a system ‘capable of evolving to assist the public’.

Some academics and lawyer have not been satisfied with Lord Woolf’s Reforms such as Michael Todd QC, chairman, Chancery Bar Association stated “The Woolf reforms did not achieve everything that was hoped for them. Costs in civil cases have risen inexorably, and disproportionately, over the past 15 years and therefore need to be contained.”

There has been extensive research in this matter by leading scholars and various academic such as Hazel Genn which was published in 2002, Court based ADR Initiatives for Non-Family Civil Disputes: The Commercial Court and the Court of Appeal. ADR was undertaken in a just over half of the cases in which an ADR order were issued, although the research found that the take-up was on the rise over the recent years.

The cases in which ADR was endeavoured, 52% settled through ADR, 5% proceeded to trial following unsuccessful ADR, 20% settled some time after the conclusion of the ADR procedure, and the case was still live or the outcome unknown in 23% of the cases. The cases in which ADR was not attempted subsequent to an ADR order, around 63% ultimately settled. Around one fifth of these said that the settlement had been as a result of the ADR order being made. However the rate of trials among the group of cases not attempting ADR following an ADR order was 15%, in comparison with only 5% of cases proceeding to trial following unsuccessful ADR.

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39 Hazel Genn, Court based ADR Initiatives for Non-Family Civil Disputes: The Commercial Court and the Court of Appeal, (2002)
ADR orders in the main are thought to have had a positive or neutral impact on settlement. Orders can have a positive effect in opening up communication between the parties, and may avoid the dear of one side showing weakness by being the first to suggest settlement.\(^{40}\)

Number of commercial mediation in April 1998 to March 1999 was 190. From April 1999 to March 2000 it was 462, April 2000 to March 2001 was 467 and April 2001 to March 2002 was 338. Whereas in regards to the percentage referred by courts has been on the rise in April 1999 to March 2000 it was 19%, April 2000 to March 2001 was 27% and April 2001 to March 2002 was 31%. This shows there has been a slight increase in the percentage referred by the courts over the years.\(^{41}\)

The Court of Appeal in 1996 established a voluntary mediation scheme, were a letter of invitation was sent to the parties to give their reasons for refusal. Upon this if the parties agreed to mediate the Court of Appeal then arranged mediation mediators, which would be without charge. Hazel Genn’s research which was published in 2002 was subject of this scheme.

It was seen that between November 1997 and April 2000, 38 appeal cases were mediated following agreement by both sides. When the scheme had the benefit of a full time manager, there was a significant increase in the proportion of cases in which both sides agreed to mediate.\(^{42}\) Around half of the mediated appeal cases settled either at the mediation appointment or shortly afterwards. In the cases in which the mediation did not achieve a settlement, a high proportion (62%) went on to trial. This implicates that there are special characteristics of appeal cases that need to be considered in selecting cases for mediation.\(^{43}\)

\(^{40}\) Hazel Genn, *Court based ADR Initiatives for Non-Family Civil Disputes: The Commercial Court and the Court of Appeal, (2002)*

\(^{41}\) Hazel Genn, *Court based ADR Initiatives for Non-Family Civil Disputes: The Commercial Court and the Court of Appeal, (2002)*

\(^{42}\) Hazel Genn, *Court based ADR Initiatives for Non-Family Civil Disputes: The Commercial Court and the Court of Appeal, (2002)*

\(^{43}\) Hazel Genn, *Court based ADR Initiatives for Non-Family Civil Disputes: The Commercial Court and the Court of Appeal, (2002)*
In conclusion to Genn’s research that she has conducted it can be seen that, opting to enter ADR schemes voluntarily remains at a modest level. Away from commercial practice, the profession endures very cautious regarding the use of ADR. Referring to an positive side of ADR, it doesn’t seem to be producing armies of coverts. A further clarification my lie upon the work which exists in preparing for commercial mediation, the incentives and economics of mediation in low value cases, and the impact of the Woolf reforms. Supplementary pre-issue settlements and swifter post issue settlements may moderate the recognised need for ADR in civil cases.

Further conclusions for Genn’s research show that a single approach to the direction of cases towards ADR is prospectively to me more operative, rather than general invitations at an early stage in the commercial litigation process. As a result this would in hindsight require the development of clearly articulated selection principles. Timing of invitations or directions to mediate is essential, the initial early stages of proceedings may not be the most suitable time, therefore should not be the only opportunity, to consider ADR. Finally it is suggested that mediators with excellent skills and familiarity with the subject-area of the dispute result in the highest levels of satisfaction. The approach of mediators needs to be matched with the expectations of parties and their solicitors.
Chapter 4.3

The advantages and disadvantages of Commercial Mediation and Commercial Litigation

Commercial mediation can benefit clients and their legal advocates. Although there are various aspects in respect of legal disputes that scholars argue are better served by commercial litigation than commercial mediation. This comprises of the outcome of a guaranteed outcome, enforceability considerations, the availability of legal precedent and reform, and the public nature of commercial litigation and the special needs of disempowered clients.

In regards to the above mentioned, guaranteed outcome, it can be said that commercial litigation always guarantees some form of outcome, though it may not resolve the fundamental conflicts in issue. In regards to this aspect commercial litigation is seen as more of a final step than commercial mediation. The main advantage being that commercial litigation causes many disputants to reject commercial mediation option out of hand. This is because once a triable issue is put before a court in a trial on merits; an outcome always results, whereas in the case of commercial mediation it may not achieve any form of settlement.

In respect of nature of enforceability, it is competed that mediated agreements have a much weaker enforceability than court judgments. Judgements are enforceable through the contempt process, whereas in the case of mediated agreements they are private contracts. This means mediated agreements are enforceable to the same extent as any out of court settlement. There is also the issue of psychological effect of a judge’s pronouncing a decision, in comparison with disputants reaching their own agreement in mediation. Taken as a whole it can be said that outcomes based upon court judgements are, less likely to be obeyed with than are mediated settlements. Most disputants like to have the authority of a judge behind the decision, and in some circumstances the gravitas of judicial assertion may be fundamental in protecting compliance. A problem that can be seen with this approach is that if the disputant
does however choose to litigate the issue in court, the judge may not give the decision the disputants had hoped for.

The issue of enforceability of commercial mediation clauses, in the United Kingdom in relation to case law is limited. In the case of \textit{Walford v Miles},\textsuperscript{44} The House of Lords, stated that an agreement to negotiate is not enforceable as a court cannot conclude the pertinent compulsions with adequate confidences and cannot assess compliance. In the case of \textit{Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd},\textsuperscript{45} the House of Lords undermined, here the Court carefully judged that it has a discretionary power to stay proceedings if there is a dispute resolution clause that is correspondent to an efficient agreement to arbitrate.

Regardless of the deterring view in \textit{Walford v Miles}\textsuperscript{46} in regards to agreement to agree to negotiate are unenforceable for lack of certainty. In regards to the enforceability of commercial mediation clauses by the English High Court this was considered in the case of \textit{Halifax Financial Services Ltd v Intuitive Systems Ltd.}\textsuperscript{47} In this case the Court considered that a mediation clause should ought to be a condition precedent to the issue in relation to litigation proceedings in order to be enforceable. Here the Court found that in regards to construction, a mediation clause failed this test. 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... ‘.\textsuperscript{48}

\textsuperscript{44} [1992] 1 All ER 453.
\textsuperscript{45} [1993] AC 334.
\textsuperscript{46} [1992] 1 All ER 453.
\textsuperscript{47} [1999] 1 All ER (Comm) 303.
\textsuperscript{48} Miryana Nesic, MEDIATION - ON THE RISE IN THE UNITED KINGDOM?
In respect of Legal Precedent, commercial mediation which can be considered as an out of court settlement will not result in a legal precedent. The precedential implication of the chosen dispute resolution process can be strategic at various points that affect disputants negotiations over which dispute resolution process will be used. A disputant who values precedent can simply refuse to settle in commercial mediation. The lack of precedential effect of mediation is at times also seen as a negative implication. Moreover some argue against settlement as a general matter of public policy due to the legal reforms which usually result from the rulings of appellate judges considering appeals of judgements which were issued in lawsuits. Our legal system is known for its continuous changes, and has a time honoured tradition of circulating some fundamental legal reforms, this has entailed school integration, the right to use contraception, through the process of ‘common law’ many have apprehensions the fact that any system that averts cases to settlement will thwart this reform process from occurring. It can be said that facilitated form of commercial mediation can be vulnerable from this process. More issues that arise are that it could become a severe public policy issue if a large proportion of disputants were manipulated into settling. If any entire set of cases are forced into commercial mediation and pressure is applied to reach a settlement, it can be disputed that the needed appellate litigation to create reform of the common would not take place.

In the aspect of privacy issues the intimate privacy of commercial mediation emulates various disadvantages and advantages. In cases were disputants may mutually desire the privacy and contemplate it a value of commercial mediation over commercial litigation. Although, in some cases, the lack of public forum for commercial mediation can benefit “bad actors” due to public exoneration and a public reprimand do not transpire. This can be of an issue if the “bad actor” has greater power that the” innocent victim” and is able to coercively push the other into mediating to an agreement. Furthermore problems can be seen in regards to issue of privacy in commercial mediation, in is that collusion can occur, just as it can in any settlement, negotiation, facilitated by ADR or not.

Leading scholars mainly feminists and civil rights advocates, have written to attack the appropriateness of commercial mediation, mainly for disempowered disputants, such as women and people of colour. Women comprise the first group of concern to mediation detractors. Many commentators make the argument that, because commercial mediation may result in overreaching by male disputants against disempowered female disputants, with the incentive complicity of the mediator, no mediation should ever take place between male and female disputants. Arguments that have been put forward by feminists who contend that women are structurally disempowered in line with men and as a result feel endangered by commercial mediation. Various scholars cite compelling evidence that some commercial mediation cases have been handled this was (Bruch 1992; Bryan 1992; Fineman 1988; Lefcourt 1984; Nader 1992)\(^5\). The classic example supporting this view is that of the late Trina Grillo’s article (1991) “The Mediation Alternative: Process Dangers for Women,” depend upon examples of mediation forced on abused women who are thereby pressured to reason with and cooperate with their physical oppressor.\(^5\)

Furthermore it can be said that commercial mediation is not the only option that is available as a last resort. The most significant drawback of commercial mediation is that disputants who could benefit most from the process typically don’t choose it. The other issue is that by the time the disputants find they are unable to negotiate an agreement on their own; their conflict has often entered an escalating phase with mutual hostility and recrimination. The litigants find the idea of cooperating with their enemy to be repugnant and would rather have an authority figure assigned to punish the opposition. This creates two problems the first problem is that the winner of the litigation obtains the sought after victory, and the second is that adversarial conflict resolution tends to be so costly, time consuming, and ineffective that even the vindicated litigant often loses as much as or more than he or she gains from a win in court. Research shows that most of angry and hostile disputants, when forced to participate in commercial mediation, often becomes its biggest fans (McEwen and Milburn 1993)\(^5\).

There are also various problems in respect of commercial litigation proceeding to court. A trial involves a winner and a loser, the adversarial procedure together with the aggressive atmosphere of court proceedings divides the parties, making them being enemies even where they did not start out that way. This can be seen as a disadvantage where there is some reason for the parties to sustain a relationship after the problem under discussion is sorted. For example in a family case or child custody case it can lead to problems and issues being created between the parties.

Various types of disputes rely upon detailed technical points, such as how machines should be made, or details of a specific problem, rather than on point of law. The importance of such technical issue details may not be readily understandable by an ordinary judge. This primarily means that expert witnesses or advisers may be brought in to advise on these points as a result of this it takes time, which mean costs go high too.

Furthermore in court hearings the rules of procedure lay down a fixed framework for the way in which problems are addressed. This may be inappropriate in an area which is largely private. Moreover court hearings impose a solution on the parties, which since it does not involve their consent, may need to be enforced. If the parties are able to negotiate a settlement between them, to which they both agree, this should be less of a problem.

Commercial mediation proceeds from the traditional U.S, cultural version of conflict resolution, “should” look like – the “invisible veil” blueprint for resolving conflict. Due to this it can be said that trying to distinguish the advantages and disadvantages in regards to litigation is somewhat a hard task.

Advantages of commercial mediation can the seen through the evaluation of a process of conflict resolution depends on the perspective taken. Methods of resolving a conflict can be assessed as quite effective, for example, if a short term perspective were taken but very ineffective if a long term perspective were taken. Another method

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of resolving a conflict might be very effective in meeting one person’s financial goals yet very poor in setting an overall conflicted relationship. Or a settlement might effectively meet the disputant’s needs, not at the expense of dependant’s constituents. There is no more important time to keep these considerations in mind than in our discussions of the advantages and disadvantages of commercial mediation.

Another advantage of commercial mediation is that of efficiency consideration this includes time and money considerations, in regards to efficiency arguments, the original impetus for the ADR movement can be seen in the United States. Early comments on commercial litigation explosion and the need for alternatives prominently cite the high cost of commercial litigation, the long delays to trial, and the burden on court systems of our litigation society (Burger 1982). As a result, there were early efforts made to create ADR programs focused on considerations of immediate savings of time and money for clients and courts. When these programs were evaluated, researchers focused primarily on comparing the time required to mediate cases to settlement with that required to litigate to judgment, as well as on the money spent on moving the cases to their conclusion.

It is outside disproval that commercial mediation is cheaper and quicker than commercial litigation. Commercial litigation is very costly the National Mediation Helpline showed in the case of Egan v Motor Services (Bath) Ltd how cost can escalate. This case was regarding a purchase of an Audi TT 3.2 litre V6 motor car that apparently has a defect on it. Attempts were made to rectify the defects but the purchaser remained unsatisfied, as a result proceeding started on the case the amount of dispute was in the range of £6,000, the parties spent over £100,000 arguing over the claim. This shows the great expenses of commercial litigation. In a dispute which was decided in court, show the extent of high costs in litigation. The well published lawsuit between Mattel Inc. and MBA Entertainment (which entailed a battle between Barbie and Bratz dolls) resulted in an award of $100 million in Mattel’s favour. The reported amount of the legal fees was more than $93 million.

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56 http://www.nfm.org.uk/what-else-do-i-need-to-know/costs-and-time
57 [2007] EWCA Civ 1002
58 http://www.nfm.org.uk/what-else-do-i-need-to-know/costs-and-time
59 Debra Cassens Weiss, legal Fees, a “Breath-taking” $93M-Plus in Bratz Battle, BA J. September 10 2008
which yet again illustrates how costly commercial litigation is. Another example of how expensive commercial litigation is can be seen in Ireland where it has heavy burden of cost relative to other jurisdictions, for example it costs on ‘average of €53,800 (27%) on a €200,000 claim compared to €25,337 (13%) in the rest of Europe. Besides cost, the average Irish court case takes 515 days to resolve’60. Commercial mediation is an informal process that does not require discovery, pleading, motion practice, hearings, or rules of evidence. As a result, even when lawyers are involved at every step of the commercial mediation process, it is both much cheaper and much more rapid than commercial litigation. If the disputants handle the mediation themselves, then they also save additional attorney’s fees. Resources are conserved for the court system works as for the individual disputants when mediation is used. It is likely that the primary reason lawyers and clients choose mediation is to save time and money (Meyson 2005, 78)61.

As suggested above commercial mediation is usually quicker, cheaper and less confrontational than going to court, this view is also shared by Justice Minister, Jonathan Djanogly said: “Nearly every time I ask someone if their stressful divorce battle through the courts was worth it, their answer is no. Mediation is a quicker, cheaper and more amicable alternative, particularly where children are concerned”62. Moreover commercial mediation can take a quarter of the time of going to court. The average time for a mediated case to be completed is 110 days compared to 435 days for non-mediated cases63. Also data from Legal Aid in respect of commercial mediation cases show the average cost per client is £535 compared to £2,823.64. As a result official figures for legally-aided mediations have risen from 400 per year in 1997 to almost 14,600 in 2009/10, with around two thirds of publically funded mediation resulting in full agreement66. It can be seen and facts demonstrate that the gradual success of mediation, and how it has begun to take up a position in the mainstream within the UK’s civil litigation system.

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60 http://www.finfacts.ie/irishfinancenews/article_1021878.shtml
65 http://www.compassmediation.co.uk/2011/03/key-mediation-facts-and-figures/
As demonstrated one of the most important sectors is in regards to costs relating to commercial litigation. Within the English court system it involves the loser of a trial to pay the legal costs of the winner. In this culture the legal fees can run into millions, and even outweigh the claim itself, this functions as a huge incentive on parties not to litigate, except where they have reasons to do so and confidence in their hoped for outcome. Therefore, as a result the courts have had the choice to the impact the behaviour of parties in respect of costs orders. This has had major implications with mediation, as mentioned above and case law has also demonstrated this in encouraging and making the use of commercial mediation compulsory.

The first case was Dunnett v Railtrack plc (in Railway Administration)\(^67\), in the Court of Appeal in this case 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 in this case said the parties and their lawyers should be attentive, as it is one of their formalities to consider ADR, especially when the court has suggested it. In this case the judge, Lord Justice Brooke, took a different view, however, and said in his judgment: “Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are beyond the powers of lawyers and the courts to achieve...It is to be hoped that any publicity given this part of the judgment of the court will draw to the attention of lawyers...the possibility that, if they turn down out of hand the chance of alternative dispute resolution when suggested by the court, as happened on this occasion, they may have to face uncomfortable costs consequences\(^68\)” This decision had major implications and was a fundamental step forward in using mediation, and an sign of how far it had begun to influence the court system.

Another case which demonstrates this issue in which commercial mediation was refused by one party is the case of Hurst v Leeming\(^69\). Mr Hurst who took his case to court did not succeed, but he did raise the issue that because of Mr Leeming’s refusal to mediate as result of that it was unfair for him to cover the legal costs to which Mr Justice Lightman disagreed, he went to say “Quite exceptionally, Mr Leeming was justified in taking the view that mediation was not appropriate because

\(^{67}\) [2002] EWCA Civ 303  
\(^{68}\) [2002] EWCA Civ 303  
\(^{69}\) 2001] EWHC 1051 (Ch)
it had no realistic prospect of success\textsuperscript{70}. The judge concluded that there was no success from mediation; also it shows that to refuse mediation depends on the facts of the case.

There have been cases which have been in contradictory of this such as in the case of \textbf{Leicester Circuits v Coates Brothers plc.}\textsuperscript{71} In this case mediation had been organised but the defendants did not pursue on the advice of the insurers. When the courts began the issue of costs the defendant, justified his withdrawal as simply there being a limited opportunity of success. As a result Court of Appeal held that because the defendants agreed to mediation initially, it was inappropriate to use the fact of their being a limited chance of success later. Therefore the defendant was punished in regards to costs.

A more recent case is that of \textbf{Royal Bank of Canada Trust Corporation v Secretary of State for Defence}\textsuperscript{72} this case concerned a clause in a property lease. The claimant stated their intention to use mediation, which was declined by the government based on it being a point of law with a clear outcome, which as a result suggested that mediation was not suitable in this case. However the Court refused to acknowledge this as a valid reason for refusal. \textbf{Mr Justice Lewison} in this case found that “The dispute was in my judgement suitable for ADR even though the main issue was one of interpretation of a lease.”\textsuperscript{73}

The efficiency of commercial mediation is often compared with that of commercial litigation because it is assumed that cases that are mediated would otherwise be litigated. If commercial mediation is compared with lawyer assistant settlement, then the direct time and money savings of mediation are less certain. Some studies appear to indicate that mediation is still quicker and cheaper than lawyer-assisted negotiation, but others do not show such an advantage. If commercial mediation is compared on a short term efficiency basis with other ADR processes, such as arbitration and nonbinding evaluation, for its ability to shorten the time to outcome, the picture becomes cloudier.

\textsuperscript{70} [2001] EWHC 1051 (Ch)
\textsuperscript{71} [2003] EWCA Civ 333
\textsuperscript{72} [2003] EWHC 1479 (Ch)
\textsuperscript{73} [2003] EWHC 1479 (Ch)
Another way of viewing efficiency consideration is to use the conflict diagnoses perspective against litigation and other forms of ADR. The processes operates primarily on the assumption that conflict is to be resolved through the clash of inconsistent positions, with commercial litigation and arbitration settling the conflict through the choice of one of positions and non-binding evaluation depending on a softening of disputants positions based on information received in the evaluation. This is true of highly evaluative mediation as well purely facultative mediation will theatrically have a different effect. Facultative mediation generally operates on an interest based negotiation model; whereas transformative and narrative mediation focus not on settlement, but on creating personal transformation conducive to the resolution of conflict. Personal bargaining approaches to resolving conflict takes less upfront time and effort than interest based and transformative processes, because disputant interests analysis, brainstorming, searches for objective decisional standards, empowerment, recognition, and narrative framing are not involved\(^\text{74}\).

Conflict management and prevention is seen as an area that reduces and prevents conflict and brings about the positives of mediation. Moreover commercial mediation presents opportunities in respect of being able to address the problems presented by interpersonal conflicts. The advantage of this is that the mediators can use the commercial mediation process to get to the root of the cause can present opportunities and best options of resolution to both of the parties. Furthermore the mediators can include the disputants to understand the dynamics of their conflicts, which as a result means that too have the roots of the conflict revealed to them and are personally able to search for and understand the available solutions. Commercial mediation also is more targeted to interpret a cycle of competition and encourages formation of a cycle of cooperation. As well as this commercial mediation uses facilitative techniques to reframe perceptions and build mutual trust, the advantage of this is that it creates a sense of personal validation on behalf of the disputants and voids any kind of misunderstanding of irrelevant disputes.

Another advantage of commercial mediation is that it preserves relationships. Commercial mediation is seen as the largely the most effective alternative dispute

\(^{74}\) Alternative Dispute Resolution: A Conflict Diagnosis Approach, 2\(^{nd}\) Edition, Laurie S.Coltri, 2010
resolution process for maintaining the relationship between the disputants. The advantage of this is that it can be of great help in situations where the disputants will be required to deal with each other after the dispute is resolved, this could be in situations such as divorce, group shareholders and landlord and tenant and partners of a business. In the above examples mentioned mediation can be invaluable, in helping and offering the chance to clarify misunderstandings, helping reach a resolution, improve the relations between the two, help set the view and targets for future reference and help bring back communications between the disputants, communication can be seen as a positive effect in the long term between the parties. This advantage as seen above is seen as very positive step in mediations as the others forms can’t provide this tending of preserving relations especially commercial litigation it creates a problem rather preserve.

Commercial mediation has the competence to deal more adequately and comprehensively with interpersonal conflict, that other forms of alternative dispute resolution, that being litigation this once again can be seen as another fundamental advantage of commercial mediation to commercial litigation. Commercial litigation only deals with issues than can be stated as caused of action. Moreover another disadvantage of commercial litigation is that of its narrow focus on the cause of action, in that it can avert the applicants from the imperative concerns. As a result it can be said that litigation therefore creates the likelihood of unnecessary legal action while diverting attention from the fundamental problem in issue, which may linger unresolved.

Apart from this issue of comprehension, commercial mediation also offers remedial flexibility and creativeness which is not accessible in litigation. The only few remedies that are available through litigation are very narrowly defined by the applicable law, therefore they mostly involve a monetary judgement. Research has led to show that commercial mediation can lead to a high number of creative, integrative sorts of outcome. Golann (2002, 334) studying the reported outcomes of private and court based civil/commercial mediation by facilitative mediators, found that “almost two-thirds of all settlements in the survey were integrative.”

Additionally unlike commercial litigation, commercial mediation doesn’t take away the power from the disputants to accept or reject a possible settlement. The primary nature of commercial mediation is to have more satisfaction with settlement and secondly more durability of the outcome. In commercial litigation it provides insufficient match to these attributes because the disputants have no say what so ever in the outcome as their interests are not identified or explored. Commercial litigation to an extent provides the lowest quality of consent for litigants who are participating against their will. There is also the issue of durable outcome in the sense of final outcome. It can be said that commercial litigation is clearly seen as a final than commercial mediation, in that once an issue is put before a court in a trial on merits, an outcome always results, whilst in mediation it may not always achieve a settlement. But commercial mediation can to an extent be viewed as more final than commercial litigation. Firstly in that not all the issues in question may come before the adjudicator. Secondly a discontented disputant may make an outcome difficult to enforce. They can make the loser of adjudication do things which would make the winner not happy such as fail to make prompt payments. Thirdly a skilled mediator can help the disputants co-opt important constituents who may have the ability to undermine the settlement by reducing the likelihood that the settlement will fall apart. Fourthly many mediators will tend to directly deal with the problems that have caused the conflict to occur and once settled it is unlikely that it will occur again. Therefore it can be said that in an overall concept if settlement does occur in a good manner mediation, it’s more likely to be completely resolved the conflict than in commercial litigation. This being that mediated settlements are more durable than litigated judgements.

Commercial mediation is more flexible and less rigid in context to litigation. In litigation there are strict rules and procedure to follow which become binding upon the parties. In regards to enforceability an example can be seen in the case of *Cable & Wireless plc v IBM United Kingdom Ltd*76, which related to a contract between parties. It involved a clause in a contract that if any disagreements arose due to their contract the parties would seek to resolve the dispute through an ADR procedure,

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76 [2002] EWHC 2059 (Comm)
recommended to the parties via a specific dispute resolution service. It was through that clause the court held that to refer the matter to ADR was binding, and thus was sufficient for the courts to enforce. The clause itself did not identify the exact ADR procedure that should be used. Therefore Justice Coleman highlighted the point that certain procedures had almost become part and parcel of the litigation process, where the courts are now in a position to compel certain parties to submit themselves to those procedures and systems. Justice Colman stated clearly that: “For the courts now to decline to enforce contractual references to ADR on the grounds of intrinsic uncertainty would be to fly in the face of public policy as expressed in the Civil Procedure Rules and as reflected in the judgment of the Court of Appeal in Dunnett v Railtrack”\textsuperscript{77}

\textsuperscript{77} [2002] EWHC 2059 (Comm)
Chapter 4.4

An analysis of development of Commercial Mediation and Commercial Litigation in England, Wales and USA

There are to an extent reaping rewards for engaging into dispute settlement as in commercial mediation. The views of various experts and academics seem to feel that efforts have been made in respect to damage the litigation process within the UK and USA, which primarily make the other forms of alternative disputes further more accessible. This view was also shared by Elizabeth Thornberg in her article ‘reaping what we sow: anti-litigation rhetoric, limited budgets, and declining support for civil courts’. Within she writes that at one time within USA, the courthouse was the pivotal point within the community characterising justice that even academics such as William Faulkner felt that a town without a courthouse failed to be a town, “Above all, the courthouse: the focus, the hub; sitting looming in the centre of the county's circumference like a single cloud in its ring of horizon...dominating all: protector of the weak; judicator and curb of the passion and lusts; repository and guardian of the aspirations and the hopes”.

In respect of today the state of affairs has changed dramatically, and where the popular culture depicts an image to masses of a ‘litigation explosion’ where ‘hired gun’ lawyers act as the catalyst and ‘runaway’ juries provide ‘skyrocketing’ damages. People are strongly advised to avoid the courts and have also warned them of the consequences that lye with them. Various issues can be said to have attributed this this current position. One of the most important changes can be seen in the hands of defendants who sought to defame all aspects of civil litigation for example the courts and judges. At the same time as this the cost factor of litigation was rising whilst government budgets were reduced. The Americans felt that this phenomenon was exclusive to them, but this theme wasn’t only within the USA because it spread across the common law world, having implications of the civil courts and their procedure rules.

78 ‘Reaping what we sow: anti-litigation rhetoric, limited budgets, and declining support for civil courts’ by Elizabeth Thornberg
79 For discussions of the concept of ‘American exceptionalism’ as applied to civil procedure, see O. Chase, “American ‘Exceptionalism’ and Comparative Procedure” (2002) 50 Am. J. Comp. L. 277
The USA got its first sense of anti-litigation rhetoric in the 1980s, this happened when insurance companies started campaigns in changing people’s views towards litigation. The main objective of these campaigns was to convince the US citizens that it was wrong for people to pursue cases against corporations or government defendants, portraying that this was aim of lawyers who were simply money hungry. The have been cases on this matter such as the Stella Liebeck who was awarded $2.9 million against McDonald’s for spilling coffee on her lap were exaggerated and facts as the third degree burns were simply ignored.

The government in United Kingdom has been an instrumental figure in funding various mediation schemes in number of different areas. This includes The Environmental Council, which is a leading charity in UK, which focuses on engages people for sustainable development. It offers ADR services which include services for public interest as well as environmental related issues and disputes. There is also the Department of Health which collaborates for Public health, adult social care, and the NHS, it too has been involved in a mediation pilot schemes in various health regions, and to an extent has been a success. There is also the Housing Ombudsman which passes on tenancy disputes in regards to Local Authority Housing to mediate which can be seen as a way of resolving the dispute and resulting in many occasions a successful outcome.

In regards to public law it too outlined its concerns of using mediation, and of saving public money. The primary case on this issue is Cowl v Plymouth City Council. This was a public case in the context of judicial review; Lord Woolf stated that the participants ought to be informed about ADR, to make the failure to adopt it, in particular where public money is involved, indefensible. Lord Woolf’s disapproval of parties that do not properly address ADR options in the course of litigation has general application. He furthermore stated that failure to use ADR led to greater expenditure: “In particular the parties should be asked why a complaints procedure or some other form of alternative dispute resolution has not been used or adapted to resolve or reduce the issues which are in dispute. If litigation is necessary the courts should deter the parties from adopting an unnecessarily confrontational approach to

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80 http://www.the-environment-council.org.uk/
81 [2002] 1 WLR 803 (CA).
the litigation. If this had happened in this case many thousands of pounds in costs could have been saved and considerable stress to the parties could have been avoided\textsuperscript{82}.

In November 1999, an \textit{ADR Discussion Paper} was issued by the \textbf{Lord Chancellors} Department, which sparked a debate on various issues in regards to mediation policy issues. The government has stated that its departments will use commercial litigation as a last resort, and using commercial mediation where possible and as a first option in resolving a dispute. The current ingenuity has been the invention of \textbf{Legal Aid}, in respect of commercial mediation in both aspects of matrimonial and non-matrimonial cases. In respect of non-matrimonial mediation, it only relates to advice and assistance in formulating mediation, and the representatives attendance at mediation and the fees. Additionally, if a case seems to be more suitable for mediation and the parties’ refuse to attend, in those circumstances \textbf{Legal Aid} can be refused\textsuperscript{83}. This position is to an extent in Northern Ireland as well as in Scotland.

There has been a fundamental increase in commercial mediation within UK there have been various activities which have been the propagation of commercial mediation organisations. There have been centres set up such as the \textbf{Centre for Effective Dispute Resolution (CEDR)} which was initially set up with the support of \textbf{The Confederation of British Industry}. The Centres membership includes areas such as retailers, bank and insurance companies. CEDR and the ADR Groups have been flagships for commercial mediation development within United Kingdom over the recent year. CEDR provides a wide range of mediation services. It proposes widespread mediation and mediator training programmes, which have earned it National Training Awards. The Centre has also established an international platform, chaired by \textbf{Lord Griffiths}\textsuperscript{84}. 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

\textsuperscript{82} [2002] 1 WLR 803 (CA).
\textsuperscript{83} In relation to the funding changes, refer to the \textit{Funding Code}, 26 October 1999; \textit{a New Approach to Funding Civil Cases}, October 1999; \textit{Testing the Code}, October 1999; and \textit{The Funding Code – Decision Making Guidance}, June 2000.
successful, the Russian Government intends to consider ADR for a range of other disputes.85

The non-matrimonial mediation organisations in the United Kingdom include groups of barristers who offer mediation services. There is also InterMediation, which is sponsored by the Commerce and Industry Group, which consists of mediators from the top 100 legal and accountancy firms. Genn's study of the Central London County Court mediation scheme indicated that in 45% of the cases mediated, both parties were companies and in 39% 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 company was a party.86

The bank to have been important users in mediation in United Kingdom for many years, an expert ADR organisation was set up called the City Disputes Panel (’CDP’), its primary aim was to meet the demands for ADR services in the banking and finance industry, the primary concern was the huge financial expenses of litigation which would adversely affect the pre-eminence of London as a world financial centre. Retail banks such as Barclays has adapted piloted mediation schemes, for example, Barclays Bank produced legal risk management guidelines, using ADR as the to resolve disputes, 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 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), drive to endure use mediation as ‘an honest broker’ approach.87 In respect of civil cases, the FSA will also use a specific mediation scheme, administered by CEDR, to address apprehensions that the FSA could abuse its wide-ranging civil powers against individuals. Another insurance institute Lloyds Market Insurers too signed an ADR pledge, a non-binding countenance of commitment to ADR, called Market ADR

Commitment (‘MAC’). Part of this process each signatory obligates to having a senior executive who can be approached if a claims handler, for example, is being recalcitrant respect of mediation.

According to CEDR statistics personal injury cases account for the smallest share of mediations. In the Central London County Court mediation scheme, less than 1% take up of mediation. 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.88

‘Blame culture/compensation culture’ features prominently in discussions relating to negligence law. When Professional Negligence first appeared, the issue were somewhat different. On occasion, judges invoked the spectre of a flood of claims which can include false claims. Lord Wilberforce in the case of McLoughlin v O’Brian89 said that ‘a proliferation of claims’ may be the upshot of the House of Lords' decision to compensate the claimant for psychiatric injury. With regards of other areas in negligence law, doubts were expressed regarding the prospect of increased remedy to litigation.

Furedi90 associates the emergence of blame culture with a multiplicity of causally significant factors. Furedi draws a distinction between his account of blame culture and right-wing analyses of the subject. Furedi identifies the latter as placing emphasis on the pursuit of financial gain as a reason for the emergence of a blame culture. Furedi rejects this view, arguing that ‘cynicism and dishonest manipulation’ cannot explain the broad social trend to which the term blame culture is applied. Instead, he argues that our enthusiasm for ‘the principle of caution’ is (to some extent) misplaced. For it diminishes our sense of autonomy and stigmatises valuable risk-taking.

Insurers in early 2000’s managed to persuade the media in regards to that there was an insurance crisis which was primarily due to conduct of the courts. The Insurance

89 [1983] 1 AC 410
90 Furedi, F, Courting Mistrust: The Hidden Growth of a Culture of Litigation in Britain (London: Centre for Policy Studies. 1999)
Council of Australia claimed that “the cost of insurance is only a reflection of our increasingly litigious society and the approach of the courts”\(^{91}\). While other newspapers wrote that “It had to happen: opportunistic lawyers, who racked up often obscene damages payments for clients and fat fees, wrecked the system”\(^{92}\). This was too mirrored in UK and in USA and Australia of lawsuits gone mad.\(^{93}\)

Like Atiyah\(^{94}\) and Weir, Furedi identifies doctrinal developments in negligence law as an engine of blame culture. Indeed, he states that “[t]he most significant single development in the rise of the culture of compensation is the expansion of liability to areas that were previously immune from it”\(^{95}\). He is critical of lawyers who have played a part in this process of change. He observes that “[a] good legal team can always find a target worthy of blame”\(^{96}\). Moreover, he argues that the legal system has developed in ways that have worked to foster a ‘new’ and less attractive ‘legal culture’\(^{97}\). Furedi concludes that these and the other developments that he lists have led British lawyers to go down ‘the road of American-style ambulance chasing’\(^{98}\).

Judges and others assume that blame culture is a live problem. But we cannot be sure that this problem actually exists because the relevant data are equivocal. While we cannot draw firm conclusions from these data, we can, at least, address the question as to why the behaviour and attitudes associated with blame culture are objectionable to judges and others.

It can be said that insurances feed blame culture. It cannot be denied that insurers are fundamental to the operation of the tort system. ‘Insurance ‘technology’’ underlies the whole practice of tort law\(^{99}\). Without insurance the tort system ‘would long ago

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91 ICA Media Release, “Insurers Lose on Public Liability and Professional Indemnity Claims” (2001)
94 The Damages Lottery, 1997
95 Furedi, F, Courting Mistrust: The Hidden Growth of a Culture of Litigation in Britain (London: Centre for Policy Studies. 1999)
97 Furedi, F, Courting Mistrust: The Hidden Growth of a Culture of Litigation in Britain (London: Centre for Policy Studies, 1999)
99 http://www.law.cf.ac.uk/research/pubs/repository/1446.pdf
have collapsed under the weight of the demands put on it and been replaced by an alternative, and perhaps more efficient system of accident compensation.”

In accordance with Lee McLlwaine, the tort system should be retained and reformed\(^{101}\) to avoid flood of claims. The tort system should not be abolished as mentioned by Lee McLlwaine otherwise the society may be faced with a serious problem. If the tort system is reformed; we would have a system where wrongdoers pay, and have a system which gives plaintiffs a sense of corrective justice. Furthermore is that there would be no blame or compensation culture. Jack Straw was critical of lawyers for acting on behalf of clients on a ‘no win, no fee’ basis by stating that it is claimed that this provides greater access to justice, but conduct of various lawyers to him advised a ramping up of the fees something he deemed to be very scandalous\(^{102}\).

Irrespective of the culture transformation 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 if any for mediation. For example, a survey of claims managers in 1999 indicated that 70% preferred negotiation to other forms of dispute resolution.\(^{103}\) To challenge this kind of intransigence, insurance companies are developing a systematic case management scheme, which necessitates case managers to consider the mediation option, and to justify non-suitability in each case. For are various examples, one of them being ITT London and Edinburgh claims that they saved more than £1 million in professional fees in 1998 alone as a result of mediation.\(^{104}\) 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.\(^{105}\)

\(^{100}\) http://www.law.cf.ac.uk/research/pubs/repository/1446.pdf
\(^{101}\) Recent reforms includes: Compensation Act 2006; Court Act 2003 s 100; Damages (Variation of Periodical Payment Order) 2005; Road traffic (accident Compensation) Bill 2008 (PMB)
\(^{102}\) Review of Civil Litigation Costs: Preliminary Report (TSO, 2009)
In the United Kingdom it is apparent from Genn's study of the Central London County Court mediation scheme, highlighted concerns regarding quality of mediators and the lack of consistency in the views held by mediators on critical issues like ethics and accountability. Moreover Lord Chancellor's ADR Discussion Paper raised the issue of whether regulation of the mediation profession is necessary, while 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. At this stage, the Lord Chancellor's Department has announced a plan to introduce a Quality Mark for providers of legally-funded mediation services.

Commercial mediation within the United Kingdom has had a slow up rise; one of the reasons behind this is the inflexibility of solicitors. The Bristol Law Society Mediation Scheme discovered a widely-held opinion by the solicitors interviewed that they endangered their relationships with clients in pressing for mediation which could prove to be unsuccessful. Research from Genn's study of Central London County Court Mediation Pilot instituted that the request for mediation was very low when both parties were legally represented. Genn's study furthermore reveals 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. 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 8% had even discussed with their lawyers regarding resolving their dispute through mediation.

In respect to CEDR polls, it underlined fundamental differences in regards to attitude towards commercial mediation between in-house and external lawyers. In addition the

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106 H Genn, Central London County Court Mediation Pilot: Evaluation Report, LCD Research Series, 5/98, (vii) and 143.
107 Lord Chancellor's Department, ADR Discussion Paper: Summary of Responses, August 2001 para 82.
poll also indicated that 78% of the in-house solicitors whom were surveyed thought that commercial mediation ought to be vital at some stage if a business dispute is litigated, yet only 40% of external solicitors agreed. Furthermore, just 56% of in-house solicitors thought that courts ought to award costs against parties who rejected the chance to take part in mediation, while only 26% of external solicitors agreed.\textsuperscript{111} A survey of 700 United Kingdom law firms in 2000 exhibited that lawyers themselves admitted lack of knowledge about, and lack of experience in, mediation as a chief cause for low take up of commercial mediation.\textsuperscript{112} There are also qualms by lawyers that, succeeding an experience of commercial mediation, clients will consider that their lawyers are unnecessary for dispute resolution.\textsuperscript{113}

Steps have been taken by the Law Societies throughout United Kingdom to resolve the problems. An ADR Working Party has been set up by The Law Society of England and Wales, which comprised developing mediator training standards and a code of conduct; moreover it is to designing panels of solicitor mediators. In Scotland the Law Society has commenced a mediation service, which is called ACCORD, whose panel entails accredited solicitor mediators. ACCORD mediators are bound by the Law Society's code of conduct for ADR and can acquire assistance via ACCORD's guidance for accredited mediators.\textsuperscript{114} The Law Society of Northern Ireland too 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.\textsuperscript{115} It is well-thought-out that, unless the legal profession embraces mediation, lawyers will lose out in the mediation services market to other professionals. Catastrophe by lawyers to encirclement mediation is also of concern in light of \textbf{Practice Rule 1 of the Solicitor's Practice Rules 1990}, which necessitates English solicitors to have respect to, and imposes a duty to act, in the best interests of

\begin{footnotes}
\item[111] CEDR, \textit{Civil Justice Audit}, April 2000.
\item[113] Also revealed by the author's 2000 survey of 700 UK law firms. The results are published in Nesic and Boulle.
\item[114] ACCORD, \textit{An introduction to ACCORD}. Refer also to R Mays and B Clark, \textit{ADR in Scotland}, The Scottish Office, (1999).
\end{footnotes}
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 commercial 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 commercial mediation has not been considered
with the client ahead of, or at the latest during, commercial litigation.
Chapter 4.5

The Future of Commercial Mediation and Commercial Litigation

CPR has presented a fundamental structure for court referral to commercial mediation in England and Wales. The Lord Chancellor in April 2000 made adamant of the plans of his Department that it would fully attempt to maintain court mediation pilots, even though it is not so far apparent to what scope any schemes will present for court-annexed mediation. The Lord Chancellor's ADR Discussion Paper set out a number of potential alternatives for the future; including the following, firstly, commercial mediation schemes, using court facilities, which could be attached to almost every civil and high court trial centre, supported with lines of the Central London County Court mediation scheme. Secondly for smaller claims, an off the peg mediation scheme which would sustain costs proportional to the value of the claim. Such a scheme might necessitate court staff to administer the mediation and arrange mediators. It is probable that such a scheme would engage time-limited mediations and fixed fees. Thirdly for higher value cases, private mediation is probable to be appropriate and the court's role, as in the Commercial Court mediation scheme, is possible to be restricted to identifying appropriate cases for mediation and providing parties with lists of mediation organisations.\(^{116}\)

In observation to court referral mediation, funding in mediation, mediation training and standards and a range of legal issues in mediation, they necessitate a vast amount of contemplation and debate within the United Kingdom if this transition is too made from mediation practice to mediation profession. Furthermore, commercial mediation in the United Kingdom has to an extent been supply driven, with proposals coming from government and a range of professional, trade and community organisations. A large amount of the focus over the next couple of years is likely to be on what can be done or achieved to increase awareness, and in turn use, of mediation by solicitors and the public.

It can be said that ADR seems to encounter the various principles for effective civil justice, the majority of people with legal problems or issues chose to use ADR have remained very low, even where there are convenient and free schemes available. It is not a clear cut as to why this may appear to be. Professor Genn’s research (1998), *The Central London County Court Pilot Mediation Scheme: Evaluation Report, London: Lord Chancellor’s Department*, found that just 5% of cases did the parties agree to try mediation, despite numerous attempts to stimulate demand. It was less likely to be used where both parties had legal representation\(^{117}\).

Many people who contemplate litigation will first go to a solicitor; Professor Genn’s research shows widespread misunderstanding about mediation processes amongst solicitors. Also many disputants did not know what was involved and were therefore not able to advise clients on whether their case was appropriate for any form of ADR, or the benefits that might flow from seeking to use it. Solicitors were apprehensive about showing weakness through accepting mediation in the context of traditional adversarial litigation. Litigants were also hostile to the idea of compromise, particularly in the early stages of commercial litigation.

Furthermore from Genn’s research it can be seen that commercial mediation mainly functions in the shadow of normal commercial litigation procedures. The main disadvantage of this procedure means that there is more of an incentive for the parties to settle during commercial mediation. But changes can to an extent strengthen and weaken the existing low level of demand. Although it can be said that education of the profession and a change of commercial litigation culture could strengthen the demand. In order to encourage a bit of enthusiasm to the grass root of the profession which is fundamental, it is essential for mediation proponents to focus on the value that mediation adds to normal settlement negotiations between solicitors, rather than just setting up mediation in opposition to trial. Commercial mediation can add value to the normal claims settlement process in civil disputes. It offers a liberating quasi ‘day in court’ to parties.

\(^{117}\) [www adr civiljusticecouncil gov uk](http://www.adr.civiljusticecouncil.gov.uk)
It can be said that in the future ADR will play a more prominent and important role in the resolution of disputes. It is already widely used in the US where the law frequently requires parties to try mediation before their case can be set down for trial. It is generally accepted that the UK will see a similar expansion in the use of ADR, as both the courts and the legal profession begin to take ADR, more seriously than they once did. Following Lord Woolf’s reforms of the civil justice system, the new rules of procedure in the civil courts impose on the judges a duty to encourage parties in appropriate cases to use ADR and to facilitate its use. Parties can request that court proceedings be postponed while they try ADR and the court can also order a postponement for this reason. Backing up this position is the fact that the Government has said, in the explanatory notes to the Access to Justice Act 1999, that in time they hope to extend public funding increasingly to cover the use of ADR.

In January 2009, Lord Justice Jackson was appointed to review the rules and principles governing civil litigation costs and to make recommendations to promote ‘access to justice’. In Lord Justice Jackson’s report presented findings of his review and proposes to the civil litigation system in England and Wales. The final report of Lord Justice Jackson was delivered to Sir Anthony’s successor, Lord Neuberger, in late December 2009 and was published on 14 January 2010.\(^{118}\)

Lord Justice Jackson in his final report presented widespread proposals, which ideally were aimed to be a “coherent package of interlocking reforms designed to control costs and promote access to justice.”\(^{119}\) Lord Justice Jackson also addressed key questions and issues which had an impact on the current costs regime. This included existing cost principles, for example the requirements of the losing party to pay costs to the winning party, there was also the issue of case management and procedural rules that have no costs and how changes in procedure could lead to more proportion costs.

Some of the major recommendations that can be touched upon from the report include, the success fee in conditional Fee Agreements and After the event insurance premiums which no longer be recoverable from the other side. Contingency fees to be permitted, this is to include only conventional costs that would be recoverable from

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\(^{118}\) http://www.burges-salmon.com/Practices/disputes_and_litigation/News/8053.aspx

\(^{119}\) http://www.blandy.co.uk/news-events/news/?newsArticleID=245
the other side. Referral fees for personal injury should be banned. Furthermore more
docketing of cases to specific judges who will be ultimately responsible for managing
the whole court procedure. These are just some of the significant changes that were
highlighted in the report.

It can be said that if Lord Justice Jackson's proposed reforms are to implemented by
the, this implications would mean that they would affect certainly every area of civil
litigation ranging from small personal injury claims to high value commercial
litigation and as a result to an extent have a much sought after practical and positive
effect on the civil litigation system. Various key provisions could be could be put into
practice through the Civil Procedure Rules Committee. Provisions regarding success
fee and ATE insurance premiums would require primary legislation. On an overall
basis it can be said that the impact of the report is unlikely to be apparent, until it is
clear which recommendations will be implemented and when. Although Lord Justice
Jackson is enthusiastic that his recommendations should generate greater access to
justice. It is not clear to us that this will be the case, particularly if the
recommendations are implemented on a piecemeal basis. The most likely people to
gain from the recommendations are defendants and their insurers.120

Many leading academics and scholar have also voiced the reviews in regards to the
impact of the final report by Lord Justice Jackson, Michael Todd QC, chairman,
Chancery Bar Association stated that "Lord Justice Jackson's report is a landmark
document..... An accessible civil justice system is essential to underpin economic
activity, and to promote social justice and equity. Lord Justice Jackson's proposals
will help in securing those goals. Concerns have been expressed about CFAs but we
must not throw the baby out with the bathwater. CFAs can promote, and in the past,
in the absence of viable alternatives, have promoted, access to justice, but they must
not be allowed to bring the system into disrepute."121 David Greene, from London
Solicitors Litigation Association president stated that“ Jackson has fulfilled his

121 Claire Ruckin , 'Jackson litigation review proposes overhaul of contingency fees', 14th January
overhaul-contingency-fees
stated purpose of seeking to redress the balance between claimants and defendants”122.

Chapter 5

Conclusion

In conclusion in respect of Commercial mediation and Commercial Litigation it can be seen that just simply over just two short decades, the impression we attained in the 1980s as marginal novelties have become more reputable features of disputing scene. Alternative dispute resolution, with its primary intention in ‘settlement’ and its principal institutional realisation in ‘mediation’, is now a virtually unremarkable feature of disputing cultures almost everywhere we look. It can be seen that the emergence of other forms of dispute resolutions such as commercial mediation has led to commercial litigation once being a household name, and a famous renowned process for resolving disputes left in the shadows of other dispute resolutions. From the discussion above it is evident that commercial mediation in comparison to commercial litigation is less cost effective, less formal, lets the disputants decide upon the outcomes, less rigid, whereas commercial litigation on the other hand it expensive, time consuming an emotional and distressful process and is more formal and not flexible.

Looking at these transformations in the utmost general context, it is evident to an extent that firstly they appear to comprehend assured apocalyptic forecasts of the early 1980s in respect to ‘the changing nature of state power in late capitalism’ (Santos, 1987),123 the shifting balance amongst understandings of ‘lifeworld’ and ‘system’ (Harbermas, 1981)124. Although Civil Justice has historically vacated itself as being fundamentally regarding the accessibility of third party determination, an imperative ideological shift away from that position has taken place. In the UK for example Lord Woolf in his seminal reports on Access to Justice (1995; 1996) categorised the prime objective of civil justice as the sponsorship of settlement, with judgement compact to the solution of last report. In respect to introducing the cultural change he wanted to bring about, the unselfconsciously of settlement as justice, leaving behind foundational images formed in the classical world and subsequently

124 Simon Roberts and Michael Palmer, Dispute Processes, ADR and the Primary Forms of Decision-Making, 2005
sustained over millennia in the Judeo, Christian Islamic traditions. Virtually without any fuss or protest, the Civil Procedure Rules 1998 now realise this novel vision. So settlement is now civil justice, just as ‘command’ has retreated behind ‘inducement’.  

The global image at this point in time is changing dramatically, to make or consider any accurate forecast of what the civil justice system will look like in a decade from now on, and while there have been some suggestive markers that have already been laid down. While one strand of ADR represents a movement of escape, of resistance to lawyer domination, the historic resilience of lawyers is now exposed in the speed with which they have represented ADR as part of their own repertoire. ADR is now mainly known as something which lawyers do, a change replicated in the way ‘ADR units’ have been customary in numerous commercial based law firms, in the prevalent rebranding of commercial litigation departments in the promotional literature and in the numbers of big city lawyers who now claim to be ‘trained mediators’. There has been the welcome extended by the courts throughout the common law world.

Although ADR’s fugitive and polymorphous abilities might have safeguarded its equipped adoption by the legal formation, from the point of view of the commentator all of this grants a daunting task of reorientation. First, with the rediscovery of institutionalised mediation there is currently a new province evidently evident on the map of dispute processes. This field’s necessity’s to be marked out and sensibly explored. Apart from these reorientations, the greatest persistent requisite is to rethink what a court ‘is’. The regime of intervention prescribed in the new civil procedure rules evidently ratifies and combines an already reputable trend towards court sponsorship of settlement. In reassuring judges to act as mediators, the rules similarly signal a profound variation in the mode of intervention historically practised by the English judiciary.

The issue in respect of determination of lawyers the fact that they are going to be mediators, and that commercial mediation ought to convert a reputable part of legal practice, has inferences together for the nature of mediation and for the uniformity

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125 Simon Roberts and Michael Palmer, Dispute Processes, ADR and the Primary Forms of Decision-Making, 2005
framework inside which it progresses. The new professional in dispute resolution appears broadly set upon developing mediation as a narrow, facilitative intervention, compassionate of party decision-making. But in so far as commercial mediation progresses in parallel in the perspective of established legal practice, it is quite difficult to see it maintain these confined objectives, concentrated amongst the support of communication amongst the parties. It is probable to evolve, rather, and evaluative intervention, more akin to specialist advisory and consultative processes.

A parallel dualism is threatened in the sphere of regulation. The law society and the bar are at present looking for comprehensive control over their members in respect of exercise of mediatory roles, than just seeing this activity as something outside legal practice. This determination is already forming a parallel regime of regulation together with those evolving among the new professionals. This essential ought to be a thoughtful complication as it will only be through the survival of the ‘mediator’ as an independent professional that distinctive practice standards and institutions of quality assurance will crystallise.

It can be seen as from above as argued that the novel determination of common law courts to act as sponsors of settlement signifies a fundamental shift when thought about in the context of existing understandings of what courts are and what they do. In the context of reaching, the involvement is if the court in a domain hitherto occupied by the parties and their professional representatives alone. Old understandings about what is ‘private’ and what is ‘public’ in the sphere of dispute management have already become blurred with these developments that have taken place, but the likely future evolution of processes around the courts still is uncertain. One prospect in respect of this might be the gradual evolution of a new, comparatively discrete phase of institutionalised settlement seeking, interposed between private negotiations and the commencement of commercial litigation, with commercial litigation itself becoming further narrowly attentive on moving to trial and judgement. The sharp decrease in relation to the number of starts in the civil courts, as a result the new procedural regime was introduced conceivably in itself forecasts this outcome. Certainly, most lawyers are not contented for a court to be supervising their negotiations. This in itself proposes that the alternative opportunity of the present hybrid process continuing in the long term is implausible. So, with the identity if the
mediator, the lawyer and the court ambiguity, additional changes of a fundamental kind must, at slightest potentially, endure in prospect. The fact that ‘courts’ continue to be constituted in this negotiated space at transitional level can be read either as a grand, imaginative leap or as a sad failure of institutional design\textsuperscript{126}.

\textsuperscript{126} Simon Roberts and Michael Palmer, Dispute Processes, ADR and the Primary Forms of Decision-Making, 2005
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Access to Justice Act – AJA
After the Event Insurance – ATE
Before the Event Insurance – BTE
Centre for Effective Dispute Resolution – CEDR
City Disputes Panel – CDP
Civil Justice Reform – CJR
Civil Procedure Rules - CPR
Civil Rights Act – CRA
Conditional Fee Agreement – CFA
Federal Rule of Evidence – FRE
Human Rights Act – HR Act
Local Housing Authority - HRA
Market ADR Commitment – MAC
Solicitors Code of Conduct – SCC
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