ADR in England and Wales: A Successful Case of Public Private Partnership

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1. Introduction

The judiciary is traditionally regarded as one of the three state powers and it is the duty of the state to organize a justice system, build the necessary legal and tangible infrastructure, recruit judges and make the services available to the public at a small cost. The state subsidizes the system by employing and often training judges and accordingly guaranteeing their competence and independence. Depending on cultural attitudes, judges and courts are deemed either an emanation of state and expression of state power (civil law model) or mere service, albeit public service providers (common law model).

In the wave of liberalization and privatization of public services that swept the western world as well as the emerging markets in the late twentieth century, alternatives to state judicial systems have been introduced. The United Kingdom[1] has been one of the driving forces behind such reforms in Europe; the motto of reform being that of 'access to justice'.[2]

Parallel to the state judicial system, a private independent but binding justice system exists and is activated at the initiation of disputants. Arbitration arguably predates state courts and is nowadays widely used for private commercial disputes, often with an international element. Its statutory introduction in the late seventeenth century[3] was justified as an alternative to a rigid and formalistic litigation system.[4] In arbitration, disputants retain the arbi-

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1 Northern Ireland and Great Britain comprise the United Kingdom (UK), the principal geographic area to which parliamentary expressions apply. But, as in the case of Great Britain, the United Kingdom is a larger area than is associated with English law.

2 Chapter 1 of *Access to Justice – Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*, published by the Stationery Office in June 1995. *Final Report – Access to Justice*, July 1996. Both reports were prepared by a Working Party headed by Lord Woolf. *See* also M. Cappelletti & B.G. Garth, *Access to Justice, Volume 1: A World Survey,* (Alphen aan den Rijn and Milan: Sijthoff & Noordhoff, 1978); H. Genn, *Paths to Justice: What People Do and Think About Going to Law,* (Oxford: Hart, 1999) H. Genn & A. Paterson, *Paths to Justice Scotland: What People in Scotland think and do about Going to Law,* (Oxford: Hart, 2001).

3 The earliest law dedicated to arbitration in England was in 1698. It enabled the courts, with the parties' consent to refer the disputes to arbitrators but did not limit the court's right to intervene or control the arbitration process. *See* further M.J. Mustill & S.C. Boyd, *Commercial Arbitration,* 2nd ed., (London & Edinburgh: Butterworths, 1989) at 434–448.

4 V.V. Veeder, "Evidential Rules in International Commercial Arbitration: From the Tower of London to the New 1999 IBA Rules" (1999) 65 *Arbitration* 291 at 293.

trators, and pay all relevant expenses. Over the years arbitration has been institutionalized and often judicialized.

More recently, in the late twentieth century, systems of alternative dispute resolution (ADR)[5] were introduced and were often entrenched in the legal system overnight. Some ADR systems are significantly older but there are no sufficient records and rarely a regulatory regime. Modern ADR is a voluntary system, according to which the parties enter a structured negotiation or refer their disputes to a third party for evaluation and/or facilitation of resolution. Especially in that the justice system was flooded by disputes of variable importance and complexity, and that the parties are almost invariably intimidated by the atmosphere in the court room and the litigation process itself, ADR has now become an acceptable and often preferred alternative to judicial settlement or settlement of disputes by arbitration.

This chapter uses the general term 'ADR' rather than the specific terms of 'mediation' and 'conciliation'; the purpose is to draw conclusions relevant for all ADR types. Where necessary definitions will be given and delimitations made. Moreover, the term ADR is used in its European context, which does not include arbitration.[6] Hence, for the purposes of this chapter ADR covers a variety of consensus-based processes, which provide an alternative to litigation and binding arbitration. Classic (binding) arbitration requires the agreement of the parties for proceedings to commence but does not re-

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5 H. Brown & A.L. Marriott, *ADR Principles and Practice*, 2nd ed., (London: Sweet & Maxwell, 1999); R. Bernstein, J. Tackaberry, A.L. Marriott & D. Wood, *Handbook of Arbitration Practice*, 3rd ed., (London: Sweet & Maxwell/Chartered Institute of Arbitrators, 1998) at 585–601; T. Stipanowich & P. Kneckell, *Commercial Arbitration at Its Best*, (New York: CPRI & ABA, 2001); M. Hoellering, *Comments on the Growing Inter-Action of Arbitration and Mediation in International Dispute Resolution: Towards an International Arbitration Culture*, ICCA Congress Series No. 8 (Deventer and Boston: Kluwer, 1998) at 121–124; K. Mackie, K, D. Miles & W. Marsh, *Commercial Disputes Resolution – an ADR Practice Guide*, 2nd ed., (London: Butterworths, 2000); M. Freeman, *Alternative Dispute Resolution*, (Aldershot: Dartmouth, 1995); J. Nolan-Haley, *Alternative Dispute Resolution in a Nutshell*, 2nd ed., (St Paul: West, 2001); E. Carroll & K. Mackie, *International Mediation – The Art of Business Diplomacy*, (The Hague and Boston: Kluwer, 2000).

6 J.D.M. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration*, (The Hague, London and Boston: Kluwer Law International, 2003); E. Gaillard & J. Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, (The Hague and London: Kluwer Law International, 1999); A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration*, 3rd ed., (London: Sweet & Maxwell, 1999). *See* also Y. Dezalay, & B. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*, (Chicago & London: University of Chicago Press, 1996).

quire their agreement for the resolution of the dispute. In ADR such an agreement is a prerequisite for settlement.

This chapter deals with ADR in England and Wales[7] and provides a 'bird's eye view' of the current infrastructure. Some limited comparative remarks will also be made. While the wider term ADR is used, the focus is on mediation and conciliation.

In particular, this chapter first considers the evolution and development of ADR in England in the context of civil justice reforms (Part 2), and the established regulatory and institutional support, before examining current attitudes to ADR in England (Part 3). Finally, a prediction about the future of ADR in the UK is offered (Part 4).

2. Evolution and Development of ADR in the UK

The history of ADR in the United Kingdom is a companion of the history of the debate about civil justice reform. In this section the references of the stages of evolution of ADR in the UK are followed by the qualitative assessment of the shift of focus of disputes referred to ADR. Finally, an attempt is made to integrate ADR in the web of dispute resolution mechanisms available in England and Wales.

a) History of ADR in the UK – Civil Justice Reform

The introduction of the discussion paper of the Lord Chancellor's Department on Alternative Dispute Resolution in November 1999 states that

> *This Government has embarked on the most radical programme for the modernisation of the civil justice system for 120 years. Encouraging and improving the ways, which enable those with legal problems*

7 English law applies in England and Wales. Great Britain, the political geographic term for England, Wales and Scotland, has no common legal system. Many English statutes are applicable in Scotland, but the Scottish private law is based primarily on the civil law and principally on Roman law, the result of an alliance with the continent in the 14th and 15th centuries intended to inhibit recurrent English expansion. After union with England in the Treaty of 1707, the development of Scottish law was influenced largely by the English common law. Since the accession of the United Kingdom in the European Community, some aspects of private law are harmonized at European level for both England and Scotland.

> *to avoid disputes, or to resolve them outside the court system, have an important part to play in that programme.*[8]

Indeed significant reforms occurred in the 1990s. First, in 1996 the new *English Arbitration Act* was introduced[9] and on 26 April 1999 the *Civil Procedure Rules* (CPR)[10] came into effect and replaced the *Rules of the Supreme Court* (RSC) and *County Court Rules* (CCR). The CPR implemented the changes recommended by Lord Woolf's *Access to Justice*[11] and also provided wide support for ADR. These reforms will be discussed in order of the decade of their introduction.

i) 1960s

The discussion in the 1960s was predominately North American and concentrated on a widespread criticism of state institutions and the role of state. The debate seemed to evolve also around the concepts of judgment and settlement.[12] The discussion had a theoretical-jurisprudential[13] and/or a historical-comparative[14] flavor.

ii) 1970s

The (further American) debate in the 1970s focused on the pitfalls of litigation and adjudication and the merits of settlement.[15] It also addressed the role of lawyers and was critical of the adversarial nature of proceedings before courts and other dispute processes where lawyers were involved.

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8 Published in November 1999. Available also at http://www.lcd.gov.uk/consult/civjust/adr/indexfr.htm.

9 *Arbitration Act 1996* (c. 23), which came into force on 31 January 1997.

10 *Civil Procedures Rules* (SI 1998 No. 3132) which came into force on 26 April 1999; the rules are also accessible at http://www.lcd.gov.uk/civil/procrules_fin/menus/rules.htm.

11 Lord Woolf, *Access to Justice – Interim Report to the Lord Chancellor on the civil justice system in England and Wales* (June 1995) and *Final Report – Access to Justice*, July 1996. See also http://www.lcd.gov.uk/civil/finafr.htm.

12 M. Palmer & S. Roberts, *Dispute Processes – ADR and the Primary Forms of Decision Making* (London: Butterworths, 1998) at 25–26.

13 Above Note 12.

14 J.P. Dawson, *A History of Lay Judges* (Cambridge, Mass: Harvard University Press, 1960); J.P. Dawson, *The Oracles of Law* (Ann Arbor: University of Michigan Law School, 1968).

15 W.E. Burger, "Agenda for 2000 ADR – Need for Systematic Anticipation", (1976) 70 *Federal Rules Decisions* 92–94; See also above Note 12 at 27–29.

iii) 1980s[16]

The discussion acquired more structure and depth in the 1980s with the introduction of the concept of informal justice and the critique of informalism.[17] Issues of dispute resolution were discussed and debated, such as the option of resolving disputes without lawyers or without reference to law.[18] Issues of settlement also became the topic of extensive and seminal academic discussion.[19] The term 'ADR' came into general use in the 1980s.[20]

A further impact of the wider debate was that academic lawyers began to refer to dispute processes rather than litigation or adjudication and that the word 'dispute' acquired a wider meaning.[21]

In the UK a practice direction was issued relating to conciliation in family proceedings: i.e. *Practice Direction (Family Division: Conciliation Procedure) 2 November 1982*.[22] According to the statement a pilot conciliation was put in operation from January 1983.[23] Towards the end of the 1980s the first UK ADR institutions emerged.

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16 Above Note 12 at 29–44.

17 R.L. Abel (ed.), *The Politics of Informal Justice, Volume 1: The American Experience*; *Volume 2: Comparative Studies*, (New York: Academic Press, 1982); B. de Sousa Santos, "Law and Community: The Changing Nature of State Power in Late Capitalism", in Abel, above, Volume 1, at 261–263; M.R. Damaska, *The Faces of Justice and State Authority*, (New Haven & London: Yale University Press, 1986).

18 J.S. Auerbach, *Justice without Law? Resolving Disputes Without Lawyers*, (Oxford: Oxford University Press, 1983); D. Bok, "A Flawed System of Law and Practice Training" (1983) 33 *Journal of Legal Education* 570–585; L.L. Riskin & J. Westbrook, *Dispute Resolution and Lawyers*, (St Paul, Minn: West, 1987); J.S. Murray, A.S. Rau & E.F. Sherman, *Processes of Dispute Resolution: The Role of Lawyers*, 1st ed., (Westbury, New York: Foundation Press, 1989); 2nd ed., (1996).

19 O.M. Fiss, "Against Settlement" (1984) 93 *Yale Law Journal* 1073–1090; A.W. McThenia & T.L. Schaffer, "For Reconciliation" (1985) 94 *Yale Law Journal* 1660–1668; O.M. Fiss, "Out of Eden" (1985) 94 *Yale Law Journal* 1669–1673.

20 Above Note 12 at 45.

21 H. Brown & A.L. Marriott, *ADR Principles and Practice*, 2nd ed., (London: Sweet and Maxwell, 1999) at paras 1-001 – 1-042; P. Stein, *Legal Institutions: The Development of Dispute Settlement*, (London: Butterworths, 1984).

22 [1982] 1 WLR 1420; (No. 2) [1984] 1 WLR 1326; they were both cancelled by a subsequent direction in 1991.

23 See further A. Bottomley, "Resolving Family Disputes: A critical review", in M. Freeman (ed.), *State, Law and the Family: Critical Perspectives*, (London & New York: Tavistock, 1984); S. Roberts, "Mediation in Family Disputes" (1983) 46 *Modern Law Review* 337–357.

iv) 1990s

Discussion about ADR in the UK was fully developed in the 1990s with a focus on litigation mania [24] and the crisis in civil justice.[25] In the early 1990s two reports were published with recommendations about ADR, one commissioned by the General Council of the Bar,[26] the other by the Law Society.[27] At the same time, a new practice direction was issued to replace the pilot conciliation scheme used in family proceedings and to reflect changes in the *Children Act: Practice Direction (Family Division: Conciliation Procedure) 18 October 1991*.[28] All these changes have received some criticism.[29]

It is intriguing that in England the driving force for all reforms was lawyers involved in commercial litigation, a few academics, and the courts. As far as the government is concerned, both the Lord Chancellor's Department[30] and the Department of Trade and Industry[31] also played a significant role in the enhancement of ADR.

In fact the commercial court, which was founded in 1895 with a specialist mandate, has been in the forefront of procedural innovation and prides itself on the speed with which matters can be resolved. A high percentage of cases before the Commercial Court are settled before trial, although very often at a late stage after substantial costs have been incurred and following a considerable number of court hearings. In 1993, while recognizing that there are certain disputes which will always have to be resolved at trial, such as those on which the parties require an authoritative ruling, the court decided to experiment, very tentatively, with the possibility of encouraging parties to use one of the developing methods of ADR, such as mediation and conciliation, as a possible additional means of resolving at an earlier stage of

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24 B. Markesinis, "Litigation-Mania in England, Germany and the USA: Are We So Very Different?" (1990) 49(2) *Cambridge Law Journal* 233–276.

25 A.A.S. Zuckerman, *Civil Justice in Crisis. Comparative Perspectives of Civil Procedure*, (Oxford: Oxford University Press, 1999).

26 L.J. Beldham, General Council of the Bar, Committee on ADR, *Report*, October 1991.

27 H. Brown, The Law Society, Courts and Legal Services Committee, *ADR Report*, 71/1991.

28 Practice Direction (Family Division: Conciliation) by Gerald Angel [1992] 1 All ER 431, [1992] 1 WLR 147, [1992] 1 FLR 228; H. Brown & A.L. Marriott, *ADR Principles and Practice*, 2nd ed., (London: Sweet and Maxwell, 1999) at para A3-007 at 636.

29 See, for example, P. Robertshaw, & J. Segal, "The Milking of ADR?" (1993) 12 *Civil Justice Quarterly* 23–28.

30 http://www.lcd.gov.uk and http://www.courtservice.gov.uk/notices/chanc/ ultra_new_ chan_ guide/Pt17.htm.

31 http://www.dti.gov.uk and http://www.dti.gov.uk/er/individual/et.htm.

the proceedings, either particular issues arising in a case or the dispute itself.[32]

This encouragement took the form of a practice statement: *Practice Statement (Commercial Cases: Alternative Dispute Resolution) 10 December 1993*.[33] Cresswell J, who was then in charge of the commercial list, indicated in the statement that, although judges in the Commercial Court would not themselves act as mediators or be involved in any ADR process, they would:

> *in appropriate cases invite parties to consider whether their case, or certain issues in their case, could be resolved by means of ADR. By way of example only, ADR might be tried where the costs of litigation are likely to be wholly disproportionate to the amount at stake. The Clerk to the Commercial Court thereafter kept a list of individuals and bodies offering mediation, conciliation and other ADR services.*[34]

The practice statement provided that parties or their legal advisers, before the hearing of a summons for directions, answer various questions set out in a questionnaire, the questions being designed to ensure that parties considered the possibility of attempting to resolve the particular dispute or particular issues by mediation, conciliation or otherwise. That initiative was in part prompted by the court's awareness of the use of ADR techniques in other jurisdictions and the increasing interest of major national and international commercial enterprises in ADR and their expressed support for its development.[35]

The Commercial Court moved cautiously. Next a *Practice Direction (HC Civil Litigation: Case Management)* by Lord Taylor of Gosforth was published on 24 January 1995.[36] This Direction aims at reducing cost and delay in litigation by, inter alia, requesting parties and their counsel to consider ADR. Four months later, ADR was added in Section 14 of the *Chancery Guide (April 1995)* and parties were again reminded of ADR and the list of

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32 A. Pugh-Thomas, "The Commercial Court of England and Wales and Alternative Dispute Resolution" (1999) 10(1) *International Company and Commercial Law Review* (ICCLR) 26–30 at 26.

33 Practice Statement, 10 December 1993 [1994] 1 WLR 14, [1994] 1 All ER 34; H. Brown & A.L. Marriott, *ADR Principles and Practice*, 2nd ed., (London: Sweet and Maxwell, 1999) at para A3-007 at 637.

34 [1994] 1 WLR 14.

35 Above Note 32.

36 Practice Statement, 24 January 1995, [1995] 1 All ER 385, [1995] 1 WLR 508; H. Brown & A.L. Marriott, *ADR Principles and Practice*, 2nd ed., (London: Sweet and Maxwell, 1999) at para A3-009, at 638.

mediators kept by the Court.[37] Finally on 26 July 1995 Sir Thomas Bingham, MR, issued a Practice Statement addressing the issue in relation to the Court of Appeal again encouraging the use of mediation.[38]

Waller J issued another *Practice Statement (Commercial Cases: Alternative Dispute Resolution) (No. 2)* on 7 June 1996,[39] assessing and improving the statement by Cresswell J. In this new statement, the use of early neutral evaluation is encouraged as a means of reducing costs and delay. In particular, the direction provided, inter alia, that, if it appeared to a judge:

> *that the action before him or any of the issues arising in it are particularly appropriate for an attempt at settlement by ADR techniques but that the parties have not previously attempted settlement by such means he may invite the parties to take positive steps to set in motion ADR procedures.*

The judge was empowered, where appropriate, to *"adjourn the proceedings then before him for a specified period of time to encourage and enable the parties to take such steps"*.

The Court of Appeal few months later published *ADR Guidelines* (Paragraph 11) for the Court of Appeal – ADR Scheme.[40] According to these guidelines a pro bono scheme was introduced from 1997 and legal aid was offered to cover the costs of ADR for an assisted party. Next, a *Practice Direction (Family Division: Family Proceedings: Financial Dispute Resolution)* was issued on 16 June 1997 by Sir Stephen Brown addressing, in particular, financial dispute resolution as a meeting held for the purposes of conciliation.[41]

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37 "ADR": Section 14 of the *Chancery Guide*, April 1995; H. Brown & A.L. Marriott, *ADR Principles and Practice*, 2nd ed., (London: Sweet and Maxwell, 1999) at para A3-003 at 631.

38 H. Brown & A.L. Marriott, *ADR Principles and Practice*, 2nd ed., (London: Sweet and Maxwell, 1999) at para A3-010, at 640. This Statement was accompanied by a Direction which entered into force on 4 December 1995, [1995] 3 All ER 847, [1995] 1 WLR 1188.

39 Practice Statement, 7 June 1996, [1996] 1 All ER 383, [1996] 1 WLR 1024; H. Brown & A.L. Marriott, *ADR Principles and Practice*, 2nd ed., (London: Sweet and Maxwell, 1999) at para A3-011 at 643. See also the more recent [1998] 1 *Lloyd's Rep* 126, 30 September 1997.

40 ADR Guidelines, Court of Appeal; H. Brown & A.L. Marriott, *ADR Principles and Practice*, 2nd ed., (London: Sweet and Maxwell, 1999) at para A3-002 at 630-1. *See* also the more recent [1999] 2 All ER 490, [1999] 1 WLR 1027, 19 April 1999.

41 Practice Direction, Family Division, 16 June 1997, [1997] 3 All ER 768, [1997] 1 WLR 1069, [1997] 2 FLR 304, [1997] 3 FCR 476; H. Brown & A.L. Marriott, *ADR*

Finally, Appendices 2 and 3 of the *Second Report of the Commercial Court Committee Working Party on ADR (ADR Orders in the Commercial Court)* were issued on 14 July 1998 under the Chairmanship of Colman J.[42] This Working Party started reviewing the interaction between the legal and judicial process and ADR as early as May 1995 by looking at materials and practice on court-annexed ADR schemes in Canada, the United States, Australia and New Zealand. It concluded there was no objection in principle to the court adopting a substantially more driven approach to pre-trial settlement using, where appropriate, more persuasive means than merely requiring lists of questions to be answered in writing, as envisaged by the December 1993 practice direction. They were, in particular, influenced by the fact

- *that it is in the interests of good court management and of the whole body of litigants that courts should not be clogged with heavy litigation where the parties have not even tried to achieve settlement by other means;*
- *that the efficient use of judicial manpower required that judges should be enabled if not to drive litigants from the judgment seat, at least to deter them from rushing there headlong before they had made reasonable efforts to try other means of resolving their disputes; and*
- *that the conservation and more efficient use of judicial resources was a strong justification for the courts actively to promote the resolution of civil disputes by means less costly to the state and less demanding on judicial time".*[43]

The working party rejected the possibility of allowing the court to order a stay of proceedings until ADR had been tried. This was because they feared that any such order would give justifiable grounds for complaint that litigants were being unduly deprived of their rights to have their disputes resolved in court. The working party was of course conscious that, in a great many of the disputes referred to the Commercial Court in London, both parties were foreign[44] and had been attracted to London by the high standing of

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Principles and Practice, 2nd ed., (London: Sweet and Maxwell, 1999) at para A3-013 at 647; *Rose* v. *Rose* (2002), Court of Appea1, 20 February 2002, reported in *The Times* 12 March 2002.

42 H. Brown & A.L. Marriott, *ADR Principles and Practice*, 2nd ed., (London: Sweet and Maxwell, 1999) at paras A3-004-5 at 631–634.

43 Above Note 32 at 27.

44 According to various statistics published in the press in England and the website of the Law Society 80% of the cases before the Commercial Court have at least one foreign

the court. They could, however, well choose to litigate in other sophisticated jurisdictions if they disliked the court's procedures, to the prejudice of London's position as a major financial and commercial centre. Finally, the court established a system for monitoring how successful the practice direction was in encouraging the resolution of disputes by ADR. As a further example of persuasion, the practice direction made it plain that the commercial judges would expect the parties to have thought carefully about ADR before *"the hearing of the first inter partes summons at which directions for the interlocutory process of the action are given"* and allow the parties to inform the court of the progress of any ADR attempt, to invite the court to allow further time.[45]

Before completing their work, the working party looked again at whether the Commercial Court's Listing Office should carry on the practice of maintaining lists of institutions offering ADR, accredited members and lists of retired members of the judiciary who might wish to be appointed as mediators and, in the case of the latter, whether they should indicate that some of those included might not have received ADR training. Except for retired judges, other individuals would not be personally identified, but litigants would be left to obtain the names of suitable mediators from one or other of the listed institutions.

v) ADR and Civil Justice Reform

While the working party under the Chairmanship of Colman J was deliberating, commercial court judges had found that making an order suspending the periods of time within certain interlocutory steps in the proceedings were required to be taken while the parties explored resolving their dispute by some form of ADR, was disadvantageous. It was found that this often led to the parties taking far too long to agree whether or not to attempt mediation and, if so, to identify the mediator. Instead of leading to a resolution of the litigation, such an order added a layer in the dispute resolution process and merely caused delay.

Court records showed that at least sixty-seven ADR orders had been made between June 1996 and July 1998 and it was thought that there might have been further orders, which had not been notified to the Listing Office.[46] Professor Hazel Genn published an evaluation report of the Bloomsbury

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party and in almost 50% of the cases both litigants are foreign: http://www.lawsoc.org.uk/dcs/fourth_tier.asp?section_id=3456&Caller_id=AboutUs#6133.

45 Above Note 32 at 27.

46 See above Note 32 at 28.

Central London County Court pilot mediation scheme. One of her conclusions was that, other than in the large City law firms, *"few parties or solicitors had any experience of mediation and were not knowledgeable about the process"*, and indeed there was some evidence of suspicion, if not active hostility, towards the process.[47]

A survey by the National Consumer Council found in 1995 that three out of four people in serious legal disputes were dissatisfied with the civil justice system. In fact, out of 1,019 respondents, 77% claimed that the system was too slow, 74% said it was too complicated, and 73% said it was unwelcoming and dated.[48] This was also the conclusion of the 1988 Civil Justice Review and it was against this background that the Lord Chancellor set up the Committee in 1994 under Lord Woolf, to produce a report on *Access to Justice*. In less than a year, Lord Woolf published an interim report,[49] and his final report was published in July 1996.[50] The Government made recommendations and in February 1997 the *Civil Procedure Act 1997* received Royal Assent.

Lord Woolf identified the problems of formal and inflexible proceedings, endemic delays and in short described a rather depressing picture of the English civil justice system which is incomprehensible to litigants, costs significant sums of money and makes no or little use of modern technology. The Report concluded that the time [1995] had not yet arrived for a system of court-annexed ADR or for any other form of mandatory procedure leading to ADR but added, at paragraph 32

> *It is to be hoped that most lawyers will regard it as their responsibility to be able fully to acquaint their clients with the options but, nonetheless, the courts must encourage their use. There is some evidence that ADR is less effective when the parties have not chosen for themselves to participate in it, and that is another reason for not making it*

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47 H. Genn, *The Central London County Court / Pilot Mediation Scheme – Evaluation Report*, accessible at http://www.lcd.gov.uk/research/1998/598esfr.htm. During the period of her study, mediation was offered in 4,500 cases, but only 160 mediations took place. She found that 62% of mediated cases reached a settlement at the mediation appointment and that mediation achieved earlier settlement.

48 *Seeking Civil Justice: A Survey of People's Needs and Experiences*, National Consumer Council (NCC), 1995. Available at: http://www.lcd.gov.uk/comlegser/repannexb.htm.

49 Lord Woolf, *Access to Justice – Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*, (London: HMSO, June 1995).

50 Lord Woolf, *Final Report – Access to Justice*, (London: HMSO, July 1996). Presented to the Lord Chancellor.

> *compulsory. There are also indications, however, that parties are often reluctant to make the first move towards a negotiated settlement or to suggest ADR, in case this is interpreted by their opponents as a sign of weakness. Legal advisers who are not themselves experienced in ADR often adopt a similar attitude, and so the court itself, as a neutral third party, has an important role in pointing out what options are available.* [51]

Following the two Woolf Reports[52] and the *Civil Procedure Act 1997*, most recommendations were effected from 26 April 1999 through the *Civil Procedure Rules 1998*.[53] The civil justice reform had four main objectives:

– Simplification of procedure (including expediency and cost reduction through an underlying principle of proportionality);

– Judicial case management (requiring judges to actively manage the resolution process by watering down the adversarial system;

– Pre-action protocols (aiming at encouraging contact between parties and better exchange of information; hoping that a settlement may be facilitated); and

– Alternatives to court procedure.

The first three issues will not be addressed in this chapter[54] as the focus is on the enhancement of out-of-court settlement mechanisms. There are three different ways,[55] in which the Woolf Reports and the *Civil Procedure Rules* attempt to promote ADR:

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51 Above Note 49 at 143.

52 http://www.lcd.gov.uk/civil/finalfr.htm.

53 http://www.lcd.gov.uk/civil/procrules_fin/menus/rules.htm.

54 But see A.A.S. Zuckerman, "Justice in Crisis: Comparative Dimensions of Civil Procedure" and P. Michalik, "Justice in Crisis: England and Wales", both in A.A.S. Zuckerman, *Civil Justice in Crisis. Comparative Perspectives of Civil Procedure*, (Oxford: Oxford University Press, 1999) at 3–52 and 117–165 respectively; J.A. Jolowicz, "The Woolf Reforms", in J.A. Jolowicz, *On Civil Procedure*, (Cambridge: Cambridge University Press, 2001) at 386–397; A.A.S Zuckerman, "Lord Woolf's Access to Justice: Plus ça change …" (1996) 59 *Modern Law Review* 773; M. Zander, "The Woolf Report: Forwards or Backwards for the New Lord Chancellor?" (1997) 16 *Civil Justice Quarterly* 208; H. Woolf, "Lawyers, Medics and the Courts" (1997) 16 *Civil Justice Quarterly* 302; M. Zander, "The Government's Plans on Civil Justice" (1998) 61 *Modern Law Review* 382; S. Flanders, "Case Management: Failure in America? Success in England and Wales?" (1998) 17 *Civil Justice Quarterly* 308.

55 J.A. Jolowicz, "The Woolf Reforms", in J.A. Jolowicz, *On Civil Procedure*, (Cambridge: Cambridge University Press, 2001), 386–397 at 392.

– The payment system has been changed so as to enable claimants and defendants alike to make offers relating to the allocation of costs;[56]
– The settlement at the earliest possible stage is encouraged by pre action protocols[57] and an active case management;[58]
– Official encouragement is given to the avoidance of litigation through recourse to alternative dispute resolution.[59]

Lord Woolf's report contained an entire chapter dedicated to ADR, entitled *Alternative approaches to dispensing justice*,[60] and most of these views found an expression in the *Civil Procedure Rules*.[61] The *Civil Procedure Rules* are undoubtedly the most fundamental change in civil litigation for more than a century. It seems that the objective of simplification of procedure in court, supported by encouragement of settlement out-of-court, has been successful. During May to August 1999, there was a 25% reduction in the number of proceedings issued in the county courts compared to the same period the previous year. By the end of January 2000 there was a further fall of another 23%.[62]

Several surveys were conducted by law firms to assess the impact of reforms. In a survey by Eversheds published in 2000 nearly two thirds of the respondents did not think the reforms would make them less likely to start

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56 CPR, rule 36 available at http://www.lcd.gov.uk/civil/procrules_fin/contents/parts/part36.htm; See above Note 50, Chapter 14; previously RSC order 22.

57 CPR Rule 1.4.2, available at http://www.lcd.gov.uk/civil/procrules_fin/contents/parts/part01.htm#rule1_4; See also http://www.lcd.gov.uk/civil/procrules_fin/menus/protocol.htm where protocols are listed: e.g. Protocol for the Construction and Engineering Disputes, Pre-Action Protocol for Defamation; Pre-Action Protocol for Personal Injury Claims; Pre-Action Protocol for the Resolution of Clinical Disputes; Pre-Action Protocol for Professional Negligence; See above Note 50 at 107.

58 S. Flanders, "Case Management: Failure in America? Success in England and Wales?" (1998) 17 *Civil Justice Quarterly* 308. *See* also *Cowl and Others* v. *Plymouth City Council*, Judgment 14 December 2001, reported in *The Times* 8 January 2002, (CA) per Lord Woolf, LCJ.

59 See, for example, CPR rule 3.1 available at http://www.lcd.gov.uk/civil/ procrules_fin/contents/parts/part03.htm#rule3_1 and CPR rule 26.4, available at http://www.lcd.gov.uk/civil/procrules_fin/contents/parts/part26.htm#rule26_4.

60 Above Note 49 at Chapter 18; above Note 50 at 107.

61 See, for example, CPR rules 26.4 and 1.4(2)(e) at http://www.lcd.gov.uk/civil/procrules_fin/ menus/rules.htm.

62 G. Slapper & D. Kelly, *The English Legal System*, 5th ed., (London and Sydney: Cavendish Publishing, 2001) at 286. According to http://www.cedr.co.uk, the drop in the number of claims issued in the Queen's Bench Division since the introduction of the CPR has been 37%. See *Resolutions*, Issue No. 28 (Summer 2001) at 3.

proceedings, but 43% said they were settling cases earlier and almost half said their lawyers were handling disputes differently. Mediation or ADR in general is becoming more popular: 41% have used it, compared with 30% in 1998.[63]

The encouragement of the parties to recourse to ADR has been manifested by the Court of Appeal in several recent decisions. Most notably, in *Cowl v Plymouth City Council*,[64] Lord Woolf, the architect of the Civil Procedure Rules, himself delivered a clear and unconditional reminder to those involved in public law cases to remember that trial litigation should be the last resort.

In *Asian Sky Television plc v Bayer-Rosin*,[65] the Court, in considering whether or not to allow the appeal, took into account the parties' willingness (or lack thereof) to attempt mediation.

b) From domestic mediation dealing with socially sensitive matters to business mediation

While ADR and, in particular, conciliation and mediation, have been successfully introduced in domestic, consumer, and family matters for several decades, in the last stages of the introduction of ADR the focus shifted to commercial disputes. It now appears that the construction industry is the single largest user of ADR services. In fact, there are strong arguments for using ADR mechanisms in a wide spectrum of disputes.

Part III of the *Family Law Act 1996* allows for the provision of publicly funded mediation in family proceedings. Over 250 mediation services have concluded contracts with the Legal Aid Board and further contracts were granted to ensure nationwide coverage by autumn 2000. Section 29 of the Act, which requires those seeking legal aid for representation in family proceedings to attend a meeting with a mediator to consider whether mediation might be suitable in their case, was implemented in over 60% of the country as of 1999, with the expectation of being in force across England and Wales in 2000. English developments in Community mediation, court-annexed mediation and e-mediation will now be addressed.

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63 Above Note 62 and (2000) *The Times* 2 May.

64 *Cowl and Others* v. *Plymouth City Council*, Judgment 14 December 2001, reported in *The Times* 8 January 2002, (CA) *per* Lord Woolf, LCJ, [2001] *EWCA Civ* 1792.

65 [2001] *EWCA Civ* 1792.

i) Community mediation[66]

Community mediation is the type of mediation, which is used to resolve conflicts between persons within the same community. It can also be used to resolve disputes, which people have in the workplace or with local organizations, such as health practices, and local council authorities. This type of mediation is being developed in many different areas across the United Kingdom although some areas are more advanced than others.[67] The rationale for community mediation is that interpersonal or social disagreements are better resolved outside the legal system.[68]

Community disputes can involve anything from arguments between neighbors or school children to conflict between victims of crime and their offenders. Accordingly the most widely practiced mediation in the community includes:

ii) Neighborhood mediation

Neighborhood mediation is a means of resolving disputes between people who live in the same local community or neighborhood. Disputes may involve, among other things, issues such as noise, anti social behavior, boundary problems or verbal abuse. This type of mediation, if conducted face to face, has a very high success rate.[69] It is often carried out by specially trained volunteers working for a mediation service in the local community. Many local councils in England and Wales have neighborhood mediation schemes.[70] Sometimes mediation services are provided in-house by local authorities or other organizations such as Citizens Advice Bureau,[71] while the first community mediation centre was set up in the early 1980s in

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66 L. Boulle & M. Nesic, *Mediation: Principles, Process and Practice*, (London: Butterworths, 2001); G.C. Pavlich, *Justice fragmented: mediating community disputes under postmodern conditions*, (London: Routledge, 1996); Above Note 42 at Chapter 12; Above Note 12 at 322–329.

67 http://www.mediationuk.org.uk/about.html. You can find community mediation service providers arranged by the regions of the United Kingdom. See also http://www.mediationwales.org.uk with focus on Wales and community mediation.

68 Above Note 42 at para 12-001.

69 http://www.mediationuk.org.uk/communityMediation/neighbourMediationText.htm.

70 See, for example, the Devon Mediation Service at http://www.devon-mediation.org.uk/community/process.htm and the University of Portsmouth University and Community Service at http://www.port.ac.uk/departments/community/. It has been estimated that there are more than 140 community mediation services in England and Wales.

71 See the National Association of Citizens Advice Bureau *at* http://www.nacab.org.uk and advice guide at http://www.adviceguide.org,uk/nacab/plsql/nacab.homepage.

Newham, London.[72] The mediation process normally takes between one and two hours. One meeting (on neutral ground) is usually all that is necessary, although occasionally a further meeting may be recommended. In that sense mediation is different from counseling which requires a series of attendances. When the disputing parties find a solution with which they both feel happy they are asked to sign an agreement. Their legal rights are not affected at any time and they are free to pursue a legal action if they so wish.

iii) School peer mediation[73]

Peer mediation is when school children are trained to help other pupils sort out their quarrels. These quarrels can involve anything from bullying[74] to unkind behavior, or disagreements in the playground. Pupils who are trained to use mediation skills in this way are called peer mediators. All peer mediators are taught which issues they will not be able to handle. In cases where there is violence, criminal activity or self harm of any description, referral must be made to responsible adults. Mediators need to have regular confidential supervision with the coordinating teacher or the head teacher. This gives them the opportunity to talk about any problems or personal issues they have encountered. In the United Kingdom, no two schools' programs are alike and peer mediation schemes are most successful when tailored to the needs of the school and established as part of the school's development plan. Usually trained adult mediators are invited into the school to train a group of children in peer mediation skills.[75]

iv) Victim-offender mediation[76]

Victim-offender mediation can be used at any point in the criminal justice system. In the United Kingdom it is increasingly being used with young offenders with first or second time offences.[77] However, victim-offender mediation has been practiced successfully for over fifteen years in Britain in

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72 Newham Conflict & Change Project, Christopher House, 2A Streatfield Ave., London E4 2LA, England.

73 Above Note 42 at paras 12-014-12-017.

74 *The Schools Standards and Framework Act 1999* has meant that since 1999 head-teachers have been required to draw up measures to prevent all forms of bullying amongst pupils. *See* also the child-friendly website designed by the community mediation services of North East Lincolnshire http://www.antibully.org.uk/.

75 http://www.mediationuk.org.uk/communityMediation/schoolPeerText.htm with further references to organizations involved in school peer mediation, such as the Young Mediators' Network and ENCORE Quaker Peace and Service Friends House.

76 Above Note 42 at Chapter 13, with further references.

77 http://www.mediationuk.org.uk/communityMediation/victimOffenderText.htm.

cases from petty theft to murder and manslaughter. Some people are initially hesitant to use victim-offender mediation in high level cases. However, in more serious cases, mediation has been used not as an alternative to sentencing but as a way to assist victims who experience great anger or hurt as a result of crime. It can assist participants to heal and come to terms with the offence, rather than becoming more bitter and resentful for what has happened. After a crime occurs, victim-offender mediation can be an important approach to assist victims, offenders and the wider community to cope with the psychological impact of crime, in a way that the formal criminal justice system does not. Both victim-offender mediation and conferencing are currently offered by local mediation services in various regions of the United Kingdom. Additionally, they are also used within probation services and local Youth Offending Teams. In some areas, members of the police are also trained in victim-offender mediation and conferencing. Victim-offender services do not operate in every region of the United Kingdom.[78] The British Home Office has also assisted in the establishment of the European Forum for Victim Offender Mediation and Restorative Justice.[79]

v) Current court-annexed ADR in England and Wales[80]

While private ADR has been around for considerable time, at least for business and construction disputes, court-annexed or court-encouraged ADR is rather recent. There is limited (in terms of time), yet considerable experience in England and Wales.

Currently ADR systems can be found in the following courts, tribunals and dispute types:

– Commercial Court and the Technology and Construction Court;[81]

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78 See, for example, Family Group Decision Making at http://www.fgdm.org; Howard League for Penal Reform at http://www.howardleague.org; Prison Fellowship International at http://www.restorativejustice.org; Victim-Offender Mediation Association at http://www.voma.org; Youth Justice Board (England and Wales) at http://www.youth-justice-board.gov.uk. Mediation UK is campaigning for the wider use of victim-offender mediation throughout the country.

79 http://www.euforumrj.org/html/homepage.asp.

80 Above Note 42 at paras 3-043 – 3-080.

81 CPR Rule 1.4 available at http://www.lcd.gov.uk/civil/procrules_fin/contents/parts/part01.htm#rule1_4; See also http://www.lcd.gov.uk/civil/procrules_fin/menus/ protocol.htm where protocols are listed: for example, Protocol for the Construction and Engineering Disputes, Pre-Action Protocol for Defamation; Pre-Action Protocol for Per-

– Family law disputes;[82]
– Court of Appeal;[83]
– Central London County Court;[84]
– Patents County Court;[85]
– Employment Tribunals.[86]

The increasing numbers of court-annexed or court-encouraged ADR have led to fewer cases being litigated in English courts. Undoubtedly, the introduction of ADR was not the only reason, as has been described above. The very introduction of the Civil Procedure Rules not only encourages parties to settle their disputes by recourse to ADR, it also discourages parties from litigating small claims, by introducing a principle of proportionality, according to which litigation costs should be ideally lower than the amount in dispute.

Mediation has often been well-received by the parties but there are occasions where parties have rejected mediation. It is intriguing to reproduce here a table produced by Professor Genn indicating the reasons for rejecting mediation.

Table 1

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sonal Injury Claims; Pre-Action Protocol for the Resolution of Clinical Disputes; Pre-Action Protocol for Professional Negligence.

82 Rules 2.71 to 2.77 of the *Family Proceedings Rules 1991*; Pilot Scheme organized by the Solicitors Family Law Association in 1998 which has become the national norm as of June 2000. See also [1997] 3 All ER 768, [1997] 1 WLR 1069, [1997] 2 FLR 304, [1997] 3 FCR 476.

83 Above Note 42 at para A3-002 at 630-1. See also the more recent [1999] 2 All ER 490, [1999] 1 WLR 1027, 19 April 1999; *Thompson* v. *Commissioner of Police of the Metropolis (and Hsu v Commissioner of Police of the Metropolis)*, [1997] 2 All ER 762; *Cowl and Others v Plymouth City Council*, Judgment 14 December 2001, reported in *The Times* 8 January 2002, (CA) *per* Lord Woolf; *Asian Sky Television plc v Bayer-Rosin*, [2001] EWCA Civ 1792.

84 H. Genn, *The Central London County Court / Pilot Mediation Scheme – Evaluation Report*, accessible at http://www.lcd.gov.uk/research/1998/598esfr.htm.

85 See, for example, *Unilever v. Procter & Gambler*, [1999] 2 All ER 691 per Laddie J. A recent case in the Court of Appeal dealt with trademark issues: *World Wide Fund for Nature (formerly World Wildlife Fund) v. World Wrestling Federation Entertainment Inc.*, 27 February 2002, reported in The Times 14 March 2002.

86 DTI News Release No. P/2001/30 dated 20 July 2001, which announced the review of employment disputes resolution and DTI document entitled *Routes to Resolution: Improving Dispute Resolution in Britain*, available at http://www.dti.gov.uk/er/individual/et.htm.

Reasons given to the Court by claimants and defendants for rejecting mediation[87]

Reasons for rejecting mediation given on mediation reply form sent to court	*Claimants (207 responses)*	*Defendants (197 responses)*
Mediation 'inappropriate' (no explanation)	17%	10%
No common ground / case won't settle	14%	12%
Complex evidence / expert evidence	17%	18%
Dispute over fact / law / both	11%	4%
Case will settle in any case	11%	9%
Need a court ruling / want to go to trial	9%	8%
No merit in claim / defence	6%	8%
Offer of mediation too early in litigation	3%	15%
Not appropriate for personal injury cases	6%	7%
Too expensive to mediate	4%	1%
Want case transferred to arbitration	0%	4%
Just don't want to do it	1%	5%

Insert points from the 2002 'Court-Based ADR Initiatives for Non-Family Civil Disputes: The Commercial Court and the Court of Appeal by Hazel Genn at http://www.dca.gov.uk/research/2002/1-02es.htm

The most common reasons given for not trying ADR following an ADR Order in the Commercial Court were:

- The case was not appropriate for ADR

87 H. Genn, *The Central London County Court Pilot Mediation Scheme – Evaluation Report No. 5/98*, Research Papers 1997. Reproduced also in above Note 42 at para 3-067.

- The parties did not want to try ADR
- The timing of the Order was wrong (too early or too late)
- No faith in ADR as a process in general.

And in the Court of Appeal:

- A judgment was required for policy reasons
- The appeal turned on a point of law
- The past history or behaviour of the opponent.

A search in LEXIS and WESTLAW conducted on 22 February 2006 on cases in UK Courts gave the following returns: On WESTLAW there were 683 conciliation, 661 mediation and 155 ADR cases while on LEXIS there were 378 conciliation, 487 mediation and 113 ADR cases. These numbers are far from definitive, as provided that ADR is successful, only very few ADR cases will end in court. The majority of the returns are from years 1997–2005; one more indication of the quantitative as well as qualitative importance ADR has acquired in recent years.

In terms of cases that have attempted mediation and then, not having reached a settlement, proceeded to litigation, more than 50% of such cases end in the Civil Division of the Court of Appeal. The Queen's Bench Division and the Chancery Division are the second largest users with almost 19% and 5.5% respectively. Family mediation cases rarely result in litigation and one can conclude that they achieve overall more successful out-of-court settlements.

The ADR cases that do not settle and are finally referred to litigation can be further classified according to subject matter. According to the same Lexis and Westlaw searches, ninety-two cases or 63% were ADR cases relating to socially sensitive areas in the public interest. In particular,

– Thirty-seven were family law cases;
– Thirteen were consumer disputes;
– Three was a community dispute; and
– Thirty-nine were public (administrative) law disputes.

Fifty-four cases or 37% were ADR cases relating to financial and commercial disputes. In particular,

– Thirty-one were commercial law disputes;
– Twelve were, at least in part, financial disputes;
– Five were insurance disputes;

– Fifteen were construction disputes; and
– One maritime law dispute.

Sixteen cases or 10.95% were ADR cases with a foreign element relating to the parties or the subject matter of the dispute.

It is compelling that the Court of Appeal has dealt with ninety-one ADR cases in the last few years and that the largest number of cases are of commercial nature. The number of thirty-nine public law cases is also significant.

In any event, the 1403 cases, which are reported in Lexis and WESTLAW UK are cases which for some reason were not finally resolved by conciliation, mediation or another ADR form. They are indicative of the growing number of cases that are now referred to ADR.

vi) E-mediation[88]

E-mediation may denote three different concepts: (a) mediation exclusively conducted online, or (b) mediation of e-commerce and technology disputes, or (c) mediation with use of electronic media, such as video conferencing and email. In this chapter e-mediation is used to denote either (a) or (c). UK lawyers have been involved actively in the discussion about online mediation in WIPO or many other private organizations worldwide. The use of

88 See, for example, M. Schneider & C. Kuner, "Dispute Resolution in International Electronic Commerce" (1997) 14 *Journal of International Arbitration* 5; R. Hill, "The Internet, Electronic Commerce and Dispute Resolution: Comments" (1997) 14(4) *Journal of International Arbitration* 103–110; C. Kessedjian & S. Cahn, "Dispute Resolution On-Line" (1998) 32 *International Lawyer* 977; S. Donahey, "Dispute Resolution in Cyberspace" (1998) 15(4) *Journal of International Arbitration* 127–168; S. Donahey, "Current Developments in Online Dispute Resolution" (1999) 16(4) *Journal of International Arbitration* 115; R. Hill, "On-line Arbitration: Issues and Solutions" (1999) 15(2) *Arbitration International* 199–208; contributions by P.A. Gélinas, R. Hill, N.N. Antaki, R.A. Horning & M. Schneider, "Electronic Means for Dispute Resolution: Extending the Use of Modern Information Technologies", in *Improving International Arbitration – The Need for Speed and Trust – Liber Amicorum Michael Gaudet* 51 (ICC Publication No. 598, 1998); R.E. Goodman-Everard, "Arbitration in Cyberspace – an Off-line, Low-tech Guide for Compucowards" (1998) 14(3) *Arbitration International* 345–357; S.J. Ware & S.R. Cole, "ADR in Cyberspace" (2000) 15 *Ohio St. J. on Disp. Resol*. 589; H.H. Perritt, "Dispute Resolution in Cyberspace: Demand for New Forms of ADR" (2000) 15 *Ohio St. J. on Disp. Resol*. 675; E. Katsch, J. Rifkin & A. Gaitenby, "E-Commerce, E-Disputes and E-Dispute Resolution: In the Shadow of EBay Law" (2000) 15 *Ohio St. J. on Disp. Resol.* 705.

online mechanisms for the resolution of commercial or consumer disputes continues to evolve.[89]

While undoubtedly the US has been in the forefront of developments,[90] the European Union has also contributed to the construction of a legal infrastructure. The recent e-commerce directive encourages out-of-court processes[91] following two Commission recommendations to that effect. The Commission also encourages significant research in that area; research projects include the eConfidence[92] initiative and the Online Dispute Resolution (ODR) standardization and interoperability with the ODR demonstrator of the OdrXML standard.[93] One of the most high profile projects is the Electronic Consumer Disputes Resolution (ECODIR) initiative,[94] which is being run on a test and free of charge basis until June 2002 when a comprehensive review is due. ECODIR, launched on 26 October 2001, is a consortium of eleven European and North American research institutions and private entities. Currently ECODIR is exclusively restricted to consumer (B2C: business to consumer) disputes arising out of internet transactions and it offers a negotiation and a mediation stage operating fully online.

In the UK there are a number of e-mediation projects. It is understood that they operate more successfully if there is a previous online relationship and the parties are willing to settle their dispute out-of-court. E-mediation is also particularly beneficial if the parties are not prepared to meet face to face and/or if they are geographically too far apart to make a conventional face to face mediation practical. The UK e-mediation projects include:

– E-mediator.co.uk[95] is an inexpensive online dispute resolution service from Consensus Mediation. The cost of e-mediator is half the amount parties would have to pay for a face to face mediation and uses a secure encrypted e-mail system.

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89 *See* the debates in cyberweek 2001 and 2002 via Google's cache of http://www.ombuds.org/cyberweek2002/.

90 Above Note 88.

91 Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJL 178/1 of 17 July 2000; see, in particular, Article 17.

92 http://econfidence.jrc.it/.

93 http://odr.jrc.it/index.html. Cached at Google: http://www.google.com/earch?q=cache:Hn7jXVQThkwC:dr.jrc.itodrXMLindex.jsp+odrxml&hl=en&ie=UTF-8.

94 http://www.ecodir.org and A. Patrikios, "ODR in Europe: The Launch of the Electronic Consumer Dispute Resolution (ECODIR) Project", *ADRonline Monthly* 2001 Issue 12, also accessible at http://www.ombuds.org/center/aaron/adronline2001/12/patrikios.htm.

95 http://www.consensusmediation.co.uk/e-mediator.html.

– Ford Journey Scheme[96] is a dispute resolution service, which has been developed by the Chartered Institute of Arbitrators at the request of Ford Company in order to resolve disputes between Ford Company Ltd and its Customers. The case may only be brought by the consumer and the dispute is resolved online. The service is legally binding only on Ford and the customer can reject the award and proceed through courts if they are dissatisfied with the outcome. Hence the award is not binding as in traditional arbitration and the project should be described as mediation. The service is free for the consumer.

– The Independent Dispute Resolution Scheme for customers using Web Trader approved websites.[97] This online dispute resolution service has been developed by the Chartered Institute of Arbitrators in conjunction with Web Trader in order to resolve e-commerce disputes between Web Trader Members and their consumer clients (B2C). A dispute may only be referred to arbitration under this service where the parties have initially referred the matter to Web Trader, and an amicable settlement has subsequently failed to be reached. The service is legally binding on the Trader, and the consumer can reject the award and proceed through the courts; hence the award is not binding as in traditional arbitration and the project should be described as mediation.

E-mediation raises a number of intriguing legal questions, which cannot be dealt with in the constraints of this chapter. Questions of mediation psychology and techniques are also relevant. There is no doubt, though, that e-mediation of consumer disputes will take center stage in the near future.

c) ADR in the web of dispute resolution mechanisms

ADR is now an established dispute resolution method in the web of various mechanisms for the settlement of disputes. The main focus of ADR remains on domestic disputes although it is also often used for international disputes. It is difficult, if not impossible, to have accurate statistics about the use of ADR, as the mediation agreement is a private agreement of the parties and can normally be enforced voluntarily. Only when one of the parties to such an agreement wishes not to be bound by the agreement, state courts may be used.

96 https://www.arbitrators.org/fordjourney/homepage.htm.

97 http://www.arbitrators.org/WebTrader/index.htm.

i) Some statistical data

The Department of Trade and Industry commissioned a report, published in 2000,[98] about the non-judicial resolution of international commercial disputes. ADR was considered but only data from CEDR was collected.[99] No other institutions or private mediators were asked to provide any data. According to CEDR data, in 1998 the number of international commercial disputes resolved by ADR was 257; in 1999, 450; and in 2000, 467.

Therefore the number of commercial ADR cases has doubled since 1998. The report also indicated that ADR accounts for roughly one tenth of international commercial disputes resolved in London. If one excluded maritime (and marine insurance) disputes, then ADR cases account almost for one third of international, commercial disputes.

It appears that the encouragement of ADR has been the most successful public private partnership (PPP) project of recent UK governments; a traditionally public service is now offered and performed by private providers, often with some support of public funds, to the extent that legal aid is now also made available to users of ADR services. The success of this form of PPP in dispute resolution can also be confirmed by statistics published by CEDR[100] according to which, in 2000/01, 27% of all cases administered by CEDR were cases referred by courts. In particular, it was 8% in 1998/99, 19% in 1999/00 and 27% in 2000/01.[101]

ii) ADR and arbitration

The relation between ADR and arbitration is not clearly defined and there is often no obligation for an arbitration tribunal to stay proceedings in favor of ADR. It is possible to use ADR before or during arbitration and there are several hybrids: arb/med, med/arb etc.

The use of ADR before arbitration is an added layer of dispute resolution. Such multi-step dispute resolution clauses are becoming more frequent although they are not always welcome. A prominent example can be seen in the famous *Channel Tunnel* case.[102]

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98 Source: BI – *Dispute Resolution in London* (2000). Edited by Judith Gill, Lord Hacking, Arthur Marriott & Peter Rees.

99 CEDR is the Centre for Effective Dispute Resolution.

100 http://www.cedr.co.uk.

101 Summer 2001 No. 28, *Resolutions* at 3; also available at http://www.cedr.co.uk.

102 Excerpts from Clause 67 of the Channel Tunnel contract, *Channel Tunnel Group* v. *Balfour Beatty Ltd*, [1993] 1 All ER 664 at 672 a-e.

The *Channel Tunnel* clause required an attempt to resolve disputes by reference to a Panel and if either party was not satisfied, it could have the decision of the Panel reviewed and revised by arbitration. The Court held that such a clause can only operate if it is well-defined and if reasonable time limits for the completion of each stage of dispute resolution are set; otherwise the parties may be involved in too lengthy and uncertain a process.

Therefore, careful drafting makes such a multi-step dispute resolution agreement effective and enforceable. This is, however, difficult to assess if the ADR stage is expressed to be in the form of 'good faith negotiations". This question was considered in *Halifax Financial Services Ltd v Intuitive Systems Ltd*.[103] In this case, a contract for software design included a provision to the effect that in the event of any dispute arising, the parties "*would meet in good faith and attempt to resolve the dispute without recourse to legal proceedings"*. The clause further provided for structured negotiations with the assistance of a neutral person or a mediator. McKinnon J considered that this clause was *"not nearly an immediately effective agreement to arbitrate, albeit not quite"*[104] as in *Channel Tunnel*.[105] The decision in *Halifax Financial Services* has been correctly criticized as unduly traditional (and dated) and not in accordance with the accepted approach of the courts both in England and in other jurisdictions of giving effect to dispute resolution mechanisms agreed by the parties.[106]

iii) ADR and litigation

The relation between ADR and litigation has been now settled as a result of the court-annexed ADR described above and all practice directions issued to express the newly adopted guidelines for courts. If there was any doubt left, this was lifted by the Court of Appeal in *Cowl v Plymouth City Council*.[107] Parties must consider non-judicial settlement of their dispute via ADR before resorting to courts. The question is whether ADR can be made a compulsory dispute resolution step and whether such compulsion would be in conformity with the *Human Rights Act 1998* and the *European Convention of Human Rights*. In other words should a court stay proceedings and refer

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103 [1999] 1 All ER 303. *See* also the Note O. Olatawura, "Managing Multi-Layered Dispute Resolution Under the Arbitration Act 1996 – Smashing Bricks of Intention" (2001) 4(3) *International Arbitration Law Review* 70–73.

104 Above Note 103.

105 [1993] 1 All ER 664 at 678 per Lord Mustill.

106 Above Note 42 at para 6-064.

107 *Cowl and Others* v. *Plymouth City Council*, Judgment 14 December 2001, reported in *The Times* 8 January 2002, (CA) *per* Lord Woolf, LCJ.

parties to ADR? Is that a possible violation of section 6 of the *Human Rights Act 1998*, which guarantees the rights to a fair and public trial? Neither of the two cases[108] referring to mediation in the European Court of Human Rights addressed this issue.

Current English law works on three premises:

– The existence of an agreement to refer disputes to ADR is a prerequisite for the commencement and validity of ADR proceedings.[109] Such agreement may be expressed or implied and may have been entered into before or after the dispute has arisen. Under European Community (EC) (and UK) law in consumer disputes, ADR is possible if the parties agree to refer their dispute to ADR for resolution only after the dispute has arisen.[110]

– ADR, unlike arbitration and litigation, arguably does not operate on the principle of fairness but on the principle that the parties jointly try to achieve a mutual acceptable resolution of their dispute. The neutral or the mediator should, however, be neutral and impartial.

– Should either party find the resolution of the dispute by ADR unsatisfactory, recourse to courts is always a possibility.

On the basis of the three principles above, ADR is undisputedly in conformity with the *Human Rights Act*, as ultimately the courts can review ADR settlements.

An issue which has dominated English court practice in recent years is whether parties which had declined to mediate may be sanctioned. The courts have distinguished between the situations where mediation was ordered by a court and cases in which mediation was suggested by the party that was unsuccessful in litigation.

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108 *Hokkanen* v. *Finland* (Case No. 50/1993/445/524), European Court of Human Rights, [1996] 1 FLR 289, 23 September 1994; *Elsholz* v. *Germany* (app No. 25735/94 European Court of Human Rights (Grand Chamber), [2000] 3 FCR 385, 13 July 2000.

109 *Jewo Ferrous BV v. Lewis Moore (A Firm)*, 19 May 2000, CA, 2000 WL 774981 (CA); *Stafford Engineering Services Ltd's Licence of Right (Copyright) Application*, [2000] RPC 797, 1999 WL 33210358 (PO).

110 EC Unfair Contract Terms Directive 93/13/EEC OJ L95, 21 April 1993, 29–34. Please note that *Statutory Instrument 1999 No. 2083 The Unfair Terms in Consumer Contracts Regulations 1999* makes no reference to ADR but it in Schedule 2 (q) declares arbitration not covered by legal provisions unfair, if there is no opportunity to review the decision in the courts.

In the first category, where mediation has been ordered by a court, a sanction is normally the case.[111] In the second category of cases, the Court of Appeal has refused to penalize successful parties.[112] However the Court has also stated clearly that it has the power to penalize parties who fail to or decline to mediate. The Court of Appeal has also given guidance as to how courts could and should approach such matters. The Court indicated that it could consider requests for sanctions, taking into account all surrounding circumstances. Such circumstances include the subject-matter of the case, whether the refusing party had a reasonable expectation that it would prevail on the merits in the litigation, previous attempts to settle the dispute, mediation costs being excessively (disproportionately) high, risk of delay as a direct effect of mediation and whether the mediation would have had a reasonable prospect of success.

3. Regulatory and Institutional Support

The development of ADR in England and Wales has been the result not only of civil justice reforms but also of the increased institutionalization (Part 3 a)) and professionalization of ADR providers (Part 3 b)) and the attitudinal shift in British disputing culture (Part 3 c)).

a) Institutionalization

In the United Kingdom, modern mediation could be said to have its roots in the formation of the Advisory, Conciliation and Arbitration Service (ACAS),[113] which was set up in 1974. This body was established specifically to deal with industrial disputes and it continues to do so to this day.

However, England had no commercial mediation service available until 1989 when IDR Europe Limited, which now trades as ADR Group,[114] was set up. This was followed in 1990 by the establishment of the Centre for Dispute Resolution (CEDR).[115] Meanwhile, community mediation was beginning to be explored as a viable means of resolving neighbor disputes

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111 See, *e.g.*, *Dunnett v Railtrack plc* [2002] EWCA Civ 303. The full text of the case is available at http://www.cedr.co.uk/library/edr_law/Dunnett_v_Railtrack.pdf.

112 *Halsey v Milton Keynes General NHS Trust* and *Steel v Joy and Halliday*, 11 May 2004, [2004] EWCA Civ. 576. These two co-joined appeals received a great deal of attention and many ADR experts were granted permission to intervene.

113 http://www.acas.org.uk/.

114 http://www.adrgroup.co.uk/.

115 http://www.cedr.co.uk/.

with a number of programs being set up throughout the country in the early 1990s, including the Newham Conflict and Change Project,[116] Bristol Mediation[117] and Mediation UK.[118] At the same time, the use of mediation in the Family Division of the UK Court system was being actively promoted.

The main ADR providers in the United Kingdom include the following:[119]

ADR Chambers (UK) Ltd is an Alternative Dispute Resolution Group consisting of retired Law Lords, Lords Justices, High Court Judges, Circuit Court Judges and other retired judges, as well as retired and practicing barristers and solicitors who are trained and dedicated to helping parties resolve disputes in an expeditious and cost-effective manner. The members of the group are independent contractors under the umbrella of ADR Chambers and provide support services to the members and clients. The group has its own mediation rules and also offers training services.[120]

Alternative Dispute Resolution (ADR) Group was founded in 1989 and is a specialist mediation provider. ADR Group arranges mediations in disputes relating to banking, insurance, contract, probate, financial services, contract disputes, as well as medical negligence and personal injury. It offers training in mediation in general as well as specific family mediation training. It also offers case selection for mediation and confidential advice to disputants.[121]

Arbitration a Commercial Initiative (formerly Arbitration for Commerce and Industry) provides extensive administered commercial dispute resolu-

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116 Newham Conflict & Change Project, Christopher House, 2A Streatfield Avenue, London E4 2LA, England.

117 http://transatlantic.telewest.co.uk/5.html.

118 http://www.mediationuk.org.uk/. See also a more up-to-date list of ADR links (under ADR) in http://www.civiljusticecouncil.gov.uk/457.htm.

119 See lists at http://www.venables.co.uk/arbitrat.htm and http://www.eej-net.org.uk/Ukprocess/RegADR/regadr.html. The latter site lists bodies, which participate in EEJ-Net and provide quality services. They include registered bodies dealing with banking, building societies, carpet cleaning, consumer credit, estates, financial services, funerals, furniture, floor coverings, and allied trades, housing, insurance, investment, legal services, mail order, and pensions. Most schemes are relying on Ombudsmen. See also http://www.pensions-ombudsman.org.uk for information about the pensions ombudsman scheme; http://www.abta.com for the Association of British Travel Agents scheme and http://www.eej-net.org.uk/UKprocess/RegADR/Legal/legal.htm for the legal services Ombudsman for England and Wales and http://www.slso.org.uk for the Scottish Legal Services Ombudsman.

120 http://www.adrchambers.co.uk.

121 http://www.adrgroup.co.uk.

tion services including arbitration, mediation, early neutral evaluation and mini trial.[122]

The Association of Northern Mediators, based in Leeds, promotes the use of mediation throughout the region. It provides, at no cost, lists of mediators divided up into local and subject groupings.[123] The association has recently produced a report about mediation in the north of England.[124] The survey contrasted mediation activity in the first and second halves of 2000. The total number of mediations monitored was 214: ninety in the first half and 124 in the second half. There was a 30% growth in the numbers of mediations between the first and second halves of last year. The survey also reveals how appointments of mediators were made[125] and the significant role institutionalization has played in the development of ADR. The 30% increase is almost exclusively due to the role of institutions in facilitating ADR processes.

Centre for Effective Dispute Resolution (CEDR) is the most high profile ADR institution in the UK and one of the leading international bodies in the field of ADR, dispute management and conflict prevention in the world. It was launched in 1990 with the backing of the confederation of the British Industry (CBI). It is the flagship for raising the understanding, profile and use of ADR, both in the UK and internationally.[126] It has its own rules and an extensive training program. CEDR Solve arranged 467 in 2002, 642 cases in 2003, an overall increase of 35% and 693 cases in 2004. In commercial cases, an increase of 24% from 387 in 2002 to 478 in 2003.. 27% of mediations referred to CEDR Solve were court-referred, compared with 19% the previous year and 8% the year before that. However, in 2004, 81% of cases came to CEDR by mutual agreement of the parties.

Table 2

Types of Disputes Mediated by CEDR Solve in 2004.[127]

Dispute Sector	*Percentage*

122 http://www.aci-arb.com.

123 http://www.northernmediators.co.uk.

124 A. Glaister, *Mediation Trends in the North of England*, available at http://mediate.com/articles/glaister.cfm.

125 Above Note 124.

126 http://www.cedr.co.uk.

127 http://www.cedr.co.uk/news/resolutions/Review2004.pdf.

Supply of goods / Services	22%
Property	16%
Employment	12%
Finance	9%
Professional negligence	8%
Injury	8%
Construction	6%
Partnership	5%
High Tech	4%
Insurance	4%
Intellectual Property	3%
Maritime	1%
Other	1%

Table 3

Types of dispute mediated by CEDR Solve in 2000/01 [128]

Professional negligence	17%	Shipping	4%
Construction	14%	Engineering	4%
Financial	7%	Partnership	3%
Information technology	6%	Insurance	3%
Clinical negligence / personal injury	5%	Intellectual property	3%
Employment	4%	Property	2%

The data above shows that disputes from supply of goods and services have overtaken construction disputes which were in place 1 in 2000/01 but moved to place 7 in 2004.

128 See *Resolutions* – Issue number 28, Summer 2001 at 3.

Caseload from court annexed schemes rose by 42% while the NCVO/CEDR Solve scheme for the voluntary sector rose by 46%. CEDR also launched new sector schemes. An example is the CEDR Solve Personal Injury Mediation Scheme and a pilot scheme for cases under £50,000.[129]

CEDR was also involved in a survey published in 2001 and entitled *Attitudes to Mediation*.[130] Some of the most important conclusions are discussed below.

The Centre for Business Arbitration provides reasonably priced dispute resolution services within the reach of the medium and small business. It provides both arbitration and mediation. Panelists are lawyers drawn from the specialist Bar and cover, among other areas, real property, trust disputes, company share and partnership disputes and financial services.[131]

Chartered Institute of Arbitrators is a professional body with over 9,000 members (practitioners in law, construction, shipping, finance, insurance commodities, agriculture, accountancy and medicine) in eighty-four countries. The headquarters are in London. Its objective is to promote and facilitate the determination of disputes by arbitration and alternative means of dispute resolution.[132] For these purposes the Chartered Institute has its own rules and offers accreditation and training courses.

Construction Contracts Mediators' Group (CCMG) provides access to a group of mediators who specialize in construction contract disputes. Each mediator has experienced the difficulties, which can arise and need to be overcome, in order to enable construction contract disputes to be settled amicably, economically, and on terms acceptable to the parties.[133]

The *Financial Ombudsman Scheme (FOS)* deals with consumer complaints about financial firms, which are regulated by the Financial Services Authority, and some unregulated firms after 1 January 2001. It is set up by law to help settle individual disputes between consumers and financial services providers. Accordingly, the FOS can consider most personal finance dis-

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129 See http://www.cedr.co.uk/index.php?location=/library/articles/Statistics_2004.htm.

130 In association with the Legal Director and Pinsent Curtis Biddle. The results were published in June 2001. Available at http://www.cedr.co.uk/library/articles/CEDR_PCB_survey.pdf.

131 http://www.arbitration.lincolns-inn.com.

132 http://www.arbitrators.org.

133 http://www.ccmg.co.uk.

putes. The service is free to consumers and the FOS decisions are binding on financial firms but not on consumers.[134]

Independent Mediation for Clinical Disputes (IMCD) is a specialist mediation, conciliation and arbitration service provider for clinical negligence and personal injury disputes. The service is available either directly to the public or via a legal representative. IMCD also offers training courses to solicitors, claims managers, insurance service providers upon mediation awareness, and case/client preparation.[135]

The *London Court of International Arbitration (LCIA)* is arguably the oldest arbitration institution, having been in existence since 1892. It is a truly international organization, and this is reflected in its membership and the wealth of international experience in administering cases.[136] It provides a comprehensive international dispute resolution service, and has introduced its own mediation rules.[137]

Mediation UK is an independent firm (registered charity founded in 1984 under the name FIRM: Forum for Initiatives in Reparation and Mediation, the name changed to Mediation UK in 1991) providing practical, cost efficient solutions for parties who find themselves in dispute. It offers services in matrimonial, corporate, employment, personal injury, medical negligence and community disputes.[138]

Royal Institution of Chartered Surveyors (RICS) is a major body in this field.[139] For example, in 1999, the RICS appointed nearly 8000 arbitrators, experts, adjudicators and mediators to resolve disputes concerning land, property and construction. Over 450 cases were referred under agricultural legislation, and approximately 600 arbitrators and adjudicators were appointed in building/construction disputes.[140] The main ADR services relate to property problems, lease renewals (PACT), and rent reviews. Professional Arbitration on Court Terms (PACT) is a new scheme offered by RICS and the Law Society, for the resolution of lease renewal disputes. PACT is aimed at unopposed lease renewals under the *Landlord and Tenant Act 1954*

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134 http://www.financial-ombudsman.org.uk.

135 http://www.imcd.co.uk.

136 *http://www.lcia-arbitration.com/town/square/xvc24*.

137 *http://www.lcia-arbitration.com/town/square/xvc24/rulecost/mediation.htm*. *See* also A. Winstanley, "LCIA: The LCIA Introduces New Mediation Procedure" (1999) 2(3) *International Arbitration Law Review* N31-N32.

138 *http://www.mediationuk.com, http://www.mediationuk.org.uk.*

139 *http://www.rics.org*.

140 *http://www.rics.org/resources/services/drs*.

and offers the opportunity for disputes to be resolved without the necessity of going to court.[141]

Syndicus is a group of consultants and practitioners in complaints handling, dispute resolution and training. Syndicus has a special emphasis on ombudsman issues.[142]

South Western ADR was set up in 1998 to support the Woolf Reforms and is now firmly established in the region (and beyond) as a leading provider for ADR services to the public.[143]

UK College of Family Mediators is the professional standards setting watchdog and body providing public information for family mediation in England, Scotland, Wales and Northern Ireland. It provides information on how family mediation works and on finding a mediator and it also provides ADR services.[144]

The recent survey of the Association of Northern Mediators has also shown that disputants prefer to rely on services provided by institutions rather than trying to agree on a mediator themselves. The survey establishes the direct link between the growth of ADR and the ADR institutions, where the ADR institutions have taken front line responsibility in raising public awareness (see table 3 below).

Table 4

Sources of information about mediation	*2000*	*2001*
Current legal firm	49%	56%
CEDR	28%	41%
Industrial / Trade Association	0%	11%
Other mediation organization	7%	14%
Legal directories / publications	6%	12%

141 J.E. Adams, "The Woolf Reforms and Property Litigation" (1999) *Conveyancer and Property Lawyer* 459–461; V.M. King, "PACT Gets Into Training" (1997) I(5) *Landlord and Tenant Review* 103-4; A. Salata & N. Cheffings, "Resolving Property Disputes in the Millennium" (2000) 4(4) *Landlord & Tenant Review* 78–84.

142 http://www.syndicus.co.uk, http://www.syndicus.co.uk/const.php?fp=whatwedo.

143 http://www.southwesternadr.co.uk.

144 http://www.ukcfm.co.uk, http://www.ukcfm.co.uk/training.htm.

Other	0%	36%
No answer	0%	2%

Table 5

Association of Northern Mediators Mediation Survey[145]

Sources of Mediation	2001	2002	2003
Direct referrals	31	57	98
ADR/AE/CEDR	40	36	87
Court schemes	16	16	39
Other	7	6	27

The wide range of disputes administered and the healthy competition between the many ADR service providers have contributed to the public awareness and the significant increase of ADR in the UK. At the beginning of a dispute, in most cases the parties can agree on very little. ADR institutions assist the parties by creating an environment in which disputes are administered professionally and in which disputes can be resolved to the satisfaction of the parties.

b) The professionalization of ADR

A significant step on the path towards the professionalization of ADR, in particular, mediation, has been the proliferation of training and accreditation programs and institutions.

i) Training courses

A variety of ADR training courses are offered by various ADR institutions, ranging from generic information on ADR to hands on workshops and university level graduate and postgraduate studies. Some of them include:

– *Alternative Dispute Resolution (ADR) Group* provides general ADR training courses falling into three categories. (a) Training to become a

[145] 2003 survey at http://www.northernmediators.co.uk/downloads/2003survey.pdf.

mediator; (b) Mediator post-qualification; and (c) Training in advocacy.[146] It also offers specialist family mediation training.[147]

– *Centre for Effective Dispute Resolution (CEDR)*[148] is arguably the largest provider of training. In addition to CEDR's five day Mediator Skills Training course, leading to assessment for CEDR accreditation, CEDR offers continuing professional development events for mediators. CEDR also provides a range of awareness courses and educational seminars on mediation and other aspects of effective dispute resolution. Through its system of intensive, practical training and assessment, CEDR Accreditation[149] is recognized as an international benchmark of mediation excellence. On the final two days of CEDR's five day Mediator Skills Training course participants are rigorously assessed by CEDR faculty members, themselves practicing mediators, and around 70% achieve accreditation. Accredited mediators are eligible to become registered with CEDR's continuing professional development scheme, which provides a framework for individual development. Registered mediators are recognized in the UK and internationally as offering a service of quality and integrity. Accreditation with CEDR is no guarantee of CEDR Solve mediation appointments, although CEDR accreditation is widely recognized by other mediation providers. No specific qualifications or experience are needed to undertake the Mediator Skills Training course and participants from different professions and backgrounds are encouraged.

– *Chartered Institute of Arbitrators*:[150] The Institute provides specialist training for mediators. The primary course lasts five days and uses role play exercises, interactive group exercises, video clips, demonstrations and formal lectures. Successful completion of the five day course will entitle graduates to apply for Associate Membership of the Institute. The five day course may be followed by a two day accreditation course, successful completion of which will entitle graduates to apply for Membership of the Institute.

– *Academy of Experts*[151] offers a number of training courses and educational seminars.

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146 http://www.adrgroup.co.uk/training/index.html.
147 http://www.adrgroup.co.uk/family/frame_src-fam.html.
148 http://www.cedr.co.uk/index.php?location=/training/default.htm.
149 http://www.cedr.co.uk/index.php?location=/training/accred.htm.
150 http://www.arbitrators.org/events/mediation.htm.
151 http://www.academy-experts.org/trainingmedexp.htm.

– *UK College of Family Mediators*[152] is a specialist body that offers training for family mediators.

ii) Accreditation

The introduction of training courses brings with it the question as to whether and to what extent it is appropriate to accredit and regulate ADR practitioners.[153] In the UK most of the institutions mentioned above as training courses providers also perform an accreditation function. However, their standards may vary.[154]

Accreditation can be advantageous:

– It sets benchmark standards;
– It inspires public confidence; and
– It is consistent with the movement towards the introduction of reliable public standards.

Accreditation is not an absolute indication of competence; neither is it a guarantee for those who have passed the accreditation exam that they will have a career in ADR. What the accreditation ensures is the observance of certain standards. In a number of cases parties to a dispute may want to have a person with a specific profile appointed who is not necessarily an accredited mediator. Hence, while accreditation is, in principle, welcome, it should be used as a yardstick rather than a ruler. It will indicate a set of skills but it should not bar other respected practitioners from providing ADR services. This is the case also with arbitration and the system has worked so far successfully.

What is essential is a certain level of self regulation of ADR practitioners. This will include a Code of Practice and regulation of the profession to which the ADR practitioner normally adheres. Accordingly, a person who is a member of the Law Society should apply the same ethical standards also in ADR proceedings. Also the requirement for continuing professional development is useful.

In the UK there are several Codes of Practice. These include:

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152 http://www.ukcfm.co.uk/training.htm.

153 Above Note 42 at para 24-001.

154 CEDR in its *Response to the Lord Chancellor's Department ADR Discussion Paper* at 3 suggests that it is an inappropriate conclusion that *"what is needed is more training, agreed standards, or worst of all external regulation."* (February 2000).

– Law Society Family Mediation Code;[155]
– Law Society Civil and Commercial Mediation Code;[156]
– UK College of Family Mediators Code;
– CEDR Model Mediation Procedure;[157]
– Mediation UK Standards for Mediators; and
– City Dispute Panel Expert Determination Guidelines.[158]

On 2 July 2004 a European Code of Conduct for Mediators was launched at the European Commission Justice Directorate Conference in Brussels.[159] The Code sets out a number of principles to which individual mediators can voluntarily commit. The principles cover most areas of mediation, including competence, advertising, impartiality and fees. The Code does not represent the official position of the European Commission – it was drafted by a number of leading European ADR providers – but it has the support of the European Commission.

The current system, which is a combination of accreditation and self regulation, is satisfactory and there have been no problems reported as yet. The indirect self regulation is welcome; the accreditation should not be used to create new clubs for mediators. In several areas, parties wish to have maximum autonomy and this should be respected in a voluntary process. Finally, the UK-based Civil Mediation Council has a significant role in bringing together all the major players in civil and commercial mediation and thus establishing a forum for discussion of all relevant matters and ensuring adequate professional standards. From its beginnings as an ADR Working Group in April 2002, the Civil Mediation Council was established in 2003 following a consultation with major ADR providers, professional bodies, independent mediators and practitioners. The main objectives of the Council are to focus on legal reform and education as well as acting as a focal point for information. ADR providers on the Council include ADR Chambers, ADR Group, CEDR, Chartered Institute of Arbitrators and In Place of Strife. The Council is also supported by nominated representatives from the

155 http://www.lawsoc.org.uk/dcs/third_tier.asp?section_id=2253&Caller_ID=NS81.
156 http://www.lawsoc.org.uk/dcs/third_tier.asp?section_id=2242&Caller_ID=NS81.
157 http://www.cedr.co.uk/library/documents/procedure_agreement.pdf.
158 Above Note 42, Appendix II at 563–590.
159 http://europa.eu.int/comm/justice_home/ejn/adr/adr_ec_en.htm.

Law Society, the Bar Council and the Lord Chancellor's Department while there also two academic posts on the Council.[160]

c) Attitudes to ADR

i) Professionals' attitudes to ADR

The shift from litigation to non-judicial settlement of disputes has been supported by the changing of the attitude of lawyers towards disputes and dispute settlement. This change in attitude is not only typical for lawyers but also for other professions dealing with or affected by disputes and their settlements.

In a recent major survey, *Attitudes to Mediation*, professional advisors were asked the following question. *"If you felt a serious dispute was developing, how effective do you believe each of the following sources of advice would be in informing you about how to resolve the dispute?"*. The responses were:[161]

Table 6

Most effective source of dispute	*Very/quite effective*	*Fairly/Very ineffective*
Accountants	36% (30%)	58% (64%)
Business consultants	18% (13%)	80% (79%)
Industry associations	33% (39%)	64% (60%)
Mediation organizations	65% (52%)	28% (31%)

160 See http://www.cedr.co.uk/index.php?location=/news/archive/20030307.htm (2003) and http://www.adrgroup.co.uk/ymediate4.html (2003). See also Civil Justice Council, Annual Report 2003, at page 30, available online at http://www.civiljusticecouncil.gov.uk/files/cjc_ar_2003.pdf. The Civil Mediation Council has its own website at http://www.civilmediation.org/index.php where its objectives are set out. The Civil Mediation Council also supports the operation of an independent academic group.

161 *Attitudes to Mediation* (June 2001) at http://www.cedr.co.uk/library/articles/CEDR_PCB_survey.pdf at 12 (2000 results in brackets).

Solicitors	89% (87%)	9% (14%)

The results are compelling. Disputants rely on lawyers for the settlement of their dispute and solicitors are the most trusted advisers with respect to disputes. This is surprising as lawyers were accused of causing all problems relating to traditional court procedure. Extreme adversarial process and lengthy litigious proceedings were an anathema for those seeking reform. It seems that the recent Woolf reforms have produced results. Many of the leading City law firms now have a distinct ADR group within their litigation or dispute resolution group. However, the credit is not exclusive to the Woolf Reforms. The second most trusted group in the list above are mediation organizations. This is not surprising, because as we have seen, the above ADR institutions have made a major campaign across the UK to raise public awareness and to educate potential disputants of the merits and drawbacks of ADR.

ii) General attitudes to ADR

The same survey provides valuable information on the views of commercial clients (potential disputants).

First, to the question, "Has your company's external legal firm ever spoken to you about mediation as a means of ADR?", the responses were:[162]

Yes: 65%
No: 33%
Don't know: 2%

Two in three firms have been spoken to about mediation by their external legal advisors. This figure has increased from 61% in the previous study.

Second, to the question, *"How strongly do you agree or disagree with the suggestion that mediation should be made compulsory if a business dispute goes to court?"*, the responses were:[163]

Table 7

162 *Attitudes to Mediation* (June 2001) at http://www.cedr.co.uk/library/articles/CEDR_PCB_survey.pdf at 13.

163 *Attitudes to Mediation* (June 2001) at http://www.cedr.co.uk/library/articles/CEDR_PCB_survey.pdf at 26.

Should mediation be made compulsory?	*2000*	*2001*
Strongly agree	9%	13%
Tend to agree	29%	19%
Neither agree nor disagree	14%	7%
Tend to disagree	20%	24%
Strongly disagree	28%	37%

While parties recognized the merits of mediation they did not wish it to become mandatory.

Third, to the question, *"Do you use dispute resolution clauses?"*, the responses were:[164]

Yes: 73%
No: 23%
Don't know: 4%

Three in four companies claim that their contracts with suppliers/customers currently contain clauses about the process to follow if a dispute occurs. Of these, 55% claim that mediation is included in the process. This suggests that approximately two in every five companies mention mediation in their contracts. Amongst those that do not have a clause in their contracts, 64% say they would consider such a clause.

Fourth, to the question, *"What, if any, do you consider the benefits of mediation to be?"*, the responses were:[165]

Table 8

Benefits of mediation?	*%*
Less expensive	61

164 *Attitudes to Mediation* (June 2001) at http://www.cedr.co.uk/library/articles/CEDR_PCB_survey.pdf at 27.

165 *Attitudes to Mediation* (June 2001) at http://www.cedr.co.uk/library/articles/CEDR_PCB_survey.pdf at 21.

Quicker response	47
Preserves relationships	40
Better for both sides	10
Avoids court action	14
More effective	7
You get an independent view	8
Keeping things private	21
Other (specify)	25
Don't know	2

Fifth, to the question, *"What do you consider the drawbacks of mediation to be?"*, the responses were:[166]

Table 9

Drawbacks of mediation?	*%*
A solution is not guaranteed	34
Want the resolution to be legally binding	21
It is a slower process	15
Extra costs	15
Other sides may not agree to participate	11
Other parties may not behave with honesty	14
There may not be a winner	10
Other	37
Other (specify)	6

166 *Attitudes to Mediation* (June 2001) at http://www.cedr.co.uk/library/articles/CEDR_PCB_survey.pdf at 22.

Finally, to the question, *"At what point in a serious dispute would you consider using mediation?"*, the responses were:[167]

Table 10

When to use mediation in a serious dispute?	*%*
Pre issue	65
Allocation questionnaire stage	6
Case Management Conference (CMC) stage	16
Exchange of witness statements	6
Exchange of expert reports	5
Listing questionnaire stage	2

4. Concluding remarks

ADR has developed considerably in England over the last few years and has acquired a distinct position in the dispute resolution landscape. In all fields of civil and commercial dispute resolution ADR plays an increasingly significant role. A large number of ADR institutions have emerged; they all provide comprehensive training and information as well as dispute resolution services. The qualitative and ethical standards are high although more will be done in the future towards increased self regulation. The standards of current self regulation are satisfactory.

The rapid development of ADR and its institutionalization in England and Wales suggests two conclusions:

– ADR users are not particularly concerned with the type of ADR mechanism; what matters is the resolution of the dispute rather the technique involved. That said, direct negotiations and mediation appear to be the most popular and successful ADR mechanisms. Hence, the quantitative development has made the debate about rigid classification redundant.

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167 *Attitudes to Mediation* (June 2001) at http://www.cedr.co.uk/library/articles/CEDR_PCB_survey.pdf at 23.

– ADR is becoming increasingly significant in the business sector. Most City law firms understand that they need to have a well-defined ADR practice. Litigation groups of the 1980s became litigation and arbitration groups in 1990s and now have been again renamed to Dispute Resolution groups to accommodate ADR, in general, and mediation, in particular. ADR service providers although normally structured as charities or not-for-profit organizations, if well-organized, have the ability to expand and to become significant employers.

The courts have also acknowledged the importance of ADR. Several schemes of court-annexed or court-encouraged ADR exist and the *Civil Procedure Rules* support out-of-court settlement of disputes. The full potential of the Woolf Reforms and the emergence of ADR will unfold in the next few years. However, the tripartite dispute resolution spectrum – ADR, arbitration, and litigation – is now clearly defined and delimited. Some voices suggest that England needs a Mediation Act. Irrespective of the introduction of an Act or not, mediation is here to stay. In any event, the current pragmatic view that regulation should deal with providers of service rather than the service itself, is justified and forward looking. In the last two or thee decades it has become evident that the service is dynamic and should remain so.

Moreover community mediation, which began slowly in the early 1980s is now fully established and well-rooted across the country. The peculiarity of community mediation is that results are achieved without any strict application of law. Disputes are settled within communities; the expectation and the experience are to the effect that common sense prevails.

The mediation landscape changes far too fast for us to provide an accurate picture; hence, it is rather impressionistic and, in parts, futuristic. The future, no doubt, will see the increase of online dispute resolution.[168] In any event, modern ADR in England is a successful PPP (public private partnership) as the private sector assumes the role of a public service provider. This is consistent with current economic ideology and the trends for globalization and settlement of disputes without strict application of law.

It is expected that England and Wales will continue to play a pioneering role in ADR in Europe, as the full dimensions of ADR in these jurisdictions have not yet unfolded.

168 http://www.ecodir.org and http://www.arbitrators.org/drs/onlineapps.htm.