

**COURT-BASED ADR INITIATIVES FOR NON-FAMILY
CIVIL DISPUTES: THE COMMERCIAL COURT AND THE
COURT OF APPEAL**

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CONTENTS

Executive Summary.....	i
Chapter One: Introduction.....	1
ADR policy developments in non-family civil disputes	1
Court-based ADR initiatives	8
Chapter Two: ADR Orders in the Commercial Court	11
The Commercial Court.....	11
ADR in the Commercial Court.....	15
The study	21
Chapter Three: The Outcome of ADR Orders.....	27
The take-up of ADR following an Order.....	28
The outcome of ADR procedures.....	32
Outcome of cases where ADR not used	34
Conclusion.....	37
Chapter Four: The Response to ADR Orders.....	39
ADR not tried following Order	40
Impact of ADR Orders on settlement.....	46
Disputes resolved via ADR following Order	48
Disputes not resolved via ADR following Order	53
Impact of ADR Orders and ADR procedures on time and cost	58
Wider impact of Orders on practice.....	62
Conclusion.....	66
Chapter Five: ADR in the Court of Appeal.....	69
The Court of Appeal ADR scheme.....	73
Review of the Court of Appeal ADR scheme	76
The demand for mediation.....	77
Refusal to mediate	82
The outcome of mediation.....	87
Characteristics of mediated appeal cases.....	89
Solicitors' experience of mediating appeal cases	93
Conclusion.....	98
Chapter Six: Lessons From Court-Based ADR Initiatives.....	101
The demand for ADR: open invitation v selective pressure.....	102
Reasons for refusing to attempt ADR	108
Impact of ADR on legal costs	111
Customer satisfaction	112
Administration of court-based ADR schemes	113
Facilitating further research.....	115

FIGURES

Figure 3.1: Number of ADR Orders issued in the Commercial Court per half year between July 1996 and June 2000	28
Figure 3.2: Availability of information about response to ADR Orders by half year between July 1996 and June 2000	29
Figure 3.3: Possible outcomes and routes for cases following issue of an ADR Order.....	30
Figure 3.4: Involvement in ADR procedures following the issue of an ADR Order by the Commercial Court	32
Figure 3.5: Outcome of ADR procedures.....	34
Figure 3.6: Outcome of cases in which ADR not used.....	37
Figure 5.1: Take-up of mediation offers during review period.....	79
Figure 5.2: Average delay between agreement to mediate and mediation appointment	80
Figure 5.3: Outcome of mediations	88

TABLES

Table 3.1: Summary of outcome of ADR Orders based on information from court lists, files and telephone interviews with solicitors.....	38
Table 5.1: Reasons given to the Court by Appellants and Respondents for refusing to enter the Court of Appeal ADR scheme.....	82
Table 6.1: Comparison of reasons given by solicitors for refusing court invitations to mediate or failure to attempt ADR following an ADR Order from the Commercial Court.....	109

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EXECUTIVE SUMMARY

This report presents an evaluation of the Commercial Court's practice of issuing ADR Orders in selected commercial disputes (Chapters 2 to 4) and a review of the Court of Appeal's mediation scheme established in 1996 (Chapter 5). The broad findings of these evaluations are combined in the final Chapter of the report with the results of an earlier evaluation of the Central London County Court mediation scheme to draw conclusions about court-based ADR initiatives that might be helpful in guiding future policy development on ADR.

ADR Orders in the Commercial Court

Since 1993 the Commercial Court has been identifying cases regarded as appropriate for ADR. In such cases Judges may suggest the use of ADR, or make an Order directing the parties to attempt ADR. If, following an ADR Order, the parties fail to settle their case they must inform the Court of the steps taken towards ADR and why they failed. Thus although the Court's practice is non-mandatory, ADR Orders impose substantial pressure on parties.

This study assessed the impact of ADR Orders on the progress and outcome of cases and explored reactions of practitioners to ADR Orders. The results are based on information collected from court files and interviews with solicitors relating to 233 ADR Orders made between July 1996 and June 2000.

During the first three years reviewed in the study, the annual number of ADR Orders issued was about 30. There was a substantial increase toward the end of the period, with some 68 Orders being issued in the final six months. This was the result of one or two judges significantly increasing the number of Orders issued.

ADR was undertaken in a little over *half* of the cases in which an ADR Order had been issued. However, the figures suggest *increasing* use of ADR

towards the end of the review period, supporting evidence from elsewhere of a developing interest in the use of ADR among commercial litigants.

Of the cases in which ADR was attempted, 52% settled through ADR, 5% proceeded to trial following unsuccessful ADR, 20% settled some time after the conclusion of the ADR procedure, and the case was still live or the outcome unknown in 23% of cases.

Among cases in which ADR was *not* attempted following an ADR Order, about 63% eventually settled. About one fifth of these said that the settlement had been as a result of the ADR Order being made. However, the rate of trials among the group of cases *not* attempting ADR following an ADR Order was 15%. This compares unfavourably with the five percent of cases proceeding to trial following unsuccessful ADR.

The most common reasons given for not trying ADR following an ADR Order were:

- The case was not appropriate for ADR
- 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.

ADR Orders were generally thought to have had a positive or neutral impact on settlement. A small minority believed that the Order had hindered settlement. Orders can have a positive effect in opening up communication between the parties, and may avoid the fear of one side showing weakness by being the first to suggest settlement.

Experience of *successful* ADR following an ADR Order was overwhelmingly positive. The factors most valued were the skill of the mediator, the ability of ADR to get past logjams in negotiation, the opportunity to focus on the strengths and weaknesses of cases, and client satisfaction. There was also a perception that successful mediation avoids trial costs, leading to substantial savings for clients.

When ADR was *unsuccessfully* attempted in compliance with an ADR Order there was a lower level of satisfaction. Concerns centred on the

shortcomings of neutrals, the intransigence of opponents, and the problems caused by pressuring unwilling opponents through an ADR Order to come to the negotiating table. However, some solicitors felt that even in the absence of achieving a settlement, the ADR process had been constructive.

ADR Orders issued by the Commercial Court are said to have had a significant impact on commercial practice and the advice given by the profession to clients about commercial dispute resolution.

ADR in the Court of Appeal

The Court of Appeal ADR scheme, established in 1996, is a voluntary scheme in which the court invites parties to participate. Cases are not individually selected, but, with the exception of certain categories of case, a standard letter of invitation is sent to parties involved in appeals. Since 1999 parties refusing to mediate have been asked to give their reasons for refusal. If both parties agree to mediate, the Court of Appeal arranges mediations and mediators provide their services without charge.

Between November 1997 and April 2000 some 38 appeal cases were mediated following agreement by both sides. In an additional 99 cases *one party* was willing to mediate. When the scheme had the benefit of a full-time manager, there was a significant increase in the proportion of cases in which *both sides* agreed to mediate.

The most common reasons given for refusal to mediate were that:

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

About half of the mediated appeal cases settled either at the mediation appointment or shortly afterwards. Among those cases in which the mediation did *not* achieve a settlement, a high proportion (62%) went on to trial. This suggests that there are special characteristics of appeal cases that need to be considered in selecting cases for mediation. Blanket invitations to mediate, particularly with an implicit threat of penalties for refusal, may not

be the most effective approach to the encouragement of ADR at appellate level.

Solicitors' experiences of *successful* mediations in appeal cases were largely positive. However, there were expressions of concern, even among cases that were successfully mediated, about clients' perceptions of being pushed into mediation and sometimes being pressured to settle.

Solicitors involved in *unsuccessful* mediations occasionally complained about having felt compelled to mediate, even though there had been little scope for compromise. There was evidence of an occasional mismatch between the mediator's approach to the mediation and the expectations of the parties and their advisers.

Although solicitors generally approved of the Court of Appeal taking the initiative in encouraging the use of ADR in appropriate cases, it was felt that there was a need for the adoption of a more selective approach, such as that being used in the Commercial Court.

Conclusions

Bringing together the results of research on ADR Orders in the Commercial Court, the Court of Appeal ADR scheme, and the Central London County Court mediation scheme, the following conclusions can be drawn:

- Voluntary take-up of invitations to enter ADR schemes remains at a modest level, even when the mediator's services are provided free or at a nominal cost.
- Outside of commercial practice, the profession remains very cautious about the use of ADR. Positive experience of ADR does not appear to be producing armies of converts. Explanations may lie in the amount of work involved in preparing for mediation, the incentives and economics of mediation in low value cases, and the impact of the Woolf reforms. More pre-issue settlements and swifter post-issue settlements may diminish the perceived need for ADR in run-of-the mill civil cases.
- An individualised approach to the direction of cases toward ADR is likely to be more effective than general invitations at an early stage in the litigation process. This would require the development of clearly articulated selection principles.

- The timing of invitations or directions to mediate is crucial. The early stages of proceedings may not be the best time, and should not be the only opportunity, to consider using ADR.
- Subjective perceptions of the profession support the view that *successful* ADR saves the likely cost of proceeding to trial and may save expenditure by promoting earlier settlement that might otherwise have occurred. *Unsuccessful* ADR can increase the costs for parties.
- ADR generally results in a high level of customer satisfaction. Mediators with excellent skills and familiarity with the subject-area of the dispute produce the highest levels of satisfaction. The approach of mediators needs to be matched with the expectations of parties and their solicitors.
- In order to maximise take-up of court-administered schemes there is a need for dedicated administrative support.

CHAPTER ONE: INTRODUCTION

ADR policy developments in non-family civil disputes

The English experience in the growth of ADR has been rather mixed and descriptions of its history and penetration in dispute resolution will vary depending on the form of ADR process under discussion and the type of dispute. The most common processes referred to under the ADR umbrella are arbitration, mediation, and early neutral evaluation.¹ Arbitration is a private process in which an expert arbitrator, chosen by the disputing parties, hears both sides of a dispute and issues a decision that is binding on the parties. In early neutral evaluation an evaluator with legal or other expertise hears the core evidence from the parties at an early stage in the case and offers an assessment of the strengths and weaknesses of each side's arguments in the hope of promoting an early settlement.

Mediation, perhaps the most commonly used ADR technique, is normally conceived of as a voluntary process in which a neutral facilitator helps the parties reach agreement. The parties decide the terms of the agreement and although mediation is a non-binding process, a signed mediated agreement is a legally-enforceable contract. There is a range of approaches to mediation, with one key variable being the extent to which the facilitator is prepared to be directive in trying to achieve a settlement between the parties. There is one model, sometimes specifically referred to as 'conciliation', under which the neutral third party plays an active part in the search for settlement, perhaps offering a view of the merits of the arguments advanced on either side. This variation can cause problems for generalising about mediation and may lead to confusion about the underlying values and objectives of the

¹ Mackie, K (ed) 1991 *Handbook of Alternative Dispute Resolution*, Routledge; Brown, H and Marriott, A (1993) *ADR Principles and Practice*. London: Sweet and Maxwell;

process. A hybrid ADR technique is ‘med-arb’, in which mediation is tried and, if it fails, the mediator delivers a binding decision.²

Although in England interest in mediation and early neutral evaluation is of relatively recent origin, experiments in ADR processes go back some time. For example, private arbitration of international, commercial and consumer disputes has been used for over a century in England and has increased greatly in the last twenty years, with London being a major centre for conducting international commercial arbitration. In England and Wales arbitration is usually governed by the Arbitration Act 1996, and English lawyers are used throughout the world as arbitrators of international commercial disputes.

In the field of industrial relations provision for the settlement of trade disputes by conciliation or arbitration was introduced as early as 1896 (The Conciliation Act) and 1919 (The Industrial Courts Act). The Employment Protection Act 1975 repealed the Conciliation Act 1896 and parts of the Industrial Courts Act 1919 and set up the Advisory, Conciliation and Arbitration Service (ACAS) in order ‘to help employers, workers, and their Union representatives resolve trade disputes and improve the conduct of their industrial relations’. This compulsory mediation stage in employment disputes relates both to individual and collective rights. Mediators employed by the government conciliation service adopt a range of techniques in the resolution of employment disputes, but a frequent feature of ACAS interventions is that the disputing parties do not meet. ACAS representatives act as a conduit between the parties, conducting negotiation by telephone and passing messages. As a result of recent legislation dealing with the adjudication of employment disputes, ACAS staff are now providing arbitration as well as mediation. Although there has been this extensive experience of various forms of dispute resolution in the employment field, it

² Other processes or resources that are also sometimes referred to as forms of ADR are Ombudsmen and Tribunals. Ombudsmen are impartial referees who investigate and adjudicate on complaints against public and private organisations. Tribunals operate as informal courts.

is frequently excluded from discussion of the contemporary development of ADR.

The last decade in England and Wales has witnessed a rapid growth of interest in ADR. Most of the recent attention has focused on the development of mediation. Although community mediation schemes (dealing with neighbour disputes and run by volunteers) have existed in this country since the 1970s,³ the use of mediation to resolve commercial disputes has only taken hold over the last decade. Mediation in the field of family disputes has also, over some twenty years, gradually gained acceptance.⁴ Through the 1980s and early 1990s government support was modest, but the Family Law Act 1996 saw a substantially increased commitment to the promotion of mediation in family disputes, delivered principally through the arrangements for legal aid in family cases.

In the last five years or so specialist mediation schemes and initiatives have emerged in a wide range of other spheres, including, for example, criminal justice, planning applications, debt recovery.⁵

Since the 1980s mediation providers in the fields of civil and family disputes have carried out a campaign aimed at promoting the advantages of mediation over traditional litigation. Despite their efforts, interest in mediation remained at a low ebb until the early 1990s when the interest of government and the judiciary was captured by the claimed benefits of mediation. In the field of civil disputes the attraction of mediation lay in the possibility that it could be used to divert cases from litigation, thereby reducing the cost and delay suffered by parties and offering an acceptable alternative to trial.

³ Dignan, J, Sorsby, A, and Hibbert, J, 1996, *Neighbourhood Disputes - Comparing the Cost Effectiveness of Mediation and Alternative Approaches*, Sheffield: Centre for Criminological and Legal Research, University of Sheffield.

⁴ Davis, G and Roberts, M, (1988), *Access to Agreement*, Milton Keynes and Philadelphia: Open University Press; Davis, G, (1988), *Partisans and Mediators*, Oxford: Clarendon Press.

⁵ Doyle, M 2000, *Advising on ADR: The Essential Guide to Appropriate Dispute Resolution*, Advice Services Alliance.

The publication of Lord Woolf's Access to Justice Reports in 1995 and 1996 was a watershed in the development of ADR for the resolution of non-family civil disputes. Lord Woolf devoted a chapter in his Interim Report to the subject of 'Alternative Approaches to Dispensing Justice' in which he stated that ADR had the 'obvious' advantage of saving scarce judicial resources, but that more significantly, 'it offers a variety of benefits to litigants or potential litigants. ADR is usually cheaper than litigation, and often produces quicker results'. Despite the asserted benefits of ADR for the Court Service and for litigants, Lord Woolf was clear that he did not propose that ADR should be compulsory either as an alternative or as a preliminary to litigation.

'I do not think it would be right in principle to erode the citizen's existing entitlement to seek a remedy from the civil courts, in relation either to private rights or to the breach by a public body of its duties to the public as a whole'

He did go on, however, to say that the courts should play an important part in 'providing information about the availability of ADR and encouraging its use in appropriate cases'.⁶

In the description of the working objectives for the new civil justice system being proposed, the Interim Report provides that:

*'Where there exists an appropriate alternative dispute resolution mechanism which is capable of resolving a dispute more economically and efficiently than court proceedings, then the parties should be encouraged not to commence or pursue proceedings in court until after they had made use of that mechanism.'*⁷

This emphasis on the value of alternative dispute resolution mechanisms was repeated and reinforced in the Final Report, in which the encouragement or pressure towards ADR was made quite explicit. In describing the 'new landscape' of civil litigation, the first feature specified was that 'litigation will be avoided wherever possible', and that information on sources of

⁶ The Rt Hon the Lord Woolf, *Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*, June 1995, Lord Chancellor's Department, Chapter 18, para 4, p136.

⁷ *Ibid*, Chapter 4, para 7 (3), p20.

alternative dispute resolution would be provided at all civil courts. Although there was no policy commitment at the time of the Final Report to make legal aid available for ADR, Lord Woolf also went on confidently to decree that legal aid funding would be available for pre-litigation resolution of ADR. However, the most important of Lord Woolf's introductory statements about the prospects for ADR were contained within the second feature of the new landscape of civil litigation. This second feature was that in future litigation would be less adversarial and more co-operative. In seeking to realise this ambition Lord Woolf gave the courts the power to punish lack of co-operation both prior to and during litigation. The shift in responsibility for case management from the parties to litigation to the courts effected by the Woolf reforms carried with it the power of the courts, through case management, to divert cases into ADR processes. In a crucial paragraph in the Final Report describing how the courts will encourage co-operation and punish adversarialism, Lord Woolf makes clear that:

'[T]he court will encourage the use of ADR at case management conferences and pre-trial reviews, and will take into account whether the parties have unreasonably refused to try ADR or behaved unreasonably in the course of ADR.'

When a new Government came to power in 1997, Lord Woolf's proposed reforms of civil justice were reviewed,⁸ judged to be sound, and then incorporated into the new Government's Modernising Justice programme. In their White Paper, published in December 1998, the Government made clear that it was:

*'seeking to improve the range of options available to people for resolving disputes without a formal court adjudication process. There are several different models of 'alternative dispute resolution' (ADR), including mediation, arbitration and ombudsman schemes. We are considering what contribution these can make to a fair and effective civil justice system.'*⁹

⁸ Sir Peter Middleton, *Review of Civil Justice and Legal Aid*, Lord Chancellor's Department, September 1997.

⁹ White Paper, *Modernising Justice*, December 1998, Chapter 1, Para 1.19

In so far as any justification was offered for this approach, the White Paper asserts that:

*'ADR offers a number of possible advantages. It can be less formal and adversarial; and in some cases, it may allow disputes to be resolved more quickly and cheaply.'*¹⁰

When the new Civil Procedure Rules giving effect to Lord Woolf's reforms were implemented in April 1999, the courts were given substantial case-management powers including the power to order parties to attempt mediation or another form of ADR and to stay proceedings for this to occur. Failure to co-operate with a judge's suggestion regarding ADR can result in cost penalties being imposed on the recalcitrant party.¹¹ As part of a programme of judicial training to cope with the implementation of the reforms, the judiciary has received training to raise awareness of ADR generally and, specifically, to alert them to the potential benefits of mediation in the resolution of civil disputes.

The perceived importance of ADR developments was underlined when the Civil Justice Council, established under the Chairmanship of Lord Woolf to oversee the implementation of the reforms and to monitor developments in civil justice, created a sub-committee devoted to the development ADR for non-family civil disputes.

Probably the most important manifestation of the Government's commitment to supporting the growth of ADR, however, was demonstrated among the root and branch changes made to the Legal Aid System in 2000. The Access to Justice Act 1999 (which came into effect in April 2000) established the Community Legal Service Fund administered by the Legal Services Commission (LSC). In 1998, the Legal Aid Board had agreed that the costs of mediating a non-family dispute could be eligible for public funding. However, pending its transformation into the LSC, the Board carried out consultations in 1999 and again in 2000 about the criteria that should be used

¹⁰ Ibid.

¹¹ CPR R1.4 (2) and CPR R26.4: stay of proceedings for settlement at the court's instigation.

for the funding of ADR. They were also concerned about what would be the best means of providing that funding, and, more significantly, the circumstances in which funding for litigation should be limited when ADR was available. Such a limitation could add additional pressure on funded litigants to explore ADR before any resort to court proceedings. In the current Funding Code, ADR processes appear to have achieved the same, if not greater priority for funding, both in family and non-family civil cases. Indeed, the use of an ADR process rather than court proceedings might be seen as better meeting the statutory objectives of the CLS Fund, which are:

- To achieve swift and fair resolution of disputes and avoid protracted court proceedings;
- To ensure that the dispute resolution method funded is the one most appropriate in the circumstances; and
- To obtain best value for money when funding legal services.

Despite all of the judicial and provider activity in relation to the promotion of ADR in non-family civil disputes, by the end of 1999 the Lord Chancellor's policy on ADR remained one of support and encouragement rather than representing a clearly articulated strategy. To assist in the development of such a strategy the LCD published a Discussion Paper on ADR in November 1999. The expressed aim of the Discussion Paper was to question why the demand for ADR appeared to have remained at a relatively low level and 'to identify any problems with the current ADR methods and put them right'. The Discussion Paper asked for responses on a large number of questions, the answers to which, it was hoped, would assist in basing the development of policy 'on the experience of those involved, and ensure that planned action will deliver the right results to meet the needs of users'.¹²

In May 2000 the LCD published a summary of the 133 responses received to the Discussion Paper at which time the Lord Chancellor, announced his intention to support additional ADR pilot schemes. He stated that his broad

¹² ADR Discussion Paper, November 1999, para 1.13.

strategy on ADR would be to embark on an awareness-raising campaign to ensure that parties to a dispute can access better information about the potential benefits of ADR. He also wanted to ensure that professional advisers, including solicitors, advice agencies within the Community Legal Service, and associated professions, were better informed about ADR, and when to recommend its use.

Court-based ADR initiatives

As a result of the discussion leading up to the publication of the Woolf Report, and in advance of the Government's White Paper in 1998, several court-based ADR initiatives for non-family civil disputes were established. Probably the earliest was the adoption in the Commercial Court¹³ in 1994 of the practice of issuing 'ADR Orders' *directing* parties to attempt to settle commercial disputes by means of some ADR process (normally mediation or early neutral evaluation). An evaluation of this practice and its impact is discussed in detail in this report.

A second important initiative is the *voluntary* mediation scheme set up in 1996 in the Central London County Court (CLCC) for the resolution of non-family civil disputes. This scheme began as a two-year pilot. Following a comprehensive evaluation of the scheme published in 1998,¹⁴ the Lord Chancellor decided it should continue to operate. For the purposes of comparison, the evaluation of the CLCC scheme is referred to at appropriate points throughout this Report.

A third court-based initiative is the *voluntary* ADR scheme established in the Court of Appeal (Civil Division) in 1997. A limited review of that scheme has been undertaken and is discussed in this report.

The Lord Chancellor's Department has tacitly or actively supported all of these court-based initiatives, and the schemes in the CLCC and the Court of

¹³ A court with special jurisdiction in the Queen's Bench Division of the High Court.

¹⁴ H. Genn, *Central London County Court Pilot Mediation Scheme: Evaluation Report*, 1998, Lord Chancellor's Department, Research Series, 5/98.

Appeal have had the benefit of Court Service resources. LCD is keen to see that such schemes are evaluated and this Report, commissioned and funded by the LCD, forms part of that evaluation.

Chapter Two of the Report describes the background to the practice in the Commercial Court of issuing ADR Orders in commercial cases. The discussion deals with the circumstances in which Orders are made and the design of the study undertaken to review the outcome of ADR Orders.

Chapter Three analyses the pattern of ADR Orders made in the Commercial Court, the extent to which ADR processes were actually used after the issue of an ADR Order, and the eventual outcome of cases in which Orders had been made, whether or not any ADR process had been used by the parties in order to reach a settlement of the dispute.

In Chapter Four the views of solicitors on the receiving-end of Commercial Court ADR Orders are summarised. The discussion explores solicitors' reasons for *not* using ADR after an Order was made, the perceived impact of ADR Orders on the settlement of commercial disputes, experiences of using ADR processes, and solicitors' views about the impact of ADR Orders on time and costs in commercial disputes. The Chapter concludes with solicitors' perceptions of the wider impact of Commercial Court ADR Orders on commercial practice.

Chapter Five of the Report focuses on the voluntary ADR scheme in the Court of Appeal. The Chapter discusses the background to the initiative and the development of the scheme. On the basis of a limited review of the operation of the scheme between Autumn 1997 and Spring 2000, information is provided about the take-up of the scheme by parties involved in appeals, and the reasons given for refusing to attempt mediation through the Court of Appeal scheme. Information is provided about the characteristics of appeal cases that were mediated through the scheme and the outcome of those mediations. The Chapter concludes with a summary of comments made by solicitors about mediations in which they had been involved through the Court of Appeal ADR scheme.

Chapter Six draws out some of the broad findings from the reviews of Commercial Court ADR Orders and the Court of Appeal ADR scheme. These are combined with some of the results of the evaluation of the CLCC mediation scheme in order to see what conclusions and lessons can be drawn that might be helpful in guiding policy development. The Chapter concludes with a note on the policy need for an information strategy. It argues that measures must be taken to establish procedures for collecting the data necessary for evaluation of such schemes and policy initiatives. If a strategy were implemented, answering apparently simple questions about the progress and outcome of non-family civil cases might become more straightforward in the future.

CHAPTER TWO: ADR ORDERS IN THE COMMERCIAL COURT

The Commercial Court

The Commercial Court is a court within the Queen's Bench Division of the High Court with specialist jurisdiction over commercial matters. The history of the Court dates back to 1895 when a Commercial List was established in the QBD as a result of dissatisfaction with the handling of commercial cases by the High Court and in response to growing concern about what was seen as a drift to arbitration. There were a number of attempts during the nineteenth century to establish some form of specialised commercial court that would offer to commercial litigants a court in which there was a greater familiarity with the subject matter of commercial and mercantile disputes. Since 1971 the cases on the list have been dealt with in a separate Commercial Court officially recognised by statute.¹⁵ The Judges of the Commercial Court are Puisne Judges of the High Court, nominated by the Lord Chancellor, who have special knowledge and experience of commercial affairs. The advantages of the Commercial Court to the business community are the development of a substantial body of case law that provides guidance on commercial matters and the development of procedures that are considered particularly appropriate for commercial cases. For example, by consent of the parties, the strict rules of evidence may be relaxed and cases can be decided on documentary evidence alone, thus saving time and money involved in calling witnesses to give oral evidence.

A wide variety of cases comes before the Commercial Court, ranging from very complicated litigation involving large sums of money, down to actions or arbitration matters where the issues in dispute may be narrowly defined. Although there is an archaic definition of 'commercial action' contained within Order 72 of the Rules of the Supreme Court, in practice the commercial Judge will decide on the basis of consideration of a range of

¹⁵ Administration of Justice Act 1970, s3(1)

factors whether the subject matter of the action and the issues of fact and law likely to arise and the procedures to be followed make the action suitable for the Commercial Court. These generally include:

- Contracts relating to ships and shipping
- Insurance and reinsurance
- Banking, negotiable instruments and international credit
- The international carriage of goods
- Contracts relating to aircraft
- The purchase and sale of commodities
- The operation of international markets and exchanges
- The construction and performance of mercantile contracts
- The law and practice of arbitration and questions connected with or arising from commercial arbitration
- Any other matter or any question of fact or law which is particularly suitable for decision by a Judge of the Commercial Court.

The same forms of originating process are used in the Commercial Court as for non-commercial actions. Even if a case is not started as a commercial action, an application may be made to the commercial Judge for the action to be transferred to the Commercial Court. The decision on transfer is in the discretion of the Judge. An action started in the Commercial Court may be transferred out on the order of the Judge at any stage in the action. Important features of the work of the Commercial Court are as follows:

- In many cases either one or both litigants are foreigners
- A significant part of the court's work comes from London arbitrations
- It is commonplace for cases to involve millions of pounds.¹⁶

¹⁶ See generally Sir Anthony Colman and V Lyon, *The Practice and Procedure of the Commercial Court* (4th Ed, 1995).

A Commercial Court committee was established in 1977 to consider and keep under review the working of the court and the appeal procedures in arbitration proceedings and to report to the Lord Chancellor. The committee comprises users, as well as Judges and practitioners and is designed to ‘assist the Court to remain responsive to the needs of litigants and the efficient administration of justice’. In recent years the caseload of the Commercial Court has increased significantly although it is thought that it remains small in relation to the number of commercial cases that are settled by private arbitration and in relation to the work of other parts of the QBD. As a consequence of the international element in the work of the Commercial Court, the significance of the court as ‘a very substantial earner indeed of foreign exchange in the form of invisible earnings’ has been widely recognised, including by the previous Lord Chancellor.¹⁷ The current Lord Chancellor has recently announced plans to modernise the Commercial Court with up to date IT and video-conferencing systems to help maintain its position in the world market.

Distinctive Procedures

Order 72 of the Rules of the Supreme Court makes special provision for commercial actions and their trial in the Commercial Court. Commercial actions are entered in the Admiralty and Commercial Registry and the clerk of the Commercial Court conducts listing for the Commercial Court. Order 73 concerns proceedings in the Commercial Court relating to appeals from arbitration. In April 1999, with the introduction of the new Civil Procedure Rules, the provisions of Order 72 were transferred to Practice Direction 49D, and those of Order 73 to Practice Direction 49G.

Over the years the Commercial Court has developed and modified its procedures so that they might remain appropriate for the types of case coming to the court and for the changing needs of commercial litigators. For example, a distinctive feature of the court’s procedures is that interlocutory matters are dealt with by the Judges of the Commercial Court rather than a

¹⁷ M Heaney, 9(12) *The Lawyer*, March 21, 1995, p14, quoting Lord Mackay of Clashfern.

master, since the court recognises that in commercial cases, interlocutory hearings can involve matters of considerable importance to the parties.

Trials in the Commercial Court can last from as much as six months down to a few hours and the court claims that it has the capacity to respond rapidly to the need for urgent remedies.¹⁸

Since its establishment, the Commercial Court has issued a series of Practice Directions providing guidance and modifying the procedures of the Court. In 1986 changes were made to the Rules of the Supreme Court and to practices within the Commercial Court with the object of promoting greater expedition, economy and efficiency in the conduct of commercial business. In particular, it was hoped to reduce hearing times by asking the Judges to read more of the documentation in advance of the hearing and by encouraging counsel to avoid the habit of reading aloud in court the contents of documents and extracts from cases. These important changes were summarised in a '*Guide to Commercial Court Practice*' issued by the Lord Chief Justice as a Practice Note in 1986. There have been two further editions of the Guide and the fourth edition entitled '*The Commercial Court Guide*' was published in August 1999 to coincide with the introduction of the new Civil Procedure Rules. Currently work is underway to streamline the Commercial Court Practice Direction and to move some provisions from the Guide into Rules or the Practice Direction.

Caseload

The Commercial Court has twelve Judges sitting on four days a week on full hearings. This can be compared with the remainder of the Queen's Bench Division, which has 22 courts running weekly. Although there are no separate monthly figures published for the number of Writs issued in the Commercial Court, figures obtained from the Court prior to the commencement of the research revealed that the number of Writs issued had been running at a rough average of around 160 per month. This can be

¹⁸ *Guide to Commercial Court Practice* (3rd edition) 1995, published by the Commercial Court.

compared with a rough monthly issue figure at the time in the remainder of the Queen's Bench Division of around 2,000 per month.

ADR in the Commercial Court

Since 1993 at least, through the publication of two Practice Statements,¹⁹ the Judges of the Commercial Court have been actively encouraging the use of Alternative Dispute Resolution (such as mediation, conciliation and early neutral evaluation) by litigants as a means of resolving particular issues in complex disputes or of bringing the dispute to a satisfactory conclusion.²⁰ While the first Practice Statement represented a general exhortation to parties to consider ADR as a means of resolving their dispute, the second Practice Direction, issued in 1996, took a rather firmer line.

First Practice Direction and First Working Party Report

The 1993 Practice Statement indicated that while the primary function of the Commercial Court was to decide Commercial Cases, the Judges of the Court wished to encourage parties 'to consider the use of ADR as a possible additional means of resolving particular disputes or issues'. The Statement proposed that in appropriate cases, for example where the costs of litigation were likely to be wholly disproportionate to the amount at stake, the Judges would invite parties to consider whether their case, or certain issues in their case, could be resolved by means of ADR. The Practice Statement also provided for the Guide to Commercial Court Practice to be amended to include additional questions to ensure that legal advisers in all cases considered with their clients and the other parties concerned, the possibility of attempting to resolve the dispute by mediation, conciliation or otherwise.

A Working Party on ADR was established in 1995, comprising Judges from the Commercial Court and commercial practitioners, to advise on matters relating to the encouragement of ADR in the Commercial Court. The

¹⁹ Practice Note (Commercial Court: Alternative Dispute Resolution) Cresswell J [1994] 1 All ER 34; Practice Statement: Alternative Dispute Resolution, 7 June 1996 Waller J.

²⁰ In this context ADR does not include arbitration.

Working Party published a Report in June 1996, making recommendations about the making of ADR Orders in the Commercial Court and including a draft Practice Direction intended to give effect to the recommendations. The Judges of the Commercial Court and the Commercial Court Committee agreed that it was desirable to take further steps to encourage the wider use of ADR as a means of settling disputes pending before the court. Mr Justice Waller (now Lord Justice Waller) therefore formally promulgated a second Practice Direction on ADR in June 1996.

The Second Practice Direction and Second Working Party Report

A fundamental view underpinning the recommendations of the first Report was the principle that the ADR jurisdiction in the Commercial Court should not involve a mandatory regime. If both parties were of the opinion that it was inappropriate to attempt to resolve their dispute by means of ADR, they should be free to continue with their court action.

The second Practice Direction thus provided that at the hearing for directions on the interlocutory progress of the action, the Judge would consider whether the action was particularly appropriate for ADR and if so, he could invite the parties to take positive steps to set in motion ADR procedures. If he considered it appropriate, the Judge could adjourn proceedings for a specified period to encourage and enable the parties to take such steps. Moreover, if the Judge considered that an early neutral evaluation could assist in the resolution of the dispute, the Judge could offer to provide an evaluation himself or arrange for another Judge to do so. If a Judge provided such an early neutral evaluation he would take no further part in the proceedings, unless the parties agreed otherwise.

The Practice Direction also provided that at the time of inviting parties to use ADR, a Judge could make a costs order relating to the costs that the parties might incur as a result of attempting to use ADR. If the parties could not reach a settlement by ADR during the period of adjournment, they were required to report back to the Judge what progress had been made by way of ADR. The report was to cover only the *process* adopted and its outcome, not the substance of what had occurred. The form of ADR Orders was contained

within the fourth edition of the Guide to Commercial Court Practice as follows:

'(Within the next 28-42 days) or (following exchange of lists of documents) or (following exchange of factual witness statements) or (following exchange of expert reports) or (before setting down for trial) the parties shall take such serious steps as they may be advised to resolve their disputes by ADR and, should they fail to do so, they shall inform the court by letter what steps they have taken and, without prejudice to matters of privilege, why such steps have failed. Costs of the ADR to be costs in the cause.' (pp 71-72).

In 1998 the Working Party on ADR published a second report reviewing the effect of the new jurisdiction created by the 1996 Practice Direction, considering whether it ought to be continued, and whether any changes to procedures ought to be adopted in light of the experience since 1996. The Working Party reported considered, among other things:

- The nature of Orders made under the 1996 Practice Direction
- The effect of ADR Orders on the settlement of commercial litigation
- Whether the experience between 1996 and 1998 justified continuation of the Practice Direction
- Whether ADR Orders should be made in all cases
- Whether ADR Orders should incorporate costs sanctions or other inducements to mediation

On the nature of ADR Orders made by the Court, the Working Party found that the Court had not been deterred from making ADR Orders in cases where one or even both of the parties had objected, provided that the nature of the issues or the relationship between the parties were considered appropriate for ADR. The report states that 'Experience suggests that, even where the parties are at first ill-disposed to or highly sceptical as to mediation, the intervention of a neutral may so strongly influence them that initial hostility may change to reluctant enthusiasm', although the evidence for this assertion is not provided in the Report. The Report further concludes that as Judges become more experienced in dealing with ADR Orders, they will be able to derive a more accurate 'feel' for cases particularly likely to respond to ADR Orders. The section in the report dealing with the nature of

Orders also suggests that Orders had ‘not always avoided significant delay’ in the timetable of cases.

In evaluating the effect of ADR Orders on the settlement of commercial litigation, the Working Party reported that between June 1996 and July 1998 ‘a total of at least 67 ADR Orders were made’,²¹ and that some seven letters had been received by the Listing Office indicating either that ADR had not been proceeded with or that, having been attempted, it had failed to produce a settlement.²² The Working Party took the view that whether following an ADR Order the parties had settled as a result of an ADR procedure or whether they had settled by direct bilateral negotiation was not a matter ‘of great importance’:

‘If the parties respond to an ADR Order by achieving...a settlement by direct negotiation, they will have achieved by a cheaper and less complicated mechanism the objective which such an Order was intended to help them reach.’

In considering whether the Practice Direction should be continued, the Working Party concluded that there was:

‘No doubt that in appropriate cases ADR Orders have an important contribution to make to the early settlement of commercial litigation. Even if the parties do not respond to such Orders by attempting ADR procedures, the impetus towards settlement by direct negotiation is undeniable.... The saving of costs to the parties and judicial time for the Court amply justifies continuation of the jurisdiction. In the vast majority of cases where ADR Orders have been made, successful mediation or settlement has followed.’

The Working Party further concluded that there was no evidence to suggest that one effect of ADR Orders might be to deter litigants, especially those from overseas, from referring their disputes to the Commercial Court. Indeed, the view of the Working Party was that successful ADR Orders would tend to reduce pre-trial costs and thus encourage the use of the English courts.

²¹ Data collected during the course of the present study show that between September 1996 and the end of July 1998 there is a record of 71 ADR Orders having been made.

²² Data collected during the course of the present study suggest that as an indication of failure to achieve settlement following an ADR order, this figure is an *underestimate* (see further Chapter 3).

On the question of the potential for ADR Orders, the Working Party report concluded that while ADR procedures were appropriate for a broad range of cases, they were unlikely to be suitable when parties wanted the Court to determine issues of law or construction, or where there was an allegation of fraud.

The Working Party also considered the question of whether costs sanctions should be imposed by the Court when parties failed to attempt ADR following an Order. On this issue it was concluded that neither a costs sanction, nor a Court fees rebate (such as operated in some jurisdictions) should be introduced. The reasoning behind this conclusion flowed from the non-mandatory regime in the Commercial Court, which was thought to be incompatible with an investigation into the circumstances in which parties might have failed to attempt an ADR procedure following an Order of the Court. The Working Party was also influenced by their view that ‘the success rate of ADR Orders is so high’ that such measures were not justified in order to achieve success ‘in those few cases where there is no genuine bilateral commitment to a successful ADR’.

Current Directions on ADR Orders

The current Commercial Court Guide²³ has a separate Chapter on Alternative Dispute Resolution (Chapter G) and a sample ADR Order printed as an appendix to the Guide.²⁴ In the introductory sections of the Chapter in the Guide on ADR, the Court emphasises the ‘primary role’ of the Commercial Court as a forum for deciding commercial cases, but encourages parties to consider the use of ADR (‘such as, but not confined to, mediation and conciliation’) as a possible means of resolving disputes or particular issues. In justifying its approach, the Court expresses its view that the settlement of disputes by means of ADR:

‘significantly helps litigants to save costs; saves litigants the delay of litigation in reaching finality in their disputes; enables litigants

²³ Fourth Edition, August 1999.

²⁴ Appendix 7, Draft ADR Order, *Commercial Court Guide*, Fourth Edition, August 1999.

to achieve settlement of their disputes while preserving their existing commercial relationships and market reputation; provides litigants with a wider range of solutions than those offered by litigation; is likely to make a substantial contribution to the more efficient use of judicial resources'.²⁵

Although no evidence for these assertions is cited in the Guide, Chapter G goes on to explain the procedure adopted by the Court designed to encourage the greater use of ADR. The Guide provides that Commercial Judges will 'in appropriate cases' invite parties to consider whether their dispute, or issues in it, could be resolved through ADR. Parties wishing to attempt ADR can apply for directions at any stage, including before service of the defence and before the Case Management Conference.

The Role of Commercial Court Judges in promoting ADR

According to the Guide, Judges may 'invite' parties to use ADR if, at the Case management Conference, it appears to the Judge that the case or any of its issues are 'particularly appropriate' for an attempt at settlement by means of ADR. The Judge has the power to adjourn the case to encourage and enable the parties to use ADR, or if he deems it appropriate, may make an ADR Order in the terms set out in Appendix 7 to the Guide.

ADR Orders

The draft Order appended to the Commercial Court Guide provides for the parties to:

- exchange lists of three neutral individuals available to conduct ADR procedures;
- to endeavour 'in good faith' to agree a neutral to conduct the ADR procedure;
- to take serious steps to resolve their dispute by ADR;
- and if the case is not finally settled, the parties are to inform the Court by letter what steps towards ADR have been taken and why such steps have failed.

²⁵ G1.2 (a)-(e), *ibid.*

The ADR Practice in the Commercial Court, which has been in operation now for around seven years, therefore remains essentially a non-mandatory scheme. Judges identify cases which they regard as appropriate for resolution by ADR and may suggest the use of ADR, encourage its use, or make an Order directing parties to attempt to settle their dispute by means of ADR. Under such a direction, in the case of a failure to settle the case, parties are to inform the Court of the steps taken towards ADR and why they have failed. This Practice on ADR has been the subject of internal review by the Commercial Court Committee Working Group on ADR on two occasions (discussed earlier in the Chapter). However, in developing his policy on ADR more widely, the Lord Chancellor felt that a more thorough and independent study of the outcome of ADR Orders would be valuable. This study therefore focuses specifically on commercial cases in which such ADR Orders have been made by the Commercial Court since June 1996.

Early Neutral Evaluation

There is also a provision in the Commercial Court for Early Neutral Evaluation of commercial disputes. According to the Commercial Court Guide, in appropriate cases, there is a facility for a without prejudice, non-binding, early neutral evaluation (ENE) by a Commercial Judge of a dispute, or of particular issues in a case. Following discussion with parties' legal representatives, a Commercial Judge may offer to provide an evaluation himself, or arrange for another Judge to do so, if it is thought that an ENE would help in resolving the dispute. If such an ENE is provided by a Judge, that Judge will normally take no further part in the case.

The study

The principal objective of this study was to assess the impact of ADR Orders on the progress and outcome of cases in which they were made. In addition, the study explored the reaction of practitioners to ADR Orders, their experience of experimenting with ADR and their perceptions of benefits and costs, if any, of ADR in commercial cases. Unlike some other jurisdictions where information about court cases is more readily (and electronically)

available, answering even relatively straightforward questions about the outcome of English civil cases is complicated and time consuming. Although information about trials is generally easily ascertainable from court paper files, it is often impossible in the absence of trial information to establish whether the case has settled, and if so how, whether it is still live, or whether the claim has died. Most importantly for this particular study, in the absence of a letter from parties to the court about any steps taken toward ADR, there was no way of discerning from paper files whether, following the making of an ADR Order by the Court, any ADR procedure had been used.

In order to accomplish the objectives of the research, therefore, data had to be collected from three principal sources:

- Records maintained by the commercial court administrators of ADR Orders imposed since June 1996
- Court held paper files of cases in which ADR Orders had been imposed since June 1996
- Interviews with solicitors acting for one, both, or all parties in commercial cases in which ADR Orders had been imposed since June 1996.

The research was carried out in two phases, with data collection being undertaken between August 1998 and October 2000.

Records of ADR Orders

Since June 1996 the court has been keeping a log of Orders imposed. The log identifies the case number, details of parties, type of case, date of ADR Order, identity of the Judge who imposed the Order, terms of the Order and details of feedback received from parties about progress on ADR. This log was used principally to identify all cases in which an ADR Order had been made so that full and reliable information could be gathered about the progress of the case from the court paper file and directly from the parties' representatives.

Paper files

For each case in which an ADR Order had been made, the paper file was retrieved from filestore at the Commercial Court and information from the file extracted and recorded by hand on a special data collection form. During the second data collection phase, information was recorded directly onto a computer database as follows:

Names and addresses of parties representatives

Nature of dispute

Date of ADR Order

Terms of Order

Judge issuing Order

Details of any further communication from parties re ADR

Interviews with solicitors

Telephone interviews were conducted with around 200 solicitors in order to check on the progress and outcome of cases. Interviews conducted by telephone were justified in this study as an economical way of gathering information and an effective way of exploring experiences and perceptions of ADR practice in the Commercial Court. Solicitors as a professional group are used to conducting their business over the telephone and are generally intelligent and articulate. However, despite the quality of the material gathered by telephone the exercise involved making repeated telephone calls (sometimes six, seven or eight calls to the firm) in order to monitor the progress of a case until it had finally been concluded. The fact that this had to be done over several years also meant that the task was complicated by changes of staff dealing with cases at solicitors' firms. More detailed information was obtained from about 120 of these solicitors. These interviews explored attitudes to the imposition of an ADR Order in the specific case with which they were dealing and to the impact of ADR Orders more generally on the approach to dispute resolution in heavy commercial cases. The quality of the interviews, and the lively and perceptive analysis

offered by many respondents, is displayed in the material presented in Chapter Four of this report.

Phase One of Data Collection - August 1998 to August 1999

During this study, data were collected in two phases. Data collection and analysis began in August 1998, when information was collected about all recorded ADR Orders from July 1996 (the date at which the Commercial Court began to keep a record of Orders made) up to the end of September 1998. At that time details were recorded about 74 cases in which ADR Orders had been made. The cases were followed up via hard copy files and telephone interviews with solicitors acting for litigants. In 14 cases all of the parties' solicitors were interviewed about the outcome of the case, their views on ADR Orders, and their experiences of ADR processes when these had been used. In most of the remaining 60 cases an interview was conducted with one or more of the parties' representatives. Thus the end result is known for most of these cases and there is a substantial body of information relating to views about ADR Orders and experiences of using ADR processes for this period.

Phase Two of Data Collection - June to October 2000

An assessment of progress on ADR Orders undertaken in Spring 2000 showed that between the end of 1998 and Spring 2000 the number of ADR Orders issued by Judges in the commercial court had increased substantially, with around 140 Orders being made between September 1998 and April 2000. Information on file explaining what action parties had taken in relation to ADR was available in only 29 of these 140 cases. Given the substantial increase in the frequency with which ADR Orders were being imposed and the large number of cases in which the outcome of the ADR Order was unknown, it was decided that a second data collection exercise should be undertaken in order to gather as much information as possible about the additional 140 cases. In the event, some information was gathered about a further 159 cases in which ADR Orders had been made between September 1998 and the end of June 2000.

The second data gathering exercise was similar to the first and involved the collection of basic information from case files on the additional 159 cases in order to establish the outcome of cases that had been the subject of an ADR Order. Where the necessary information was not available on the case file, solicitors were interviewed to establish the outcome of the case. This information is presented and discussed in Chapter Three.

As in the first data-gathering phase, interviews with solicitors were also used to explore their personal experiences of using ADR and their more general attitudes and perceptions of the potential of ADR in the resolution of commercial disputes. This qualitative information is presented and discussed in Chapter Four.

CHAPTER THREE: THE OUTCOME OF ADR ORDERS

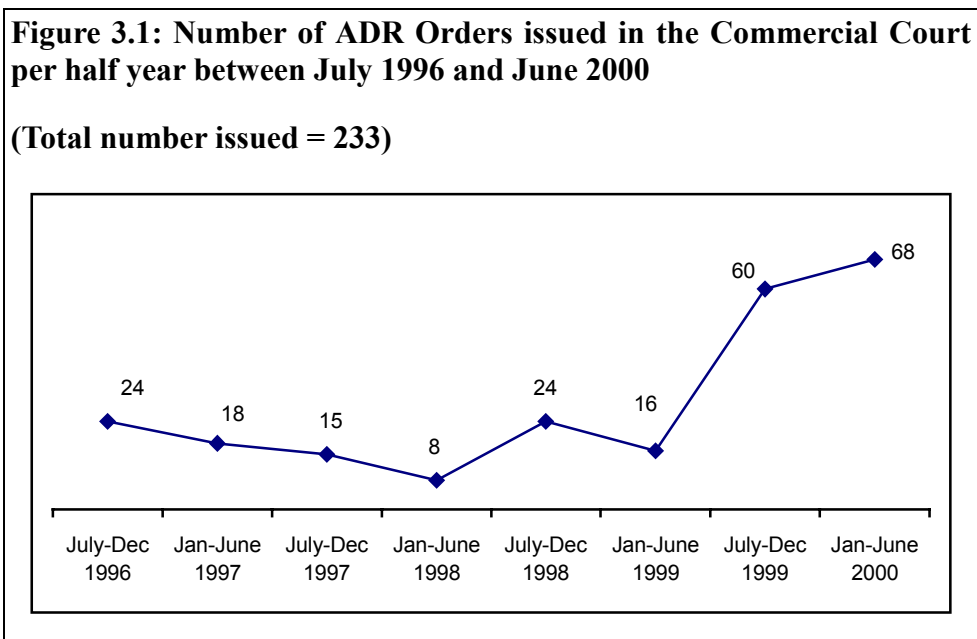
A key objective of the study was to ascertain the outcome of cases in which Judges in the Commercial Court had made ADR Orders. Prior to this study, Judges in the Commercial Court and the Commercial Court Committee's Working Group on ADR had taken the *absence* of a letter to the court informing the court that ADR had not been successful as evidence of successful ADR or settlement by means of ordinary solicitor negotiations. For the purposes of this study, no such assumption was made. Instead, information was collected individually about 233 cases in which ADR Orders had been made between July 1996 and June 2000. For each case the progress and outcome was tracked via information contained in hard copy court files and from telephone interviews conducted with the solicitors of disputing parties. In 184 of the 233 cases in which ADR Orders were made, information is available about whether or not ADR was attempted following the court's issue of an ADR Order. The amount of information available for cases is most complete for Orders issued in the earlier stages of the review period (1996-1999). Information is thinnest for Orders issued during the period January-June 2000, because those cases were still in their early stages when data collection was ended in October 2000.

All of the information gathered from court files and solicitors relating to the number of Orders issued and the eventual outcome of cases is summarised in tabular form at the end of this Chapter in Table 3.1. The elements from those summary statistics relating to the number of Orders made, the number of cases in which ADR procedures were used, the outcome of cases involved in ADR, and the outcome of cases not involved in ADR are analysed and discussed separately in the following sections.

The pattern of ADR Orders being made

Information about the number of Orders being issued during the period reviewed in the study was obtained from lists maintained at the Commercial Court. It can be seen from Figure 3.1 that between July 1996 and June 1999

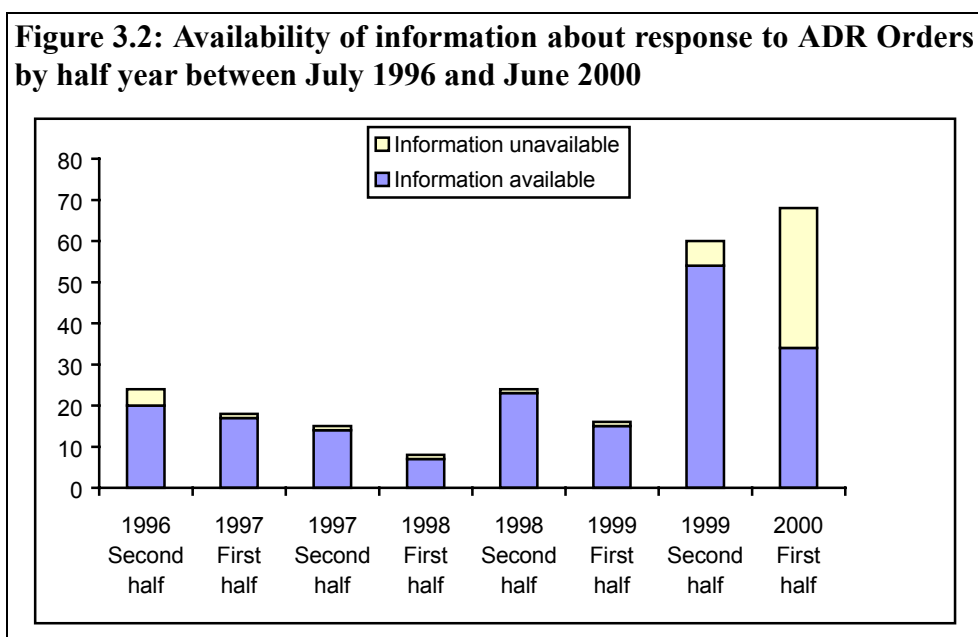
the number of ADR Orders being issued by the Commercial Court was averaging around 18 per six month period, with highs in July to December 1996 and 1998 (with about 24 being issued in each of those six months), and a low during the period January to June 1998 (only eight Orders issued). However, in the period July to December 1999 there was a significant increase in the number of Orders being issued, from 16 in January to June 1999, to 60 in the period July to December 1999. This rate of issuing continued in the final sixth month period, with some 68 Orders being issued between January and June 2000. Information from the lists of Orders issued indicates that throughout the period Orders were being made by a relatively limited number of Judges in the Commercial Court. The increase in the July 1999-June 2000 period is accounted for by one or two judges vastly increasing the number of Orders being made.



The take-up of ADR following an Order

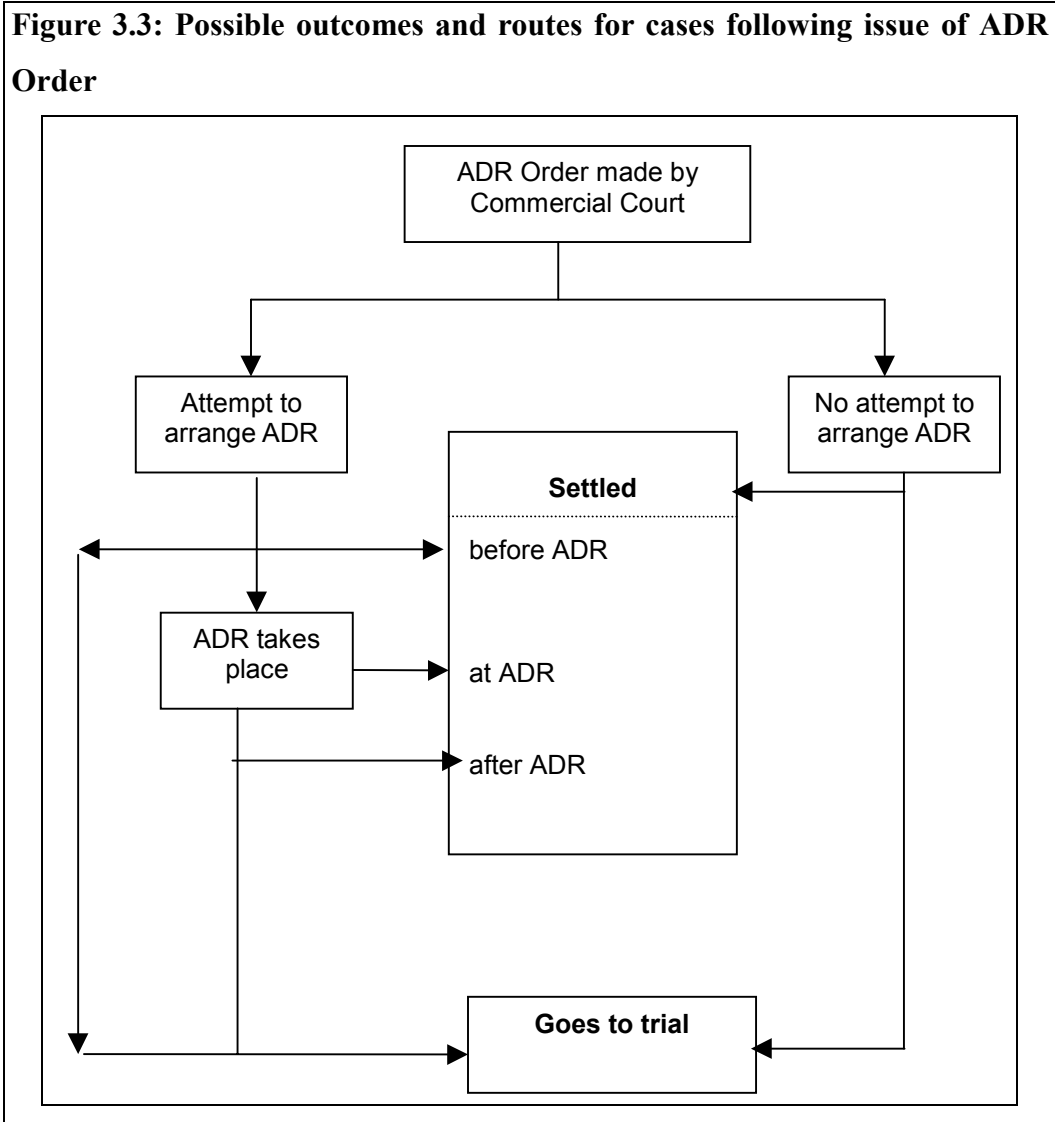
A key objective of the study was to ascertain whether or not, following the issue of an ADR Order, parties engaged in any form of ADR (whether mediation, conciliation or early neutral evaluation). The sources of information for this assessment were material contained in the hard copies of files held in the Commercial Court and telephone interviews with solicitors

of both or either of the parties involved in the litigation. After a lengthy process of searching for information and attempting to contact parties' representatives, information was finally obtained about 184 of the 233 cases in which ADR Orders had been made (representing almost 79% of cases). Naturally, information was more easily available for those cases in which Orders had been made well before the end of the data collection period. So for cases in which ADR Orders were made prior to January 2000, information is available about 91% of cases (Figure 3.2).



Following the making of an ADR Order, parties and their representatives are faced with a range of alternative courses of action. The ADR Orders are not mandatory, in the sense that the parties cannot be forced to arrange and attend an ADR procedure. They are merely encouraged to attempt to settle the dispute by means of ADR and if the parties later wish to return to the court and continue with the court timetable, they are required to inform the court of the steps taken to achieve settlement by means of ADR. The Orders thus impose pressure on the parties to consider ADR or to attempt to achieve settlement by means of solicitor negotiations. It sends a strong signal from the Judge that in his view the case ought to be capable of settlement.

In only around half of the disputes in which ADR Orders were made, the disputing parties were involved in ADR procedures. Figure 3.3 attempts to describe the range of potential outcomes following the issue of an ADR Order and the various routes by which parties reached those final outcomes.



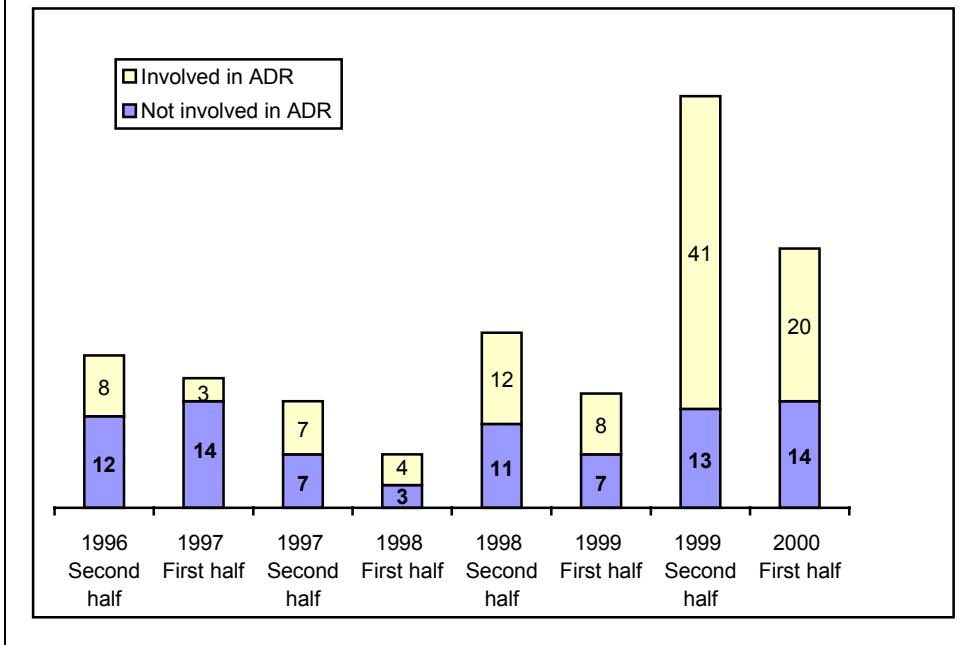
Involvement in ADR Procedures

Information obtained about the extent to which parties were actually involved in ADR procedures following the making of an ADR Order shows a trend suggesting *increasing* use of ADR procedures over the review period. Towards the end of the review period a substantially *higher* proportion of

cases were leading to ADR procedures being used than at the beginning of the review period. Figure 3.3 (based on cases where information was available about the use or non-use of ADR) shows that in the first year of the review period, the proportion of cases in which ADR was actually used by the parties following an ADR Order remained relatively low. Between July and December 1996, of the twenty cases about which information was available, only eight were involved in ADR procedures following the issuing of an ADR Order by the Commercial Court (a rate of about 40%). In the period between January and June 1997, of the seventeen cases about which information is available, only three tried ADR and 14 did not (a rate of about 18%). From July 1997 onwards, the proportion of cases in which ADR was attempted following an ADR Order appears to increase. Between July 1997 and June 1999 the parties in around half of the cases in which ADR Orders had been imposed attempted some form of ADR in each six month period (50% July-December 1997; 57% January to June 1998; 52% July to December 1998; 53% January to June 1999). However, between July and December 1999 there was a large increase in the proportion of cases attempting ADR following an ADR Order, with about *three-quarters of cases* (where information was available) apparently attempting ADR. During the final six month period from January to June 2000, among the 34 cases about which information is available, the proportion attempting ADR appears to have dropped back to about 60%, but this remains higher than the average for the earlier stages of the review period.

Taking together all of the 184 cases about which information was available at the end of the review period, about 103 attempted some form of ADR procedure following the issue of an ADR Order, representing 56% of cases in which an Order was made.

Figure 3.4: Involvement in ADR procedures following the issue of an ADR Order by the Commercial Court (Base = 184 case about which information available)



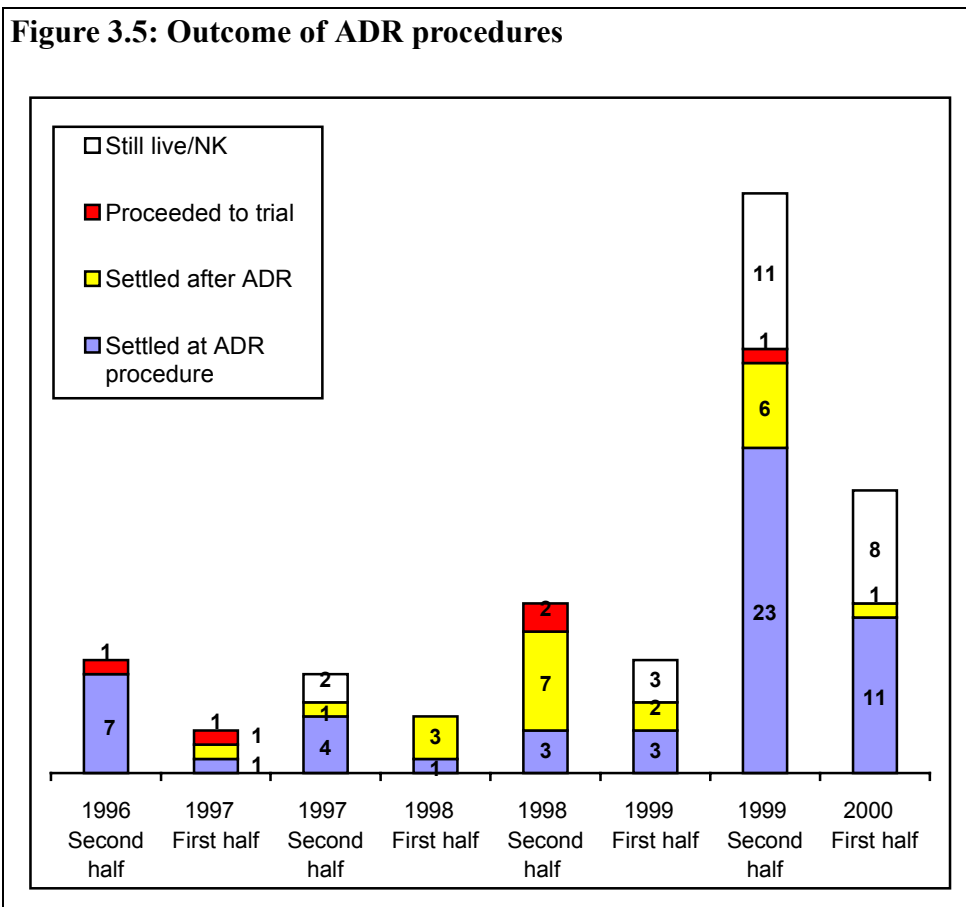
The outcome of ADR procedures

Information was obtained from files and interviews with solicitors about the outcome of 103 cases in which ADR procedures were attempted following the issue of an ADR Order by the Commercial Court. Cases have been divided between those that settled at the end of the ADR procedure and those that did not settle at the end of the ADR procedure. The final outcome of the latter category was also tracked to discover the eventual outcome of cases in which ADR was tried, but a settlement was not reached at the end of the ADR procedure. Among this group are cases that went on to settle, cases that went on finally to trial and a small proportion of cases that were still live at the end of the study period. Of those cases that settled, some did so relatively quickly after the ADR procedure, while others went on for some time before reaching settlement. In Chapter Four, solicitors' views about the value of ADR Orders and involvement in ADR procedures as an aid to settlement are summarised and discussed.

Figure 3.5 shows the outcome of ADR procedures over the review period, divided into half yearly intervals. It is difficult to form any firm conclusion about success rates in the earlier part of the review period because the number of cases involved in ADR procedures was so small. However, in the period July to December 1998 of the twelve cases in which an ADR procedure was tried, three cases (25%) settled at the conclusion of the procedure. In the following six-month period, January to June 1999, of the eight cases in which ADR was tried, three settled at the end of the ADR session, which is a success rate of 38%. In the period July to December 1999, however, where ADR was tried in a substantial number of cases, 23 of the 41 cases using an ADR procedure settled at the end of the process, giving a success rate of 56%. In the final period, January to June 2000, of the 20 cases about which information is available, it appears that eleven settled at the end of the ADR process, which is a success rate of 55%. Thus, although the number of cases involved in ADR procedures following an ADR Order varied substantially from interval to interval, there is evidence that the success rate, in terms of settlement at the conclusion of ADR, was beginning to stabilise towards the end of the period at a somewhat higher level than in some of the earlier half-year intervals.

As will be seen in Chapter Four, in cases where a settlement was not reached at the end of an ADR process, some solicitors commented on the extent to which the process had been helpful in clarifying issues and removing log-jams in the negotiation process. Only a very small minority of solicitors interviewed who had been involved in an ADR process following an ADR Order were of the view that ADR had not been helpful in the process of achieving settlement of the action.

Figure 3.5: Outcome of ADR procedures



Among cases where some form of ADR process was attempted but settlement was not reached via the ADR process, the majority went on to settle the case, with only five cases, over the whole review period, going on to trial. By the end of the review period of the 103 case in which ADR had been attempted 53 cases had settled at the end of the ADR process (52%), five cases had proceeded to trial (5%), 21 cases had settled some time after the conclusion of the ADR procedure (20%), and the case was still live or the outcome unknown in 24 cases (23%).

Outcome of cases where ADR not used

Of the 184 cases in which ADR Orders were made, and for which information about use of ADR is available, 81 reported that they had not been involved in any ADR procedure following the making of the ADR Order by the Court. In some of these cases no attempt to arrange an ADR

procedure was made and cases either settled or went to trial without any serious attempt to use ADR. In others, some steps were taken to arrange an ADR procedure but either the case was settled prior to the ADR taking place, or discussions to organise a procedure broke down and the case finally went on to trial. Solicitors' accounts of these circumstances and their views about the impact of Orders on the subsequent course of their case, are summarised and discussed in Chapter Four.

Figure 3.6 summarises the outcome of cases in which ADR was *not* attempted following an ADR Order. Among cases which had settled following the issue of an ADR Order by the court, but where there had been no involvement in ADR, solicitors were asked during interviews whether, in their view, the settlement had been achieved as a result of the ADR Order. The responses to this question have been used to subdivide settled cases between those perceived to have been as a direct result of an ADR Order and those where, in the solicitor's view, the ADR Order had not stimulated settlement of the case.²⁶ The Figure shows that in each of the half-year intervals of the review period, the majority of cases in which ADR was not attempted ultimately concluded with a settlement between the parties. However, the proportion of cases proceeding to trial is, predictably, considerably higher than among those cases in which ADR was attempted following an ADR Order. Over the entire review period, of the 81 cases in which ADR was not attempted following an ADR Order, some 51 cases settled (63%). Of these 51 cases about one fifth (22%) said that the settlement had been as a result of the ADR Order being made. The following extracts from interviews with solicitors provide typical examples of how this view was expressed:

“Following the Order [mediation organisation] was approached and a mediator was appointed and a mediation date was set and a timetable for an exchange of written submissions was agreed. At that point the solicitors instructed for the parties met and began to discuss settlement. Two or three telephone calls were then exchanged and in the event the case was settled about three weeks

²⁶ Examples of solicitors' views and perception of the impact of ADR orders are presented in detail in Chapter Four.

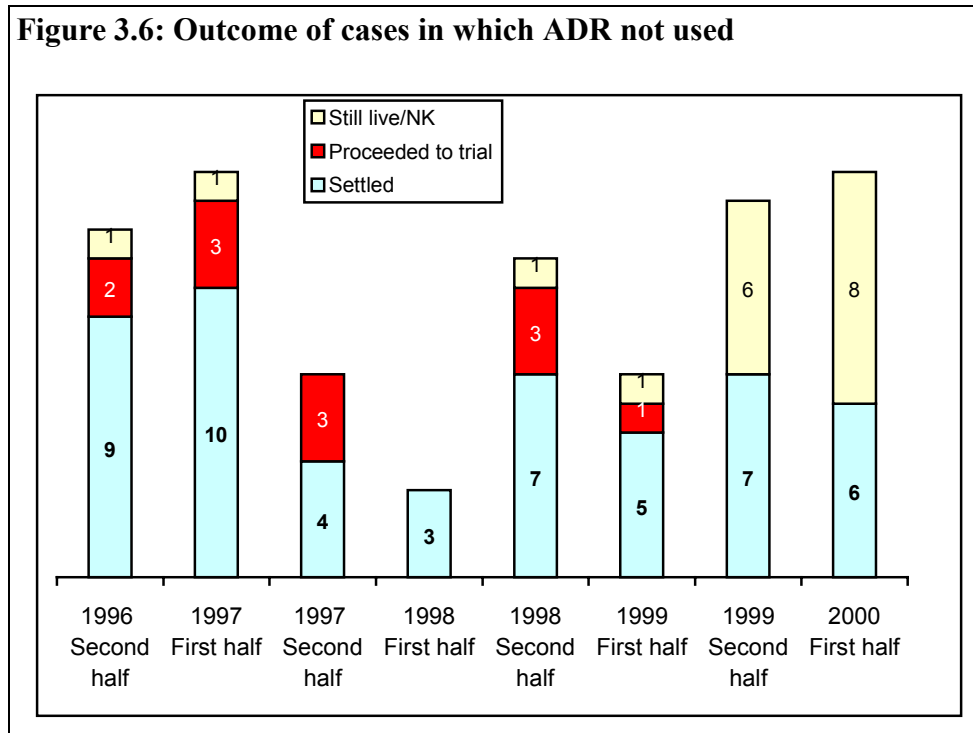
before the mediation date. The mediation date certainly precipitated settlement negotiations and there was an urgency in order to avoid the cost of turning up for a full-day mediation if the parties were minded to settle it anyway.”

“The matter did not go to mediation because the other side got very cold feet, and it was settled following a meeting. It was settled without the use of ADR on terms favourable to my client. On that occasion I have no doubt at all that the threat of an ADR procedure was one of the factors which induced the other side to settle.”

Of the 81 cases in which ADR was not attempted, some twelve cases ultimately proceeded to trial (15%), and 18 cases were still live (22%), at the end of the review period. Since by the end of the review period no trials had been recorded for either of the last two half-year intervals, it is likely that the proportion of trials will ultimately be somewhat *higher* overall, once the live cases have reached their final conclusion.

The rate of trials among the group of cases not attempting ADR following an ADR Order is predictably higher than among the group which unsuccessfully tried to achieve a settlement via ADR. The fifteen percent of cases proceeding to trial among the group of cases in which ADR was not attempted can be compared with five percent of cases proceeding to trial following an unsuccessful attempt at resolution via ADR. This is unsurprising. As will be seen in Chapter Four, a principal reason for the solicitors of disputing parties failing to attempt ADR following the issue of an Order by the Court, was the belief that the case was in some way inappropriate for ADR. Cases were deemed to be inappropriate by solicitors where the dispute concerned a matter of law, or involved fraud, or complicated expert evidence. Solicitors also felt Orders were inappropriate or that the prospect of achieving resolution via ADR was hopeless when they perceived the parties as being too far apart, too intransigent, and uninterested in compromise. Some commented that the timing of the Order was not optimal for achieving settlement, although they could foresee settlement at some later date.

Figure 3.6: Outcome of cases in which ADR not used



Conclusion

The analysis of outcome of ADR Orders shows first that increasing use of Orders has been made by the Commercial Court, particularly since July 1999, although Orders were still being routinely issued by only a minority of Commercial Court Judges at the end of the review period in Summer 2000. Over the review period as a whole, ADR procedures were actually used following the making of an Order in a little over half of the cases in which an Order was issued. The trend to use ADR was clearly increasing substantially toward the end of the review period, as compared with the beginning of the period.

The success rate at ADR appointment was around 50% over the review period as a whole, although there was some variation from year to year and some evidence that the figure is stabilising at around 50% or a little above. The success rate must be viewed in the context of a system of ‘directed’ ADR, or at least a system in which the Court is applying considerable pressure toward ADR.

Among those cases in which ADR was unsuccessful, the majority settled subsequently, with only a very small proportion proceeding to trial. When ADR was not used following an Order, about 15% of cases went on to trial. This is much higher than the rate among mediated cases, and is unsurprising. It suggests, as one would expect, that those cases in which the parties do not attempt to use ADR following pressure from the Court, are those where there is little scope for compromise or in which parties require a judicial determination. Further evidence on these issues is provided in the next Chapter.

Table 3.1: Summary of outcome of ADR Orders based on information from court lists, files and telephone interviews with solicitors

	July- Dec 1996	Jan- June 1997	July- Dec 1997	Jan- June 1998	July- Dec 1998	Jan- June 1999	July- Dec 1999	Jan- June 2000	Total
Number of ADR Orders	24	18	15	8	24	16	60	68	233
Some information available	20	17	14	7	23	15	54	34	184
ADR tried	8	3	7	4	12	8	41	20	103
settled at ADR	7	1	4	1	3	3	23	11	53
not settled at ADR	1	2	3	3	9	5	18	9	50
<i>Proceeded to trial</i>	<i>1</i>	<i>1</i>	<i>0</i>	<i>0</i>	<i>2</i>	<i>0</i>	<i>1</i>	<i>0</i>	<i>5</i>
<i>Settled later</i>	<i>0</i>	<i>1</i>	<i>1</i>	<i>3</i>	<i>7</i>	<i>2</i>	<i>6</i>	<i>1</i>	<i>21</i>
<i>Still live/other/NK</i>	<i>0</i>	<i>0</i>	<i>2</i>	<i>0</i>	<i>0</i>	<i>3</i>	<i>11</i>	<i>8</i>	<i>24</i>
ADR not tried	12	14	7	3	11	7	13	14	81
Settled as result of Order	0	1	1	1	2	0	4	2	11
Settled not as result of Order	9	9	3	2	5	5	3	4	40
Proceeded to trial	2	3	3	0	3	1	0	0	12
Unknown/still live	1	1	0	0	1	1	6	8	18

CHAPTER FOUR: THE RESPONSE TO ADR ORDERS

Following the issue of an ADR Order by the Court, the parties and their representatives are faced with a number of options and possible outcomes. Since the Court cannot force the parties to attend mediation and reach settlement, the effect of the Order is to place pressure on the parties to consider seriously whether or not involvement in some sort of ADR procedure is feasible and desirable, and what steps ought to be taken to try and achieve settlement via an ADR process. In over a hundred interviews with solicitors, important insights were provided into the different approaches taken in dealing with Orders, and the obstacles and incentives to involvement in ADR.

It is clear that following the making of an ADR Order by the Court the strategy adopted by parties and their solicitors differed considerably. These ranged from a refusal to make any serious attempt to organise an ADR procedure, through weak attempts to agree on a procedure, through concerted efforts to settle on a procedure and a day, and on to successful arrangements for mediation or early neutral evaluation. As was discussed in Chapter Three, the discussions necessarily involved in attempting to set up an ADR procedure sometimes led to settlement of the dispute without the mediation or ENE ever taking place.

This Chapter attempts to shed light on these different responses to ADR Orders using information drawn from interviews with solicitors. The discussion focuses on solicitors' reasons for *not* using ADR procedures despite the issue of an ADR Order by the Commercial Court; the role of ADR Orders in promoting or inhibiting case settlement; evaluations of successful and ADR procedures where these were used; and solicitors' perceptions of the impact of ADR Orders and ADR procedures on delay and expense in commercial cases. In the final section the views of solicitors about the impact of ADR Orders on commercial practice more widely are discussed.

ADR not tried following Order

“If you have sensible clients you don’t need it. If you don’t have sensible clients you’re not going to get anywhere with it anyway.”

It was reported in Chapter Three that in somewhat under half of the cases in which ADR Orders were made by the Commercial Court during the review period (44%), no ADR procedure was used by the parties in order to achieve a resolution of the case. According to reports given by solicitors in interviews about the outcome of cases, in the majority of cases in which an ADR procedure was *not* used, little serious attempt had been made to organise any kind of mediation or ENE. The reasons for this refusal to attempt ADR fell roughly into several broad categories:

- The case is not appropriate for ADR
- The parties do not want to try ADR
- The timing of the Order is wrong (too early or too late)
- No faith in ADR as a process in general

Of these four categories, the most common response was that ADR was ‘inappropriate’ for the particular kind of dispute that was the subject of the litigation. This is consistent with the findings of the evaluation of the mediation scheme in the Central London County Court²⁷ (CLCC), which found that one of the most common reasons given by both plaintiffs and defendants for rejecting the court’s offer to mediate disputes was that the case was ‘inappropriate’ for mediation.

Case not appropriate

Inappropriateness for ADR, as explained by solicitors, often derived from the nature of the issues at stake in the dispute. For example, if a case involved a point of law requiring a judicial determination or complex factual evidence, solicitors might suggest that such cases would be ‘inappropriate’ in that such issues would need to be decided in court. For example:

²⁷ H Genn, *The Central London County Court Pilot Mediation Scheme: Evaluation Report*, Lord Chancellor's Department Research Series 5/98, July 1998, Chapter 2, pp31-33.

“Everybody agreed it was a waste of time. It wasn’t the sort of case where ADR was likely to solve things...both fairly hard-headed people. It was a pure business dispute - not the sort of typical ADR case where there’s hidden agendas and emotions coming into play. It was simply a fairly narrow point on the construction of a contract, and one side was right and one side was wrong.”

“We objected to [the Order] and the Court said that we had to do it. We will continue to object to it, because frankly we think it’s a waste of time. I actually think it’s a waste of time in quite a lot of cases, to be honest. I don’t think in a commercial dispute, where there are often complex legal issues, that it’s an appropriate procedure. We would prefer a High Court Judge to decide the legal issues. In many commercial disputes once it’s reached the High Court it’s already gone past the time that the parties are going to sit around the table to have a quiet chat. It’s a different type of pressure which reaches a settlement. Not ADR.”

“No mediation took place. We were the Claimants, but the Defendants had a counterclaim. We were seeking a declaration on liability. Some evidence on the counterclaim had been forged, and we requested disclosure. The Court ordered ADR despite the fact that we knew there had been a forgery. We knew that the Defendants were in financial trouble so they would be looking to collect costs. We felt ADR was a waste of money and time. We challenged the Order when it was made.”

“In a lot of cases the actual dispute matters, for instance if somebody is testing conditions of business. You get a lot of cases where people are trying to break conditions or limitation clauses, and it’s those sorts of cases which we deal with day in and day out. And they can’t really be settled by ADR because people are less likely to take a commercial view, despite economics, because they’re arguments about conditions which would have an effect on the industry as a whole.”

The label ‘inappropriate’ was also used to cover cases in which the views of the parties about the merits or value of a case were very far apart, leaving little room for compromise. In the opinion of most solicitors interviewed, ADR (mostly meaning mediation) is a process in which the willingness of the parties to compromise is fundamental to success. In the anticipation that such willingness was absent on one or both sides of the dispute, solicitors often regarded attempting to arrange ADR as a waste of time and effort. For example:

“We were too far apart, so there was no prospect of ADR. In the end we went to trial, and we won, so I am pleased that we did not try ADR.”

“We both decided that we were too far apart and it was not really appropriate.”

“At the moment the case is stalled. The Court Order has resulted in the case grinding to a halt. We asked the other side if they thought ADR a possible way of resolving the dispute. And the other side thought it was not. In this case the parties are in such entrenched positions, they have suspicions about each other’s motives, so basically want to fight it out rather than find some sensible solution. Our clients were not happy as the Order interrupted the flow of the litigation.”

“ADR was considered, but in this case there is no way a settlement could be negotiated. We were pleading misrepresentation and nondisclosure of relevant facts. There is no room for manoeuvre, because my clients won’t move and it cannot be settled unless they give in.”

“There was no mediation. We did not think it was appropriate. At the time both parties were some way apart. Before you can have ADR you need consensus on certain points.”

There was also some concern expressed that ADR Orders were being imposed indiscriminately, without sufficient attention being paid by the Court to whether or not cases were, indeed, appropriate for direction towards ADR procedures. For example:

“The Court seems to think that in every case [ADR] is a good thing and that is not so. There are cases where there is no prospect of a negotiated settlement and in those cases ADR is a complete waste of time. The secret is in determining what those cases are. Some clients want a judgment. That depends on the case and the individuals concerned.”

“One does wonder what role the ADR Order has to play when the Courts are there to actually decide legal disputes, not there to force parties to settle their cases. Some of the Commercial Court Judges will make these Orders routinely, and I’m wondering whether consideration is being given as to whether certain cases are appropriate to make such an Order. Certain Commercial Court Judges are very pro-ADR and will make these types of Order in almost every type of case. Others are a little bit more hesitant towards ADR and are less inclined to make such Orders, or make such Orders simply because they feel obliged by the Commercial Court practice to do so.”

“I’ve had a couple of cases where we’ve been told to go away and go to ADR whether we like it or not, and that I don’t like. I don’t see the point in insisting upon it and imposing ADR upon people. It’s an option now that everybody knows, and I think the Court has every right to ask the question as to why parties don’t want to go to ADR. But above that, if the parties’ view is that they don’t, then I think deciding to stop the case and impose ADR for a three-month period is unrealistic.”

Parties do not want ADR

A second important reason for failing to attempt resolution by ADR following the issue of an ADR Order was resistance either from opponents, or in some cases, from solicitors' own clients. Again, in common with evidence from the CLCC mediation study, solicitors reported instances in which resistance to compromise (and thus suggestions of ADR) was rigid:

“I have never seen a party who feels he has a strong case likely to mediate - only parties with weak cases. I have never seen parties agreeing to the Commercial Court Orders. It's a waste of costs. I encourage my clients to look at it, but very often one gets to the stage where the other side doesn't want to do it because they think they have a strong case. My personal experience is that when I suggest ADR I have met with great resistance, and equally when I am on the receiving end of a suggestion of mediation, my clients instruct me to resist. It is absolutely a sign of weakness that means that you do not want a legal result. What you want is the issues blurred as much as you can.”

“I don't really understand the rationale behind ADR. If cases are going to settle, they settle either just before or very soon after proceedings are issued. Most of the cases I deal with, the parties are so entrenched in their position they're prepared to run it. They know there's a risk involved, but they're still prepared to run it and they're not interested in compromise. If they are interested in compromise, you usually don't get to the stage of issuing proceedings.”

There was also the view that commercial clients are somewhat different from other sorts of litigants, in that they are sophisticated, commercial-minded, know what they want and are capable of making their own decisions without having procedures imposed on them. If they had reached the stage of issuing proceedings in the Commercial Court they were committed to litigating if necessary, and indeed, in the case of overseas litigants, had specifically selected the English High Court as the forum in which they wanted to litigate their dispute.

“Most of my clients are commercial. They know about ADR. Not many of them like it. A lot of them are being approached independently by ADR companies outside of the Court scheme, but the trouble is that you just can't get away from the fact that clients want to take legal advice. They want to feel as though they've got somebody to talk for them.”

“Our clients, who were from [overseas] weren't that excited about the prospect of spending money in London Court proceedings,

nevertheless do see London as giving the attraction of certainty and a Court system that works well. Our instructions were to commence proceedings and push on with it, because we knew that when the pressure was on the Defendants would come and talk to us. That only happens if you're allowed to keep the pressure on. Therefore our client was very disappointed when he was compulsorily transferred to ADR. [ADR is] not very popular with an overseas client looking to enforce their rights. Our primary objection wasn't so much that there should be some form of ADR (because it was always our intention the parties should negotiate – we're not so stupid as to want to spend a week in Court with barristers' fees), but we did think we would try to put the pressure on to get exchange of evidence - expert evidence and witness evidence - because then all the evidence is on the table and then you can negotiate. But the Court said 'Oh no, that's an expensive process, we should have ADR before then'. I think that was quite poor, because it meant that you're asking them to horse-trade, and that's an insult to sophisticated clients."

Timing of Order

There was some concern expressed about the timing of ADR Orders, but no real consensus about when was the most appropriate time to try to reach a resolution via ADR. The problem is that any cost and time savings likely to accrue from a successful ADR will be greatest the earlier in the litigation ADR is attempted. On the other hand, seeking to force parties to enter into ADR at a very early stage in proceedings was seen as ineffective, since parties are least likely to be psychologically prepared to compromise soon after the issue of proceedings. Some believed that parties are not really in a position to consider settlement until all of the necessary evidence has been gathered and exchanged so that a rational view of the strength and weaknesses of cases can be formed.

"I think if you have some sort of ADR after all the processes have been gone through, but well before trial, then I think people would be more inclined to sort their problems out more effectively and more efficiently. Until discovery there's no way you can do it, and you're going to have the expert and witness evidence needed as well, because you can't evaluate the other side's case. You might have a good idea of yours, but you can't really see theirs. You've got to have all the balls at least available to the parties if they want to juggle with them, and *then* you get the ADR."

"I recommended ADR to my clients but they refused to see the benefits of it. They were [nationality] and they had an abject fear of any formal legal process in England and couldn't accept that ADR wasn't like going to Court. You need a case where the two parties are capable of speaking to each other...I'm not sure you're

going to get the clients to agree to it right at the early stage, even though I actually think it's a very sensible time to have a go at it."

"Generally I think that litigation gets to a certain point before people will want to try ADR. At a very early stage mediation is often proposed. People generally want to fight at that stage. The advantage with mediation later on is that time has gone by, costs have been spent and the parties have thought more about costs, time and fees and the value of a settlement amongst those considerations."

"If you try to mediate too early before the issues are identified, it may not be suitable. I don't think you can make a hard and fast rule about it. In my experience you are more likely to succeed where the issues are known by the parties and they can sit down and talk about it, and that does not happen at the beginning of the case. I am not sure whether it should come after discovery, but certainly after the exchange of pleadings."

No faith in ADR as an approach

Finally, a small proportion of solicitors interviewed was generally sceptical about the value of ADR, particularly in commercial disputes. The basis of this view is that in commercial disputes the parties are generally sophisticated and the solicitors who represent those parties are themselves knowledgeable and experienced in the litigation of commercial disputes. In this view, the objective of solicitors in most cases is to achieve a favourable settlement for their client, and negotiations continue throughout the litigation process to accomplish this outcome. If settlement cannot be achieved by means of solicitor negotiations it is unclear what "value" will be added by submitting the dispute to ADR.

"There's a huge bandwagon of people who promote ADR, because it's fashionable to promote ADR, and want to be seen to be setting up ADR units in their solicitors' firms. But the conventional methods of settlement - solicitor to solicitor - still perform a role and I suspect that 90% of cases are settled solicitor to solicitor or client to client.... I certainly think that [some judges] have gone over the top. It gets to the stage where you go to the Commercial Court and you look at which Judge you've been assigned and you think, 'Well I'll have to think a bit more about ADR', but you end up in situations where neither party wants ADR and you get forced to do it."

"It seems to me that if you have sufficient will to attempt mediation anyway, then it ought to be up to the solicitors to be able to settle the case anyway, and having some third party intervene - who

necessarily has a fairly superficial knowledge of the facts – it’s difficult to see how that’s likely to add value.”

There was also some evidence of a “pre-Woolf” adversarial approach to litigation in which ADR was seen to be incompatible with a relentless push towards trial and with traditional litigation tactics. This was, however, given as a reason for refusing to attempt ADR in only a handful of cases. For example:

“Let us bear in mind one of the rules of litigation...if you’re a plaintiff you try and push cases as hard and fast as you can. If you’re a defendant you try and delay and obstruct as much as you can.”

Impact of ADR Orders on settlement

It was reported in Chapter Three that in a proportion of cases which settled following an ADR Order, but not as a result of being involved in any ADR procedure, solicitors had suggested that the ADR Order had been a positive influence in promoting settlement between solicitors. On being questioned about the impact of Orders on settlement processes, those solicitors who expressed a view generally felt that the ADR Order had either been helpful or had had little effect on settlement. In a few cases, however, solicitors believed that the imposition of the Order had actually hindered settlement and, as will be discussed at the end of the Chapter, some also believed that the Order had involved the parties in additional costs even though they didn’t use any ADR procedure.

Positive impact of Orders on settlement

The most obvious positive effect of ADR Orders, according to solicitors, is to get the parties and their solicitors discussing the question of whether or not it would be desirable or effective to engage in some sort of ADR procedure. Once proceedings have been issued there may be a relatively lengthy period in which the parties retreat to their corners and are reluctant to engage in constructive conversation about the possibility of reaching settlement. An ADR Order from the Court, however, may get the parties out of their bunkers. For example:

“Before we took any steps towards ADR I had a meeting with the other side and we were actually able to conclude it without actually going through the ADR process. Although it was a persuasive factor. I suppose it brought us together, because up until that point there had been a sort of stonewall from the other side on any sort of settlement negotiations. So in fact it was the ADR Order that brought about at least discussions, which brought about a settlement.”

“After the ADR Order was made, the respective clients decided to contact each other to negotiate. I think they may well have tried it anyway, but I think maybe the fact that the ADR Order was there perhaps pushed them to do it a bit more quickly. If you’ve got two parties who are very much bound up in the litigation then [the Order] gives them a chance to go away and reassess where the case is going and what they want.”

“The case was settled before mediation. I have no doubt that the prospect of the mediation brought to the attention and focussed the minds of the parties and the legal advisers on the case merits. The making of the Order had a beneficial effect and they found a way to settle it.”

“It has settled. The Judge ordered the mediation and we decided that it wasn’t even worth the costs of mediation and we simply settled it. The Order and the Judge’s comments concentrated the minds of the parties and influenced their decision to settle. We were happy for the Order to be made. I am a convert to ADR, having had several successes with it, and I think that so long as it takes place at the right time, it can be effective. That moment might differ from case to case, and I think that it was at the right moment for it to be suggested in this case.”

Equally importantly, the imposition of an ADR Order by the Commercial Court has a useful function in mitigating the problem of showing weakness in opening up settlement negotiations. There is a sense that being the first person ‘to blink’ during litigation may be taken as evidence of vulnerability, and this can act as a constraint both to making offers of settlement in the normal course of solicitor negotiations, and to suggesting that the parties submit to ADR, since ADR inevitably implies willingness to compromise. The fact that Orders are imposed by the Court rather than necessarily being suggested by either side, can remove this constraint and free *both* parties to enter into discussions:

“Starting settlement negotiations is often felt to be a sign of weakness, so I think there’s a bit of reluctance there. Now if you’re actually obliged to enter into the ADR process before you get to trial, I think it gets rid of that sort of natural reticence. It actually forces the parties to consider settlement when otherwise they might

feel that it would be seen as a sign of weakness to raise the subject at all.”

“We still have the problem that [suggesting ADR] is still perceived as a sign of weakness. If it is imposed that is fine, as it takes that aspect out of it. Having to report hangs over people who don’t want to be seen to be being obstructive.”

Neutral and negative impact of ADR Orders

Where solicitors did not feel that the ADR Order had had a positive impact in promoting settlement, they generally felt that its imposition was neutral.

For example:

“The ADR Order didn’t help or hinder negotiations. It was superfluous. It held us up for the period of time in which we had to try and comply with it, but since the case had been going on for about three-and-a-half years it didn’t really make much difference to the overall time.”

In a few cases, the ADR Order was actually seen as a hindrance to settlement, although this was very much a minority view. For example:

“The ADR Order actually acted as an obstruction to the case. Settlement came about despite the Order rather than because of it. I wasn’t present at the directions hearing where it was made. It was suggested by the Judge and the solicitor on the other side said ‘Oh yes’, so the Order was made without anyone really thinking about it in a serious way.”

Moreover, some solicitors felt that ADR Orders had delayed their case unnecessarily and that parties could use ADR Orders as a delaying tactic. These views are discussed below in relation to perceptions of the impact of ADR Orders on time and costs.

Disputes resolved via ADR following Order

During the period of the review, 53 cases in which ADR Orders had been made by the Commercial Court were settled via some form of ADR procedure. In most cases the parties had used mediation, conducted by a member of one of the leading commercial mediation providers. In a minority of cases, parties had arranged an Early Neutral Evaluation, conducted by a Judge.

Where cases had been settled at the end of the ADR procedure, solicitors generally expressed great enthusiasm for the process, which is again consistent with the findings of the mediation scheme in Central London County Court.²⁸ Although some of the solicitors interviewed were themselves trained mediators and many had considerable experience of being involved in mediation, a substantial proportion (particularly those interviewed in the early stages of the study in 1999) had had little or no prior experience of mediation.

Among those who felt that the ADR procedure had been a positive experience, the factors most commonly referred to in their evaluation of the process were:

- The skill of the third party neutral
- The ability of ADR to get past logjams in the settlement process
- The opportunity offered by ADR to focus on the strengths and weaknesses of the case
- Satisfaction of clients with the process
- Perceived saving of cost and time

In some cases solicitors indicated that although they had been doubtful about the potential of ADR as a means of resolving the dispute when the ADR Order had been imposed by the Court, in the event a successful outcome had been achieved despite initial reluctance. This view emerges in a number of the extracts presented below, but the following is a succinct expression of this perception:

“A mediation took place with Lord X as the mediator. We reached an agreement. We finally put the other side under threat and they agreed. At the time we were enraged with [Commercial Court Judge] for ordering the mediation, but as it turned out, it worked out quite well.”

²⁸ CLCC Evaluation Report, 1998, op. cit., Chapter 5, pp123-125.

Skill of the neutral

A common view among solicitors who had settled their cases via mediation or ENE was that both skill and gravitas on the part of the neutral were very important in achieving a satisfactory outcome to the process. However, there was some difference of view about whether the nature of the skill required on the part of the neutral was expertise in the subject- matter of the dispute, or whether what was required was merely excellent mediation skills. In so far as there was a majority view, the weight of opinion appeared to favour expert knowledge or the authority that comes with judicial experience at a senior level. Naturally, a fusion of both expertise and good mediation skills was a winning combination.

“The mediation was excellent. We were very lucky he was an excellent mediator and achieved quite a difficult settlement. He knew a lot about the area of law that was relevant and that was crucial. Without a doubt we could not have settled it so easily. It was a one-day mediation where our client had flown over from America and he was very keen to settle it. It all worked because it was a mediation on one day. If we had tried to settle it between solicitors it would have taken a lot of letters, to-ing and fro-ing and at the end of the day would not have happened, or would have been more difficult.”

“Myself and my opponent determined the nature and scope of ADR and a mediator was appointed. We decided between ourselves the nature of the submissions and the manner of the mediation. As a result of the mediation the case was settled and we were quite pleased with it. The clients were pleased with it and it most certainly did work. But I think it worked principally because one was able to fairly amicably determine the nature of the jurisdiction of the mediator, without being tied to any particular procedures, such as the [mediation provider] procedures. When the Order was first made I thought that it had absolutely no chance of success at all, because the parties were so far apart and there had been no positive response to the settlement proposals that we had originally made. I think that it was principally as a result of [mediator’s] gravitas, being Head of Chambers and the simple persuasiveness on his part.”

“The case was settled by mediation and it was an eight-figure settlement. We used one of the Court of Appeal Judges from a panel, who was extremely good. Very helpful. Before the mediation we both were trying to negotiate and reach settlement, but I think there was a fundamental difference on the figures, and I think there were a number of very difficult questions of law which arose which were going to be decided for the first time, so we needed some guidance as to how a Court was likely to decide those issues. We thought that somebody with seniority and experience as

a Judge would be very helpful. It was resolved to both parties' satisfaction and within a very short time."

Getting past logjams

Although some of those solicitors who had rejected the opportunity to try ADR had offered polarisation between the parties and an unwillingness to compromise as a reason for reluctance to use ADR, there were instances when such troublesome cases were resolved after the imposition of an ADR Order and despite some apprehension about whether the case was capable of resolution through ADR.

"This action had been going on for years and everyone was thoroughly sick of it. A mediation took place and was successful. We had decided that ADR would be appropriate between ourselves, although there was a bit of argie-bargy about the ADR Order. The mediation lasted for three days with three parties and their solicitors, but on the final day it was just the parties who were present. The foreign parties were not affecting the dynamics of the mediation at all. In my experience most commercial litigants are foreign. No one was really satisfied with the result, but that's the way it is with ADR!"

"I was slightly surprised that we could not reach a settlement before [the mediation] took place. I think that the key was to have all of the decision makers together. I think that these days commercial clients like to be more hands on in their approach to litigation and as all of the decision makers were all together we settled it on the day, which was a great result for us."

"Having the clients there on the other side was a help. The solicitors on the other side were very strident and we could not really get past them. As the clients were there they could hear what we said through a mediator and get the message that we were happy to accept that there had been faults on our side. Also there is nothing like sitting in a room for a whole day without the phone going and having to concentrate on the facts on one case in particular."

Focusing on the strengths and weaknesses

In common with evaluations made of mediation in the Central London County Court scheme,²⁹ a positive feature of ADR and ENE was seen as the opportunity focus down on the central issues of disputes and to reflect on the

²⁹ CLCC Evaluation Report, 1998, op cit. Chapter 5, pp119-121, and p123.

strengths and weaknesses of the case. By questioning and testing parties' perceptions of the merits of their case, mediators seek to encourage movement in the positions that have been taken and may offer an alternative perspective.

“ADR helps you to focus on the issues. There is an air of formality and a skilled mediator can have an air of credibility, which can help the parties to see the strengths and weaknesses of the case. We probably would not have tried it without the ADR Order. The more judges make the Orders the better, in my opinion. Even on a weak case it may be worth trying.”

“It was fantastically successful. The mediator was excellent and the reason why it was successful was because it got the parties to focus on the strengths and weaknesses of their cases and realistically assess the chances of success against failure. With the assistance of the mediator we got a settlement. The Order made us take it seriously. It was a good call by the [Commercial Court] Judge. He set the timeframe and there was not much time to comply with the Order and it worked. We were tremendously happy with the result.”

Although the classic model of ‘facilitative mediation’ suggests that mediators do not offer their own evaluation of the merits of cases, it is clear from accounts of the course of some mediations organised in response to ADR Orders that mediators were often prepared both subtly, and sometimes quite explicitly, to communicate their assessment of merits. For example:

“A mediation took place. We exchanged reports and the two parties agreed that they would try it. [Senior Judge] was the mediator. We agreed on mediation, and no disrespect to him, but it was really an early judicial evaluation. He walked into the room and the other side said ‘We would like your views on the matter’ and he turned to them and said ‘As far as I am concerned you have to show XYZ otherwise you have had it’. Then we got down to settling. It was all over in the first three-quarters of an hour. Once [the defendants] had sat down with the mediator and us, the crushing realisation came that they were going to lose. They went home paying more than they wanted to, which we were very pleased about. A considerable amount of legal costs were saved. As mediations go it broke all the rules, as it was actually an early judicial determination. Mediation would probably not have worked here. You needed someone with sufficient gravitas to persuade the parties that they had weaknesses in their case. When a Lord tells you what he thinks of your case, that is going to be pretty persuasive.”

Disputes not resolved via ADR following Order

Although solicitors expressed a high degree of satisfaction with ADR procedures when these had been successful in achieving a resolution of the dispute, mediation appointments and ENE sessions that did not lead directly to settlement often led to considerably less favourable assessments. Negative evaluations following a failed mediation session tended to focus around perceived shortcomings of the mediator or evaluator, unwillingness of opponents to compromise in a situation in which parties had felt compelled to submit to ADR by the Commercial Court, and the mediation process itself. In many of these cases the additional cost and delay of a failed procedure intensified the dissatisfaction.

Dissatisfaction with neutral

Some solicitors were critical of the level of expertise displayed by the neutral, either in terms of their mediation skills or in their experience of the subject matter of the dispute. In a few instances there was also a criticism that the neutral had not sufficiently familiarised himself with the details of the particular case. For example:

“One of the problems with mediation I have found in this country is that those who are really responsible for mediation don’t fully understand the case. They get the papers, don’t bother to read them, and then turn up to the mediation expecting to be told about it, and don’t understand the intricacies of the case.”

In other cases, however, it was clear that the problem was a mismatch between the expectations of the parties and their solicitors, and the approach of the neutral. Neutrals display great variety in their approach to ADR and it is important that there is a good fit between parties’ expectations and neutral’s approach. So, for example, if the neutral is proposing a non-evaluative approach, parties are likely to feel dissatisfied if they are looking for a clear steer on the perceived merits of the case. Similarly, if parties are expecting a relatively hands-off facilitative mediation that will help them to find their own solution to the dispute, they may be turned off by high-intensity pressure towards a particular outcome. The following exemplifies this mismatch problem:

“The ENE was a complete waste of time. It helped no side. It said on balance, I think, the Plaintiff will succeed, and the Judge was then asked to put a percentage of succeeding on it, and he declined to do so. It was such a wishy-washy finding, it helped nobody, and just incurred a load of money. It cost about £10,000. Once we’d had the ENE, we thought we’d got such a hopeless result that really the only thing to do was continue. I can tell you my clients will never go to another ENE. If you have an ENE the Judge should be prepared to put his (excuse the expression) cock on the block, and say what he thinks the percentage prospects of success or otherwise are, which we didn’t get.... If the Judge had said ‘I think there’s a 60:40 percent chance of the plaintiff succeeding’ it would have settled. But because the Judge wasn’t prepared to do that it didn’t settle. And the other thing which I think horrified my clients, during the course of the ENE, the Judge admitted that he had no experience of insurance disputes.”

Behaviour of opponent

Some of the descriptions of the behaviour of parties during failed mediations or ENE sessions raise some doubts about the value of placing too much pressure on parties to enter into ADR procedures. Parties may agree to attend a mediation or ENE session if they fear that to refuse may lead to some subsequent penalty if the case goes back to court. In these circumstances, attendance may be a matter of form with no intention to negotiate in good faith, thus leading to a rather futile and costly exercise. The following extracts convey the strength of feeling expressed by some solicitors about these kinds of experiences:

“We did attend a mediation, which was conducted entirely at our expense as we were dealing with a litigant in person. The case was a simple debt recovery action and we spent one day with our client in a room while the mediator spoke to the litigant in person who was frankly there for a laugh. The Judge [in the Commercial Court] was very keen on the process of ADR. We would have preferred not to comply with the Order and go to trial. The trouble with litigants in person is that they are in for the whole lot or bust. There is therefore no middle ground for them. The litigant in person has too much to lose and not much to juggle with.”

“We did try mediation and it fell flat on its nose. The other side was simply not interested and they immediately set about proving that. In fact the mediator walked out. Apparently he went in to see the other parties and one said to him that he thought he had bigger balls than our client, and then the mediator simply said that he was quitting and walked out of the process in disgust. That was deeply unsatisfactory. The other side had no intention of settling and they made that clear from the start. We did ultimately settle, but that had nothing to do with the mediation process.”

“I have mixed feelings about the mediation. The good side was the soul searching that it caused on our side. We possibly looked at the case in a way that we might not have otherwise done. It made the clients focus on what we had done, so it was worthwhile. However, it did not work, or at least it has not worked. Our opponent is quite hostile. The opponent pretty much said ‘I am here because the Court ordered me to come here. Our offer is £zero’. The case is probably inappropriate for mediation, but that is really because the defendant is digging in his toes. I am not enthusiastic about forcing the parties to mediate. With most commercial actions we are dealing with pretty sophisticated parties who even when feelings are running high, they are dealing with each other fine on another contract. To an extent they are capable of coming to a settlement when they can.”

“The mediation took place but was unsuccessful and we did not really move much further forward. There were two defendants and although there was some limited progress from the discussions point of view, there was no substantive headway made. Essentially one defendant was not willing to participate in the process.”

“After the ENE there was no feedback or response; the other side defaulted and their case was thrown out. The incentive for the ENE popped up from the Commercial Court. Actually it was an irritant, as it put a whole other layer of procedure on the case, which we thought should have been thrown out. The Court bunged it on us and that meant that the case limped along much longer than it should have done. It was one of those cases where the court forced it on us and should not have done.”

There is clearly an issue here which needs to be considered in the selection of cases for ADR, particularly in light of the findings discussed below of the potential of a failed mediation or ENE to increase the costs in a case.

The mediation process

From the complaints made by some dissatisfied solicitors about the mediation process following a failed mediation, it seems that there may also occasionally be problems about uninformed expectations of ADR processes. Several solicitors complained that they disliked shuttle diplomacy and were unhappy about differences in the amount of time that mediators spent with one side or the other. As the following extract illustrates, unless parties and their solicitors are properly prepared for the form of procedure to be adopted by the neutral, misunderstandings and dissatisfaction are likely to occur. As with court procedures, with which lawyers are familiar but parties are often not, satisfaction with procedure is at least in part a function of management

of expectations. If people do not know what to expect they will guess what to expect - probably incorrectly.

“We had a mediation - it didn’t resolve it. I think one of the parties wasn’t genuinely treating it as a day to settle on; I think they just wanted to test out how far they could go. And the other reason was that we weren’t happy with the way the mediation went in the end at all. We didn’t like the process.... There were three different parties. They were all in separate rooms, and the mediator was kind of ‘shuttling’ between all three - so he would put their points to me, and then I would answer them, and I would ask him to ask questions of the other parties. And really we weren’t happy - it was too much Chinese whispers. I would have preferred just to have said to them ‘Look, we don’t think we have to pay for this reason, so what is your answer?’, whereas it wasn’t quite working like that - we were only getting half the answer back, and we don’t know how forcefully he was making points that we were making to him. So you’d never really know how points were being addressed, or whether you were getting them across properly, [or] whether their clients were understanding them, which was the most important thing. I think on the whole we thought it was a waste of a day.”

“The actual process was slightly cumbersome. It took longer than expected, spending one to two hours waiting for the mediator, who was shuttling back and forth.”

Some solicitors were rather disillusioned by a failed mediation experience, especially if it was felt to be expensive and relatively unhelpful in terms of promoting settlement. Although in cases where mediation was successful, solicitors generally felt that their parties had achieved a cost saving, when mediation was *not* successful it could lead to a sense that costs had been wasted (see discussion of impact of orders later in the Chapter). This kind of negative assessment is exemplified by the following extract from an interview and is consistent with some of the findings of the CLCC study which concluded that, on the plaintiff’s side at least, unsuccessful mediations could lead to increased costs for parties.³⁰

“The mediation took place on one day and there was another attempt on a second day, but that also failed. I have to say that it proved to be a very expensive way of not resolving a dispute that the parties thought would not be resolved by that route. When one is dealing with established commercial parties who know what they

³⁰ ‘Among plaintiffs whose cases *did not settle* at mediation, almost one-half thought that the mediation had increased their legal costs...one-third of plaintiffs’ solicitors in *unsettled* cases thought that costs had been increased by the mediation.’ p150, CLCC Evaluation Report, 1998, op. cit.

are dealing with in terms of the dispute there may be some scepticism about the process. The mediator did a good job, but some of the hurdles were very difficult to overcome and the cost was phenomenal. When you consider the costs of the mediator's fees, the hiring of several rooms, one for the mediation, plus other rooms; two days for the whole thing for which everyone had to be available, the preparation time, the document bundles and so on, and it all got us nowhere. The claim was not a vast one but the mediation made the costs more disproportionate. My fear is that my client will be very wary of mediation again. It just cost so much. It is great if it succeeds, but the cost factor will be the main consideration for the future. This cost thousands of pounds."

Positive views of mediation experience

There were, however, a number of cases in which a failed mediation or ENE was nonetheless regarded as constructive by solicitors, principally as a means of clarifying issues in the dispute and moving the parties closer to settlement.

"A mediation was fixed up and held, and it didn't settle at the mediation but it did settle three months later. We felt that the mediator did a pretty good job considering it was a very difficult matter. We were very disappointed when it didn't settle on the day, but we didn't attribute that to any failings on the mediator's part. His style was to put a lot of pressure on each of the parties that they don't have concrete cases, and to try to explain the weaknesses on each side. He pushed it very hard, but unfortunately one of the parties just wasn't prepared to move at all. They were very resistant to a compromise on the day. I think everybody went away and thought about their respective positions more, and there was movement ultimately by all parties. I think the mediation was a useful start to the settlement process. I think ultimately it would have settled, because most cases settle, but it did certainly assist (and didn't hinder) a settlement to the case."

"We did not settle at the mediation, but the mediation cleared a lot of issues which were really non-issues and then following that the parties became entrenched in their positions. The action then settled two months later. The mediation certainly helped this to happen."

"The Judge ordered the parties to mediate. It was not settled at the mediation, but settled subsequently and the mediation definitely assisted there. Generally our experience of mediation is mixed - sometimes it works, sometimes it does not. I don't think you can guess whether it will work. I think it is always useful to meet and finally get to grip with the issues. Mediation is often a good way of getting the parties in a room together."

Impact of ADR Orders and ADR procedures on time and cost

It was not possible within the scope of this study to undertake a quantitative assessment of the extent to which the making of an ADR Order or the use mediation or ENE might have resulted in time or cost savings for parties. However, during interviews solicitors were asked whether they believed the issue of an ADR Order or the use an ADR procedure, had decreased or increased the delay or cost of resolving the case in which the Order had been made. In most cases where the dispute had been *settled* as a result of the ADR Order or where there had been a successful mediation or ENE, solicitors tended to think that there had been cost and time savings for clients. However, when the ADR Order itself was seen as an obstacle to settlement, or where an ADR procedure was not successful in achieving a settlement, solicitors sometimes felt that there had been an increase in either delay or cost, although this was not invariable.

Positive impact of ADR on costs

In some of the larger cases included in the study, legal costs were not a major pressure during the course of the litigation, because of the sums involved, the importance of the litigation to the parties, and the fact that the dispute was between major business concerns with considerable resources. Even in these cases, however, solicitors were always conscious of costs issues. In other cases, costs were a central problem and sometimes a major obstacle to settlement of the claim.

In so far as it is possible to generalise about the perceived impact of ADR Orders on costs and time in commercial cases, it seems that when a mediation or ENE had been *successful*, solicitors mostly felt that this had resulted in costs savings for the parties, and that these savings had been significant. The cost savings derived principally from avoiding a lengthy trial. In many of these relatively high-value commercial cases legal costs can be substantial in absolute terms, and although the reported cost of mediation or ENE was often quite significant, this still compared favourably with the potential costs of proceeding with the litigation. This was

particularly so when cases had been listed for trials lasting several days or weeks. For example:

“We saved at least £100,000 on the costs of going to trial plus six to nine months in terms of time.”

“The costs savings were significant. On a conservative estimate up to trial we saved £100,000. It was listed for 20 days if it did go to trial.”

“The case would have needed a five-week trial, so the success of the mediation saved about £500,000 on costs. Costs had already been incurred of roughly £150,000 on each side, so we already had a quarter of a million at issue. The major issue in many of these cases is legal costs and anything which can be done to bring the thing to a resolution before they get out of all proportion has got to be good.”

“The mediation saved about four to five weeks of court time and I think the costs which the parties would have had to pay for the trial would have been £500,000 each way, because the leading counsels’ fees would have been enormous. The mediation by contrast cost no more than £60,000 in total. Both parties shared the costs of the mediator half and half.”

“The Order saved a dramatic amount of time and money by settling at this early stage. We’d not exchanged lists of documents or witness statements or experts’ reports at the time that the mediation was set for. The trial was listed for five days. In terms of costs it wouldn’t have surprised me if I wouldn’t have got much change out of £75,000 going through with the trial, and that’s just my clients costs. We would have been at risk for the same amount for the Plaintiff, and then the Second Defendant would have incurred a similar sum.”

“I would have thought that running a matter like this to trial would have cost perhaps up to a quarter of a million pounds. As the matter settled at an early stage probably it cost about £50,000-£60,000, with savings to both parties.”

“I suspect we saved hundreds of thousands of pounds. It was a very big complicated case which involved a lot of parties and lots of issues.”

Although to some extent these extracts speak for themselves, the perception of cost savings flowing from the use of ADR is generally made by means of a comparison with potential trial costs. It is less clear whether such substantial savings would be projected set against the potential costs of settlement by solicitor negotiation. Nonetheless, solicitors’ perceptions of costs savings in commercial cases are consistent with the subjective assessments of the impact of mediation on costs made by parties and

solicitors in the CLCC study. In that study about two-thirds of parties who had *settled* their case through mediation said that they believed they had saved legal costs, while about 90% of solicitors questioned in the study believed that successful mediation had achieved cost savings for parties.³¹

Negative impact on time and cost

In discussing failed attempts at ADR, solicitors sometimes complained about the negative impact of ADR Orders and procedures on time or cost, although such complaints more frequently concerned time than cost. Where time was mentioned, complaints seemed to fall into three areas of concern. First, in discussing the impact of ADR Orders in general, some solicitors were worried that the ADR Order could be used as a tactical weapon. One or two believed that this had actually occurred in cases that they had recently been dealing with, and that the impact had been detrimental to their client. For example:

“We tried to agree terms for mediation with the other side but in my opinion the other side had absolutely no bona fide intention to go to ADR, and probably went home celebrating the day the ADR Order was given, because it gave them another few months in order to delay the hearing of the matter before the Court. We must have spent a good couple of months trying to agree with them the terms for the ADR procedure to absolutely no avail, and in the meantime everything else was put on hold. When the ADR direction was given by the Judge, we had been indicating to our client that we were on our way to obtaining the trial date and we were extremely disappointed - quite gutted. Their solicitor’s remit was to put off the fateful day of judgment, which the ADR Order was very successful in doing. Had the ADR procedure not been ordered we would have had an opportunity to get the matter heard before the Court and to get a better result for the client.”

“The [unsuccessful] ENE took four months to organise and carry out (and this was a very small case). ADR/ENE Orders and procedures can be used cynically as a delaying tactic by Defendants, and ENEs must be dealt with expeditiously if they are to become useful tools and are to avoid this sort of abuse. The mindset of solicitors has become more switched on to mediation since the practice of issuing ADR Orders began, and a non-compulsory ADR Order is the most amenable way of getting mediation into the mindset of solicitors and clients. Mediation should not be mandatory as a matter of principle, because the Court

³¹ CLCC report, 1998, op cit, pp93-94.

is there first and foremost to dispense justice. Further, the Court should not suspend the timetable as a matter of course in these ADR Orders, though it should be amenable to such a suspension if the parties request it.”

In at least one case, a Defendant was prepared to admit the use of such tactics:

“I use the fact that the Commercial Court encourages ADR as a tactic in relation to actions where I think I’m going to have to pay something and I try where possible to transfer them to that forum so that I can get it on to mediation. Two or three insurers that I’m acting for at the moment virtually have it writ in stone that I must attempt to settle it by mediation, and that seems to be the buzz-word at the moment in the insurance industry. They all seem to be very keen to get it in front of mediators. While my clients are very pro-mediation it is more difficult to persuade the Plaintiff to go along with it, and you do need a bit of judicial support. And I think the Commercial Court is succeeding in that direction.”

A second concern was the interruption caused by the stay of proceedings to the natural flow of litigation procedure. It was felt that bringing the case to a halt at a crucial moment could hinder a preferred strategy of maintaining pressure on opponents in order to achieve settlement:

“I am not entirely sure whether all the instances in which ADR is imposed by the Court in fact properly lends itself to anything other than an intervening delay. It is bound to delay the process if at a time when both parties are essentially ready for trial you then interpose another stage through which they must go.”

Finally, some felt that by introducing effectively an additional compulsory stage to proceedings, the overall length of the case had been increased.

“The case did settle, but that had nothing to do with the ADR Order. The person who was on the other side said basically ‘this will settle over my dead body’. He had authority, so there was nothing you could say. A report was made to the court, but there is only so much you can say. The other side were entitled to take the position that they did. [The ADR Order] took 18 months out of the case, so it was not a happy experience.”

There were also some general negative comments about the impact of ADR Orders on costs, indicating that when an Order or mediation had not resulted in promoting or achieving settlement, this added to cost and delay rather than reducing it:

“If the Order had any impact at all, it was to increase costs.”

“Sometimes when mediation is ordered it can be a burden. When the Order is made the Judge should think of the parties involved. If the parties are asked whether they want to try mediation before the Order is made and they answer ‘No’, and the mediation is ordered, that wastes more costs.”

“There has been undue pressure to go to ADR which can sometimes be quite off-putting as the court is not necessarily helping the case to be resolved by telling parties to try ADR. I think it’s a bit shoddy sometimes. Certainly at the start some of the Judges went completely overboard. Lord Woolf complains about costs in some courts, but the Court sometimes run up the costs.”

These more negative views of the impact of ADR Orders on cases highlight the fact that stays of proceedings and involvement in ADR procedures can have costs as well as benefits when unsuccessful, both in terms of length and expense. This is again consistent with the findings of the CLCC study, which found that “mediation has the potential for increasing costs. Although this was most evident among cases that failed to settle at mediation (where about one-third of respondents perceived increased costs) there was also a small minority of cases where respondents perceived increased costs despite the settlement of the case at mediation”.³² These matters need to be borne in mind both in the operation of the ADR practice in the Commercial Court and more widely by courts in fulfilling their duty to encourage the use of ADR as set out in the overriding objective of the CPR. The identification of cases as “appropriate” for ADR is not science, but there is an art that involves weighing a number of factors, and recognition that a seriously unwilling party can derail the process.

Wider impact of Orders on practice

“There’s no question that had the Court not started making ADR Orders we wouldn’t be undertaking the mediations that we do. Now I am much more likely to turn around to the client and say ‘Look, this is something where you should think about mediation’.”

During telephone interviews, solicitors were asked to reflect on the question of the extent to which, aside from particular cases in which ADR Orders had been made, the Commercial Court’s practice was having a broader impact on

³² CLCC report 1998, p91.

advice given about the resolution of commercial disputes. The view of the majority of those interviewed was that the Court's practice of issuing Orders had had an impact on practice, although views differed about the extent of the impact and whether the change was a good or bad development. Interestingly, reflecting the change in response to Orders discussed in Chapter Three, there seemed to be a softening of view about ADR Orders between the two phases of the research. Compared with interviews conducted with solicitors during 1998, interviews carried out during Summer 2000 seemed often to display a greater familiarity with ADR and a more common perception that ADR was being advised and used more frequently in the resolution of commercial disputes. This is consistent with reports made by mediation providers in the commercial field that their caseload in commercial disputes has been steadily increasing.³³

A common view was that, in anticipation of the possibility of an Order being made, solicitors were more frequently considering with their clients whether it would be appropriate or practical to consider trying to resolve the dispute via some form of ADR procedure. The following examples provide clear expressions of this view:

“Ever since the Practice Statement when it came out that Judges were going to start making these ADR Orders, you had to raise it earlier on in the proceedings with your clients. And because of that they've had to think about it and you do approach the other side to discuss whether it's appropriate or not.”

“When ADR first came around people just tended to say ‘No’ and fill in the form and that was it. But now that the Court is taking a more robust view to ADR and what it is doing is making everybody think about it. Everybody is considering ADR and instead of just saying ‘No’ they are thinking ‘Well OK, is this a case for ADR?’ and not necessarily saying ‘No’ but saying ‘Possibly’ and then talking to clients.”

“I've got another (Commercial Court) case where pleading have just closed, so we're some way away from the directions Order.

³³ For example, according to CEDR's own 'commercial mediation statistics', between April 1999 to March 2000 they mediated 462 commercial case, an increase of 141% on the total of 192 cases for the previous financial year. Commercial contract disputes accounted for 31% of the cases mediated compared with 15% of the previous year's total. However, the organisation attributed the rise to the increasingly widespread use of mediation clauses in contracts, rather than the activity of the Commercial Court.

But already the parties are talking to each other in a much more open fashion than I think would have happened some time ago, probably anticipating what's coming up."

"I think these days litigation solicitors actually have mediation much more firmly in their minds than, say, two years ago, which is roughly when the direction [to start issuing ADR Orders] was made. ... I think generally speaking you don't have to educate the client much either – they've all heard of it too, and it's much easier to persuade the clients to do it."

Some respondents even believed that the Orders could be strengthened:

"I would like to see a situation where the court would positively encourage parties to try ADR and go further. Currently the court suggests to the parties that they should consider it, the lawyers spend thirty seconds considering it, and then refuse it, and there is no further enquiry beyond that. There is no point in ADR before discovery and exchange of factual statements, but there should be an intermediate step between that stage and setting down, where the parties go back to the court and stand up and explain to the court why they have not done so. It is very, very easy to avoid ADR. I would like to see more bite in the Orders."

"I think the Americans are much more sophisticated in their ADR than we are. First of all, ADR is compulsory - you have an Order for it."

A minority of solicitors, remained at best unconvinced by the practice and, at worst, positively hostile to it. Doubts were raised about the indiscriminate use of ADR Orders and the need to make realistic choice about which cases to direct toward ADR. This echoes the concerns described above about its use in cases in which a judicial determination on the law was necessary or where the parties were too far apart, or too intransigent to reach compromise.

For example:

"There's a limited range of cases, I think, where mediation is likely to provide the solution. Commercial case are wholly different from disputes with people who have had disastrous holidays or the hospital cuts off the wrong leg, where there's a big emotional charge and feelings come into play. It's only money we're arguing about."

"I think some cases are much more susceptible to mediation than others. I think professional indemnity and insurance cases tend to be more capable of resolution by mediation than certain other commercial disputes - you know, there are always going to be some kinds of commercial disputes where really nothing less than an all-or-nothing result is appropriate."

“I think the [Order] obliged them to actually sit and discuss ADR with their opponents, but the difficulty of course is that the Court can’t actually force parties to mediate. Mediation is a voluntary procedure and it doesn’t really fit very comfortably with what the Courts are there for.”

“ADR is on the increase generally. Some people think that it’s a cure-all, others think it prolongs litigation. My own feeling is that the Commercial Court is directing ADR to decrease the burden of the trial list.”

Although most of those who commented on special factors in relation to overseas litigants did not perceive particular problems in the issue of ADR Orders or the possibility of achieving successful outcomes to disputes via mediation or ENE, one or two respondents felt very strongly that potential litigants from overseas might be deterred from using the English courts to resolve disputes if they feared that they would be compulsorily directed toward ADR. The following are expressions of this type of view:

“These guys in the Lord Chancellor’s Department, if they’re awake, have to understand that we’re talking in the Commercial Court primarily about overseas clients - it’s an invisible earning. It’s not about doing justice and social duty and all that sort of thing. It’s providing a service to the international market. Foreign clients choose what they consider to be the best international Court to handle their litigation, and we’re proud to be the ones that they choose when they put English law and English jurisdiction in their contracts. But if they’re going to do that we’ve got to give them that service, and the service they want. If they’re not able to have a decision of the Court - if the Court refuses to make a decision - when they’ve chosen the English Court jurisdiction, then they have to stop and think ‘Well why the hell should we put English Court jurisdiction in our contracts and go to the English Court, if the English Court refuses to deal with it?’”

“I think [mediation] is a useful tool, but it should not necessarily be used too extensively.... Just having cases shifted out of the High Court into mediation isn’t necessarily a good thing, when you bear in mind that a lot of High Court litigation arises because foreigners have chosen to have English jurisdiction clauses in their contracts. I would think if I was in the shoes of a foreigner I’d be a bit put off by the fact that, having agreed to have my dispute in the High Court, to get it bounced out of the High Court to some sort of lesser vehicle. Perhaps I have a different view, because a lot of my cases don’t involve English litigants at all; they involve foreigners.”

Conclusion

Interviews with solicitors about their reasons for not trying ADR following the issue of an ADR Order by the Commercial Court raised some questions about the identification of cases by the Court as being ‘appropriate’ for ADR. A common reason given by solicitors for failing to try ADR despite an ADR Order was the party’s need for an authoritative judicial ruling. There were also cases in which there was believed to be little scope for compromise or that the approach of the parties was not conducive to settlement by ADR. In some cases there was a concern that the timing of the Order was not optimal. In others, there was simply a general scepticism about the value of ADR as compared with ordinary solicitor negotiations. Despite these concerns, however, in the majority of cases in which an Order was made, the Order itself was not seen to have a negative impact on settlement negotiations and in some cases settlement was seen as a direct result of the Order, even though ADR was not used.

Experiences of ADR, when it was successful, were overwhelmingly positive and the factors most valued were the skill of the mediator, the ability of ADR to get past logjams in negotiation, the opportunity offered by ADR to focus on the strengths and weaknesses of cases, and client satisfaction. There was also a perception that as a result of successful mediation the costs of trial had been avoided, often leading to substantial savings for clients. When an ADR process had not been successful, there was a lower level of satisfaction among solicitors and concerns were expressed about the shortcomings of neutrals, the intransigence of opponents and the problem of pressuring an unwilling opponent through an ADR Order to come to the negotiating table. There were instances, however, when solicitors felt that even in the absence of achieving a settlement, the ADR process had been constructive.

In so far as views were given about the impact of ADR on costs in Commercial Cases, there was a perception that successful ADR could save costs through avoiding trial and that unsuccessful mediation had the potential for increasing the overall costs in a case.

On the wider impact of ADR Orders on commercial practice, there was a common view that the practice of the Commercial Court had had a significant impact on the way in which solicitors advised their commercial clients about approaches to the resolution of commercial disputes.

CHAPTER FIVE: ADR IN THE COURT OF APPEAL

The discussion in Chapter One noted the extent to which the publication of Lord Woolf's Report on Access to Justice represented a watershed in the development of ADR in the resolution of non-family civil disputes in England and Wales.³⁴ In the Final Report, published in 1996, a chapter was devoted to consideration of appeal cases and of the need for a change in approach to appeal procedures. In discussing procedures in the Court of Appeal cases Lord Woolf specifically endorsed an announcement made by the Court of Appeal in 1995,³⁵ that in the future the Court hoped to be able to identify cases that might be susceptible to settlement by mediation. Lord Woolf felt that this approach was in line with the encouragement of ADR contained within the 1995 Interim Report on Access to Justice. In that Report he had said that, 'litigation is not the only means of resolving civil disputes, or necessarily the best', and proposed that through active case management, the courts should encourage parties to use satisfactory alternative methods of dispute resolution.³⁶

In discussing the special character of appeal cases in the Final Report, Lord Woolf acknowledged that aside from the private purpose of final resolution of disputes, appeal cases performed the important *public* purpose of ensuring public confidence in the administration of justice by correcting wrong decisions. Nonetheless, in Lord Woolf's view, such a purpose had to be achieved without introducing unnecessary costs, delay, and complexity into the procedures. He believed that the broad principles established for the new approach to the conduct of litigation, spelled out in the early sections of the Interim and Final Reports, applied just as much to appeals as they did to first instance hearings. He argued that cases at the appeal level must also be

³⁴ See Interim Report Chapter 18 and Final Report to the Lord Chancellor on the civil justice system in England and Wales, July 1996, London, HMSO, Chapter 14.

³⁵ 1 WLR [1995] at 1188.

³⁶ Interim Report, 1995

managed with an eye to ‘expedition, proportionality, saving expense and assisting settlement’.³⁷

In a paragraph devoted to ‘encouraging settlements’ in the Final Report, and without any extended discussion of the topic, Lord Woolf asserted that mediation in the Court of Appeal is ‘clearly most appropriate in the case of final appeals to the Court of Appeal’. He could, however, foresee that there might also be some occasions on which mediation could be encouraged in the case of interlocutory appeals, for example where an interlocutory injunction has been granted or in multi-party proceedings.³⁸ In the list of his main recommendations on appeals, however, no mention was made of mediation or any other form of ADR.

Following his appointment as Master of the Rolls in October 1996, with the co-operation of leading ADR practitioner proponents, Lord Woolf worked on developing a fully-fledged ADR scheme in the Court of Appeal. Discussions between distinguished mediation providers and members of the Court of Appeal led to the establishment of a specialist mediation scheme, to be offered on a *pro bono* basis to selected groups of appeal cases. The mediations would be conducted by leading solicitor practitioners and members of the Bar, who were not necessarily trained mediators, but who were of sufficient distinction to command authority in the mediation of an appeal case.

The Court of Appeal ADR scheme received an important boost in February 1997 when Lord Woolf gave the leading judgment in two linked cases in the Court of Appeal concerning police misconduct.³⁹ The cases involved appeals against the level of compensation awarded to plaintiffs by juries in the Central London County Court. In the course of the judgment, the Court of Appeal provided guidelines for future compensation awards in similar

³⁷ Final Report, 1996, Chapter 14, paras 3-4, p14.

³⁸ Ibid. para 39, p162-163.

³⁹ *Commissioner of Metropolitan Police v Claudette Thompson and Kenneth Hsu*, [1997] 3 WLR 403.

cases. In the knowledge that six other cases of the same type were awaiting determination by the Court of Appeal, Lord Woolf took the opportunity in the closing paragraphs of his judgment to urge those parties to try and settle their cases. Most importantly, he encouraged them to avail themselves of the new ADR scheme in the Court of Appeal. Lord Woolf drew to the parties' attention 'the arrangements which can now be made by this court for assistance by way of alternative dispute resolution ('ADR')' and then went on to say quite pointedly:

'We would hope that the guidance we have provided should enable the appeals to be settled without difficulty by the parties themselves, but if they are not we would hope that the parties would seek the assistance of ADR from the court before proceeding with the appeals. If they do not this may be an appropriate matter to be considered when determining the order for costs which should be made.'

The final sentence of the paragraph contains the kind of explicit threat of punishment for failure to follow the court's 'suggestion' that Lord Woolf sees as a fundamental tool of effective case management within the court system.

The Bowman Report, which followed Sir Jeffrey Bowman's review of the Court of Appeal in 1997, further reinforced the ADR message coming from the Court of Appeal, in recommending that ADR should be used in appeal cases where appropriate.⁴⁰

Some might think that the scope for ADR at the appellate level would be very limited, given the fact that by the time a case reaches appeal one party has been deemed the 'winner' in litigation. However, appellate ADR programmes in the United States, for example, are well established, dating back to 1974 when the Second Circuit inaugurated its Civil Appeals Management Plan. All thirteen federal courts of appeals have now implemented ADR programmes in some form and the number of cases that undergo appellate ADR in the US is significant, amounting to around ten to

⁴⁰ Bowman Report on the Court of Appeal, Chapter 7, para 58.

twenty five percent of appeals filed.⁴¹ The focus of most of these programmes is ‘to encourage or require counsel for the parties to discuss settlement at a conference facilitated by a non-judicial court employee or other third party neutral [whose role] is primarily that of a mediator’.⁴²

Under the Federal Rules of Appeal Procedures⁴³ the court can direct lawyers, and in appropriate cases parties, to attend such settlement conferences, and they are normally held before the filing of appellate briefs, and in most cases before oral argument. Local court rules or procedures identify the criteria each court uses to determine whether a case is eligible for the programme and whether a conference should be scheduled.

The core common objectives of such mediation and settlement programmes in the Federal Courts of Appeals are:

- The settlement of cases through facilitated negotiation
- Helping litigants to obtain outcomes not otherwise available
- Conserving judicial resources
- Improving case management

In discussing the background to these objectives, it has been argued that prior to the introduction of the Rule there were few opportunities in the Federal Courts appellate processes for parties to meet to discuss settlement. Moreover, since most programmes are staffed entirely by non-judges (using lawyers employed by the court to conduct the conferences) settlement at such conferences leads to a substantial saving in judicial resources. The programmes tend to use facilitative mediation techniques to assist parties in reaching settlement. Counsel for each party is always included in these sessions.⁴⁴ In most programmes, there is no charge to appellate litigants for

⁴¹ Robert J Niemic, *Mediation and Conference Programs in the Federal Courts of Appeal: A Sourcebook for Judges and Lawyers*, Federal Judicial Center, Washington DC, 1997.

⁴² Niemic, note 17, p2.

⁴³ Fed. R App. p33

⁴⁴ Niemic 1997, op cit, p8.

participation. Each court of appeals funds the administration of the programme.

Key issues in these programmes concern the selection of cases for inclusion in the programme, the timing of settlement conferences and the question of whether participation in such conferences should be mandatory or voluntary. In most of the existing programmes, once a conference has been scheduled, the parties or their lawyers are required to participate and there is no method for opting out of a programme. However, although participation is mandatory, the conference process is non-binding, so that no settlement can be reached unless all parties consent. Some programmes, however, consider the willingness of the parties to mediate as a factor in selecting cases to be mediated.

Comparisons of the effectiveness of the different approaches taken in these programmes have not yet been undertaken, given the fact that many have only recently been established.

The Court of Appeal ADR scheme

The objective of the ADR scheme in the Court of Appeal has been to encourage parties in appeal cases to attempt mediation. According to the Court's information about the scheme, the purpose of mediation is 'to help parties in dispute to resolve their differences, in whole or part, outside the Court process'. The Court's information leaflet goes on to advise that '[mediation] is a speedy and informal process, in which an independent person (the mediator) assists the parties'.⁴⁵

The Court of Appeal ADR initiative is a voluntary scheme in which parties are invited by the court to participate in the scheme. A mediation will only take place if both parties agree to it, and both parties are required to attend the mediation in person. There is no charge for the mediator's services and each party must bear its own costs relating to the mediation unless otherwise agreed. The mediator has no power to make orders in relation to the case.

⁴⁵ At the time that the ADR scheme was started, the average monthly number of appeals coming into the Civil Appeal Office was about 200, with a settlement rate of about 25%.

Since 1999 parties refusing to mediate have been asked to return a form to the court stating their reasons for refusal (see further below).

The Civil Appeals Office (CAO) administers the scheme. In its early days the scheme was managed by a lawyer in the CAO and had the benefit of IT support from a member of the CAO. A considerable amount of effort was put into setting up the scheme and arranging mediations when parties agreed to mediate. Between February and July 1999, the scheme was run by another lawyer employed specifically to take charge of the scheme. The post was funded jointly from private sources and LCD. During this period the manager was proactive in following-up expressions of interest in using the scheme and an analysis was conducted on a fortnightly basis of parties' reasons for refusing the Court's offer to mediate.

Cases have been drawn into the scheme in a number of ways. First, following the judgment in the two police misconduct cases in February 1997 the Court identified a group of six similar cases thought appropriate for mediation. These were cases in which the substance of the appeal related to quantum only. A letter was sent by the Court to the parties in the six cases inviting them to use the Court of Appeal mediation scheme to try and achieve settlement in the cases. Information was provided about the scheme and about the way in which the mediations would be conducted.⁴⁶

In addition to the hand-picked group of police misconduct cases, in November 1997 the Civil Appeals Office sent out a 'mail-shot' to appellants and respondents in 231 appeals, advising parties of the existence of the Court of Appeal mediation scheme and offering the opportunity to use the mediation scheme. A number of categories of case were excluded from the mail-shot on the ground that they would not be suitable. These were insolvency, employment, and judicial review appeals.

⁴⁶ In all six cases, the offer to make use of the CA mediation scheme was accepted, although one of these cases subsequently settled without the intervention of a mediator. Five cases were mediated of which two settled as a result of the mediation and three did not settle (see further discussion below).

Since April 1998 the Civil Appeals Office has been operating a standard system. A paragraph was inserted into the standard letter that goes from the Appeals Office to appellants when their appeal has been lodged with instructions to notify the respondents about ADR. It was never envisaged that all cases would be appropriate for mediation, and certain classes of case have been defined as probably *inappropriate*. At the moment these are: judicial review cases; insolvency cases; cases concerning significant principles of commercial law on appeal from the Commercial Court; and employment law cases. In addition, it is currently thought that cases in which one party is unrepresented are probably not appropriate for mediation.

A further refinement to the Court of Appeal scheme was introduced in November 1998, when a letter about the ADR scheme, signed by the Master of the Rolls, was routinely included in the information pack which the Appeals Office sends to parties involved in appeals.

Finally, in some cases, Lords Justices have been recommending at the leave to appeal stage that the parties consider Alternative Dispute Resolution. Cases considered particularly suitable are contract and tort appeals from the county courts where the claim value is relatively low.

The information pack sent by the Court of Appeal is modelled on that used in the Central London County Court mediation scheme. It includes a leaflet giving information about the purpose of mediation, the voluntary nature of the scheme, the powers and role of the mediator and the confidentiality of the process. Parties are also told that there is no charge for the mediator's services and that each party must bear its own costs relating to the mediation, unless otherwise agreed. In common with the CLCC scheme, the Court also informs the parties that if they do not wish to accept the court's offer to arrange a mediation, then the Court should be informed of the reasons for refusal.

Mediations have been carried out by senior solicitors and members of the Bar who have volunteered their services on a *pro bono* basis, and who have undertaken a specially designed short mediation course run by CEDR and the ADR Group. In cases where the Court of Appeal's offer to mediate the

case is accepted, mediators are assigned on the basis of the relevance of their expertise to particular cases.

Some of the mediations have taken place within the Royal Courts of Justice (RCJ), but most have been held outside of the RCJ at venues agreed between the parties and the mediator assigned to the case. No limit has been imposed on the length of mediations or on the number of occasions that the mediator may meet with the parties in order to achieve a settlement of the case.

Review of the Court of Appeal ADR scheme

Following the establishment of the ADR scheme in the Autumn of 1997, in Spring 1998 the Court of Appeal's computerised database was modified in order to be able to track the progress of cases in which the Court's offer of ADR had been accepted by parties. In early 2000 the Lord Chancellor's Department commissioned a limited review of the operation of the ADR scheme in the Court of Appeal since its establishment in 1997. Between February and early April 2000 information was gathered from several sources. The primary source of data was the Court computer system (RECAP) which provided most of the case details used in the review. Case files were also examined to check the information on RECAP and to fill in gaps. Solicitors were contacted where necessary in order to obtain updated information about the status of cases where the outcome was unclear from the computer system or the files. In addition, literature kept by the scheme administrators was scrutinised and correspondence from mediators and solicitors was checked to identify all cases that might have proceeded to a mediation session. Court staff helpfully assisted this exercise by identifying cases that *might* have proceeded to a mediation.

This time-consuming and complicated approach to the establishment of what might appear to be the relatively simple questions of how many cases had entered the mediation scheme and what had happened to them, was necessary for several reasons. First, because cases were able to enter the mediation scheme via several different paths; second because there were gaps in the recording of information on to the computer database; and finally, because as always, in the absence of a successful mediation or trial, it

was almost impossible to ascertain from the court database or paper files the eventual outcome of cases.

The review also included an analysis of reasons for refusing the Court's offer of mediation, and a small number of interviews were conducted with solicitors who had been involved in the scheme. The limited objectives of the review were to establish:

- The number of cases mediated since the establishment of the scheme, the types of cases mediated, and the outcome of the mediations;
- The eventual outcome of those mediated cases that did not settle at the mediation;
- Reasons for refusal to mediate

The demand for mediation

Since the establishment of the ADR scheme in the Court of Appeal, the take-up rate has remained relatively modest. The mail-shot that was sent out by the Court of Appeal in November 1997 went to appellants and respondents in 231 appeals, advising them of the existence of the ADR scheme in the Court of Appeal and inviting them to enter the mediation scheme. In April 1998, the new regime began in which an invitation to consider ADR was issued automatically in appeals against final orders, excluding family cases. Between April and October 1998 invitations to mediate were sent out to solicitors in 536 cases. Out of this total of 767 appeal cases in which an invitation to mediate had been made by the Court, some fifteen cases had been mediated through the scheme by the end of January 1999. This suggests a conversion rate of around two percent, although as discussed below, the number of cases in which the court received a positive reply from *one side* in a case was higher than the number of mediations actually occurring.

Although the overall take-up of the scheme remained relatively meagre throughout the review period, there was some variation in take-up during the period February to July 1999, when a full-time manager was employed to run the scheme. While the scheme has always had the benefit of

administrative support from the Civil Appeals Office staff, the full-time manager was able to be proactive in contacting solicitors, encourage participation in the scheme and canvass reasons for refusal to use the scheme. In order to assess the impact, if any, of this full time administrative support on the take-up and outcome of the ADR scheme, the review period has been divided into several phases as follows:⁴⁷

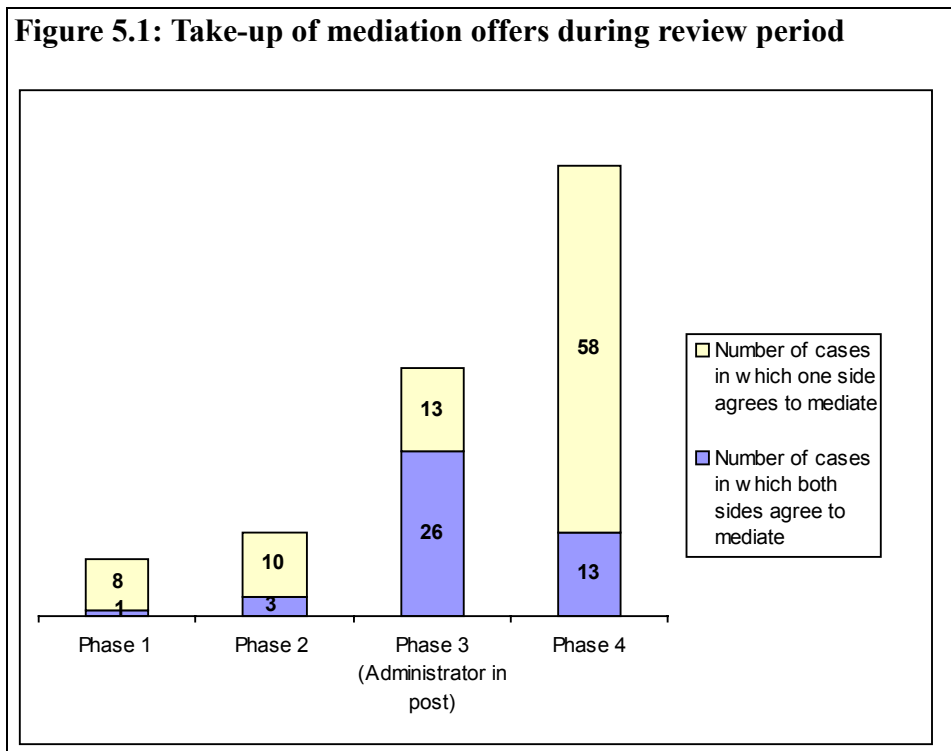
- A preliminary phase, comprising only the six police cases that were approached directly by the Court and invited to enter the ADR scheme.
- Phase 1 February to July 1998.
- Phase 2 August 1998 to January 1999.
- Phase 3 February 1999 to July 1999 (the period in which the full-time manager was in post).
- Phase 4 August 1999 to January 2000.

Although the number of cases in which *both sides* in the case accepted the Court's offer of mediation has been quite small since the scheme's inception, a review of responses to letters of invitation shows that there was considerable variation in take-up over the review period. During the time that the scheme had the benefit of a full-time manager, the number of positive replies from one or other party increased significantly, as did the proportion of cases in which *both sides* responded positively.

From Figure 5.1 it can be seen that in Phase 1 of the scheme positive responses were received in relation to nine cases, but in only one case did both sides respond positively. This represents 13% of *cases* in which any positive reply was received. In Phase two responses were received in relation to 13 cases, and in three of those cases a positive reply was received from both sides, representing 23% of cases in which any reply was received. In the third phase, however, both the total number of cases in which a positive reply was received by the Court, and the proportion of cases in which both sides agreed to mediate, increased significantly. The total

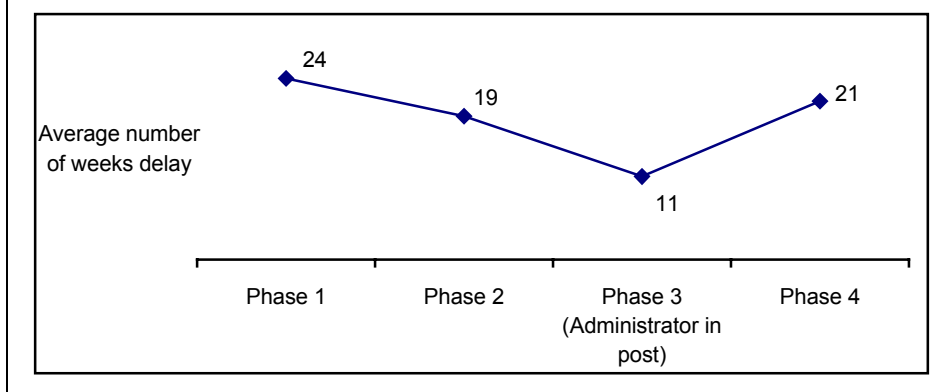
⁴⁷ These six-month phases were used in the analysis in order to assess the impact, if any, of the full time scheme manager while she was in post.

number of cases in which a positive response was received in Phase 3 was 39. In 26 cases both sides agreed to mediate, representing 67% of cases in which any positive reply was received. In the final phase of the review period the number of cases in which positive responses were received continued to increase (to 71), but in only 13 cases did both sides agree to mediate, representing only 18% of cases in which any positive reply was received.



A comparison was also made of the time delay between the receipt of agreement from both sides to mediate and the mediation appointment. During Phase 1 the average delay was 24 weeks. In Phase 2 it was 19 weeks. During Phase 3 of the review period, while the full-time manager was in post, the average delay was eleven weeks. Following the departure of the full-time manager, the average delay between agreement to mediate and mediation appointment rose again to 21 weeks (Figure 5.2).

Figure 5.2: Average delay between agreement to mediate and mediation appointment



Thus although the number of mediations taking place during each of the four periods remained fairly stable (see below), the number of parties responding positively to the offer of mediation was greatly *increased* during Phase 3 (when the scheme had a full time manager), and the delay in fixing mediation dates was also substantially *lower* than during the other periods of the scheme.

Acceptances where no mediation took place

In a total of 34 cases, the parties had both agreed to ADR but no mediation had ever taken place. Of these 34 cases about half were still within the scheme at the end of the review period, but no mediation had been arranged. Seven cases in which both sides had accepted the offer to mediate settled prior to the mediation date or before a date had been fixed. Of the remainder, four chose to mediate independently of the Court of Appeal scheme; three proceeded to an appeal hearing, and in two cases it is unclear what happened to the case. Examples of cases in which the parties agreed to mediation but did not, in the end, mediate are as follows:

Clinical negligence case: Both parties accepted the offer to mediate. One appellant was an NHS Trust. The respondent withdrew from the mediation before it took place, but the case was eventually settled prior to the appeal hearing.

Commercial case: Both parties accepted the offer to mediate. The respondent pulled out of the mediation before the mediation appointment, because of concern about time and costs. The case went to trial and the appeal was ultimately allowed.

Personal injury - liability issue: Settlement negotiations were taking place while waiting for legal aid to be granted to fund ADR. The case settled without the need for mediation.

Landlord and Tenant - assessment of reversion: The case was withdrawn from the ADR scheme and later settled prior to an appeal hearing.

Case concerning Animals Act 1971 - appeal against quantum: The case settled before the mediation appointment.

Acceptance on one side only

In analysing acceptances from one side only, an attempt was made to identify whether appellants or respondents were more likely to agree to mediate their case. In 52 cases where some response was received the appellant agreed to mediate, but the respondent refused. In 47 cases the respondent agreed to mediate but the appellant refused. On the basis of these results there does not appear to be any greater propensity for appellants to accept ADR than respondents. Nor did there appear to be any obvious difference in the type of case in which the appellant accepted as compared with the type of case in which the respondent accepted. Among the 52 cases where only the appellant agreed to mediate, about 14 were Chancery cases, about twelve were land or landlord and tenant matters and ten were general company/commercial cases. There was a mix of other cases, including seven personal injury cases where the appellant only agreed to mediate.

Among the cases where only the respondent agreed to mediate, about 13 were Chancery cases, ten were company/commercial, six were personal injury and six were land or landlord and tenant cases. An example of a case in which one side only agreed to mediate is as follows:

An appeal against the decision of Social Security Commissioners that where property was inherited under a will, the appellant was not entitled to income support. Although the appellant agreed to mediate, he was *unaware* that the Department of Social Security had refused to participate

Refusal to mediate

All of the forms received by the Court of Appeal relating to parties' refusal to make use of the ADR scheme have been analysed and categorised by response. In 175 cases no reason for refusal was actually supplied by the party or their legal representative. These divided roughly equally between 86 appellants who returned the form but gave no reason for refusing to participate in the mediation scheme and 89 respondents who gave no reason.⁴⁸

Reasons for refusal were given in 525 response forms returned to the court and these were analysed according to whether the reasons were offered by the appellant or by the respondent. The reasons cited on the reply forms returned to the Court cluster into a number of categories summarised in Table 5.1.

Reasons for refusing offer of mediation given on reply form	Appellants (N=258)	Respondents (N=267)
Judgment required for policy reasons	22%	14%
Appeal turns on point of law	21%	19%
Unwillingness to negotiate/past history	17%	29%
Appeal is of 'all or nothing' nature	9%	12%
Parties too far apart	4%	1%
Procedural reason	2%	2%
Appeal on liability alone	2%	6%
Reason unclear	10%	7%
Other reason	11%	8%

Although the broad categories of reason given for refusal of mediation by appellants and respondents are similar, there are some differences in the frequency with which certain reasons were given by appellants and

⁴⁸ This particular analysis was quite difficult since the ADR response form used by the Court does not ask on whose behalf the solicitor is acting. Moreover, the solicitor is asked to sign the form in person, rather than sign the name of the firm.

respondents. Among appellants, the most common reason given for refusal of ADR was that a judgment was required for policy purposes. The second most common reason given was that the appeal concerned a point of law and ADR was therefore inappropriate. The third most common reason reflected a general unwillingness to enter into negotiations with the respondent as a result of the respondent's approach or past behaviour.

Among respondents the most common reason for refusing to enter the ADR scheme was a general unwillingness to enter into negotiations with the appellant. The next most common reason was that the appeal concerned a point of law, and the third most common reason was that a judgment was required for policy purposes.

Appellants' reasons for refusing mediation

Judgment required for policy purposes

About one fifth of responses given by appellants (54 cases) fell within this category and the response was frequently offered by public or quasi-public authorities. For example, it appeared to be a standard response from the Department of Social Security in Social Security appeals, from local authorities in housing issues, and from area health authorities in clinical negligence actions. Examples of the way in which this was expressed are as follows:

“The parties dispute the interpretation of E410 in European Directive 78/663. We wish to seek the Court's decision on its meaning.”

“The appeal relates to the need for the Court of Appeal to consider the quantum of damages for personal injuries, further to the recent Law Commission Report.”

“This appeal raises important issues regarding the application of the *Bolam* test and wider public issues.”

Appeal is on a point of law

A similar and related category of reasons for refusing mediation offered by appellants in 53 (21%) cases, was that the case involved a significant point of law and was therefore judged to be inappropriate for ADR. This response

was given in a variety of cases, often without any further detail being given. An example, however, might be that the appeal related to a point of statutory construction. For example:

“The appeal concerns a point of law which both parties agree would not be suitable to be dealt with by ADR. It is agreed that it is unlikely that ADR could bring about a solution and would only involve further costs and time.”

“The appeal relates to a question of law rather than fact.”

“As stated within the order, this appeal raises a ‘short point of statutory construction’. Both parties have agreed that since the appeal is based on a point of law, ADR is inappropriate.”

The following combination of reasons indicates that in addition to the appeal concerning a point of law, the relations between the parties rendered ADR inappropriate:

“The appeal is based on legal rather than factual arguments. Counsel’s involvement in ADR would therefore be essential and the potential costs savings to the Legal Aid Board negligible. The parties are particularly embittered towards each other.”

Unwillingness to mediate in light of opponent’s approach

The third most common reason for refusing mediation, given in 44 cases (17%), was the past unwillingness of parties to negotiate or a belief that, given the past history of the case, mediation would be unlikely to achieve very much. In some of these reasons a preference was shown for normal solicitor negotiations on a ‘without prejudice basis’. For example:

“We would not want to enter into ADR without full co-operation from the respondent as it may...delay matters further.”

“We have been advised that the solicitors for the respondent have already indicated to the court that their client does not want to opt for ADR.”

“ADR compared with ordinary negotiations would simply delay matters and/or incur additional costs.”

The appeal is of an ‘all or nothing’ nature

This reason was given in twenty-two cases (9%) and appellants often provided little additional explanation for their refusal to mediate. The most likely interpretation of this rather bald statement is that the appeal was on

liability alone and for that reason regarded as an ‘all or nothing’ matter. For example:

“The London Borough of [name] wants a property back and the tenant does not want to give it back.”

The appeal concerns a procedural matter

In about eleven cases the reason given by the appellant related to the fact that the issue being appealed was a procedural point, for example that the case concerned locus standi, limitation or jurisdiction. Sometimes this merged with a problem of timing, for example where the appeal was at an interlocutory stage. In some of the cases in this latter category, it was suggested that ADR might become appropriate at a different stage in the proceedings. For example:

“The appeal concerns an application for leave to serve a notice of appeal out of time. ADR will be appropriate if leave is given.”

“The appeal concerns the preliminary legal issue of limitation.”

“Mediation may be of assistance following these determinations rather than prior to them.”

The parties are too polarised

This reason was given by appellants in ten cases and simply conveyed the fact that there appeared to be little scope for compromise. For example:

“We do not believe that the parties could be brought together from the opposing stances they presently adopt.”

“The area within which compromise could be achieved is too limited.”

“The clients feel that on the merits there is no room for a negotiated settlement since the parties are polarised.”

Respondents’ reasons for refusing mediation

Although the frequency with which some of the reasons given by respondents for refusing to mediate differed slightly from appellants (Table 5.1), the way in which the reason for refusal was expressed by respondents was very similar to that of appellants, as illustrated by the following examples.

Unwillingness to mediate in light of opponent's approach

This was by far the most common category of reason offered by respondents for not entering the ADR scheme, and was given by 77 respondents. Examples of the way in which this was expressed are as follows:

“Any attempts to settle the matter prior to this appeal have been rejected and there is now no possibility of negotiation.”

“It has been our experience that the applicants, who do not have legal representation, are not receptive to reasoned arguments put forward on behalf of our clients.”

Appeal is on a point of law

This reason was given by 51 respondents as a justification for refusing to enter the ADR scheme, often without much further elaboration. For example:

“The dispute now turns on an issue of pure law.”

“This appeal involves substantive issues of law and fact which cannot be resolved by ADR.”

Judgment required for policy reasons

In common with appellants, respondents frequently referred to the need for an authoritative judicial ruling in order to settle matters that had implications for future policy. Some 38 respondents gave this as the reason for refusing to enter the ADR scheme.

“The defendant wishes to obtain from the court an authoritative decision on the legal issue which is the subject of the proceedings.”

The appeal is of an ‘all or nothing’ nature

In 33 cases respondents refused mediation on the ground that the issue in dispute was of an ‘all or nothing’ character. For example:

“This is a ‘winner takes all’ matter.”

“There have been allegations of impropriety made by the appellant...our view is that the appellant would not be satisfied with any outcome which did not include a finding that there was impropriety on the part of the respondent.”

“Compromise is not an acceptable option for the claimants.”

“This matter is not capable of compromise.”

The analysis of responses given by solicitors for refusing the opportunity to enter the Court of Appeal ADR scheme can be compared with the reasons given for rejecting mediation offers in the Central London County Court mediation scheme. The CLCC scheme was also a voluntary scheme in which parties were invited by the court to mediate their disputes and in which the take up of the court’s offer remained at around four to five percent over a period of two years. The evaluation of that ADR pilot included a similar analysis of parties’ reasons for refusal to mediate, although the reasons most frequently given were somewhat different from those offered in appellate cases. In the CLCC scheme the most common reasons given for refusing mediation were that mediation was considered ‘inappropriate’, or that the case involved complex matters of evidence that required oral evidence to be given in court. Other reasons for rejecting mediation were that there was a dispute over fact, law, or both, or that there was no common ground between the parties. Another common reason given, which did not appear in the reply forms in the Court of Appeal, was the belief that the case would settle in any case and therefore mediation was not necessary.

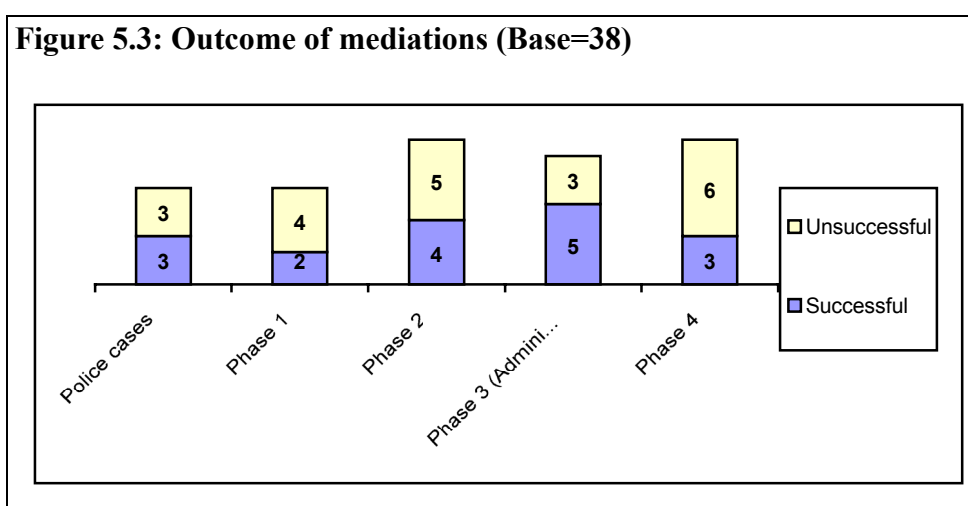
The outcome of mediation

The review of cases based on all sources of information available indicates that between the start of the scheme in November 1997 and the end of the review period in April 2000 a mediation session had taken place through the Court of Appeal Scheme in 38 cases. As a result of the very small number of cases mediated through the scheme, the analysis that could be conducted was necessarily limited.

Figure 5.3 shows the number of completed mediations and the outcome of those mediations in each of the reviewed phases of the scheme. The success rate at mediation was *lowest* in Phases 1 and 4, with one-third of cases in each of those phases settling as a result of the mediation. The success rate was *highest* in Phase 3 when almost two-thirds of cases mediated settled as a result of the mediation (63%). This includes as a ‘successful’ mediation those cases that either settled at the mediation, or in one case where an offer

was made at the mediation that was accepted soon afterwards and the parties considered the mediation to be a success.

The numbers are, of course, too small to draw any particular conclusions about trends in success, other than to indicate that the overall success rate was about 45%. However, in two of the successful cases (both family cases) although there was a settlement at the mediation, the agreement came ‘unstuck’, and the appellants involved attempted to restart their appeals (unsuccessfully). If these are excluded from the above ‘settlement rate’, the overall success rate at mediation falls to about 40%.



Examples of the types of cases that were successfully mediated are as follows:

Professional negligence appeal regarding the purchase of property, with an allegation that there had been a failure to advise on planning conditions. The case was listed to be heard by three Lords Justices and estimated to take three days. During the mediation an offer was made which was subsequently accepted and the parties considered that the mediation had been successful.

Contract case regarding the terms of a franchise agreement. The case was listed for around one and a half days to be heard by three Lords Justices. The mediation, conducted outside of the RCJ, was successful and the case was settled.

Dissolution of partnership involving dispute over failure to renew an insurance policy. The case had been listed for up to one day, to be heard by three Lords Justices. The mediation was successful and the case settled.

Personal injury appeal on quantum. Listed to be heard by three Lords Justices and estimated to take a maximum of five days. Mediation was successful.

Misrepresentation and breach of contract in relation to sale of business. To be heard by two Lords Justices and estimated to last a maximum of half a day. Successfully mediated.

The range of cases entering the ADR scheme and eventually being mediated suggests that it is possible, even at appeal level, to use mediation across a relatively broad spectrum of cases.

Characteristics of mediated appeal cases

The types of cases most commonly agreeing to mediate in the Court of Appeal scheme were company/commercial cases in which the parties were often commercial entities and insurance companies. In addition there were six police misconduct cases, three personal injury cases, three family cases, and three cases concerning professional negligence of solicitors or accountants. There were two landlord and tenant disputes, two boundary disputes, and a miscellany of other cases. The list of types of disputes is given in full below to display the range of cases mediated successfully and those where the mediation was not successful in achieving a settlement.

Although the details provided of nature of case are very brief, the list shows that a relatively wide range of cases was mediated within the scheme, and there is no immediately obvious difference between the *types* of cases mediated successfully and those where the mediation was unsuccessful.

Type of case	Outcome
3 Police misconduct cases, on quantum	Successful
Personal injury on liability	Successful
Professional negligence solicitor- purchase of property	Successful
Breach of contract	Successful
Dissolution of partnership	Successful
Appeal on costs	Successful
Professional negligence - accountant	Successful
2 Personal injury - quantum	Successful
Misrepresentation and breach of contract	Successful
Interpretation of terms of settlement agreement	Successful

Type of case	Outcome
Liability under guarantee	Successful
Commercial dispute	Successful
Family dispute on probate - claim for part of estate	Successful, but later unhappy with settlement
Commercial dispute	Successful
Family - several point on finances	Successful, but later settlement came unstuck
3 Police misconduct cases on quantum	Unsuccessful
Assessment of damages, breach of contract	Unsuccessful
Breach of contract	Unsuccessful
Landlord and tenant - right to buy tenancy	Unsuccessful
Breach of contract, assessment of damages	Unsuccessful
Appeal against refusal of application to enforce undertaking	Unsuccessful
Breach of contract	Unsuccessful
Taxation of costs	Unsuccessful
Professional negligence - solicitors - extent of indemnity	Unsuccessful
Landlord and tenant - possession	Unsuccessful
Professional negligence - solicitors	Unsuccessful
Shipping	Unsuccessful
Company dispute over VAT charges	Unsuccessful
Possession action, judges discretion on costs	Unsuccessful
Appeal from Technology Court on quantum	Unsuccessful
Boundary dispute	Unsuccessful
Chancery, construction of rules of pension scheme	Unsuccessful
Family, child abduction	Unsuccessful

Final outcome of cases that were mediated unsuccessfully

Of the twenty-one cases that were mediated in which a settlement was *not* reached at the end of the mediation, almost two-thirds (62%) went on to trial. About one quarter settled before the appeal hearing (24%), and a small proportion were still live at the end of the review period (14%). The very high proportion of cases proceeding to trial after an unsuccessful mediation suggests either that there may well be less scope for compromise at the

appellate level, or that cases were entering the mediation scheme where there was, in fact, little prospect of settlement. Interviews with solicitors about unsuccessful mediations shed some light on these issues. For example:

“To some extent it was doomed from the outset. We felt that we had won what was a hard fought trial and then mediation was suggested immediately by the Court of Appeal staff. At first we said no, but then reconsidered our position several months later because we felt that it might be quicker. My enormous criticism was that the partner from the other side’s firm did not show up. I had to work quite hard to persuade my client to attend the mediation. He did so on the basis that the senior partner from the appellant’s firm would be present. On the day, he was not there. That really got things off to a bad start, as he felt that the other side had sent a monkey, not a decision-maker. If he had been told that the partner would not have been there, he would not have attended. The other thing was that the other side were not prepared to pay more than they had previously offered so I don’t know why they bothered turning up.... They were clearly not prepared to negotiate at all.”

The following extract provides an example of another case in which there was probably little scope for compromise. It was also a case in which the solicitor was unhappy with the mediator’s expertise and approach:

“The mediation was not successful as the parties were too far apart. The mediator was a specialist [in a different area of law] and was not familiar with this area of law. We could not agree on anyone with this area of specialisation so it was the court in fact who chose this mediator. That was a bit unsatisfactory, as this matter was quite technical. I felt that the mediator was a little too gentle. All he did was to put the position of the other side. He was not very proactive. I am not sure if they are supposed to be, but I think in this case it would have helped if he had been a little more pushy.”

The quotation illustrates the points raised in Chapter Four about the perceived need among solicitors for mediators to display expertise in the subject-matter of the dispute, as well as mediation skills. It also underlines the fact that it is important to manage the expectations of parties and their solicitors in advance of mediations. If there is a mismatch between the preferred approach to mediation of the mediator and expectations of approach by parties and their advisers, there is likely to be dissatisfaction. Dissatisfaction can be caused both from a perception that a mediator is ‘too gentle’ or ‘hands-off’, and a perception that a mediator is too prepared to ‘bang heads together’ in order to achieve a settlement.

There was also some evidence of solicitors feeling that their client had effectively been pushed into mediation and had incurred costs as a result.

For example:

“We only went to mediation because we were forced to do so. There was no hope of compromising. The gap between us was too big. There was no way we would have gone to the figure [opponent wanted]. The argument the other side was running was not tenable and we didn’t feel they would get anywhere on appeal. The mediation was not successful, even though the mediator was good. If we conclude we have a winnable case it will be fought, but if we form the view that our case has weaknesses we will offer to settle. This exercise has been very expensive for not a lot of gain. Where mediation is successful I would be surprised if it is any cheaper than whacking the case off to the Court of Appeal. Where mediation fails, it has added a whole new layer of costs and time. The extra costs of mediation are not insignificant.”

The final outcome of unsuccessful mediations in the Court of Appeal is rather different from that encountered in the review of Commercial Court ADR Orders and the evaluation of the CLCC mediation scheme. The conclusion of both of those reviews is that, in general, mediation appears to promote settlement, even when the case *does not* settle at the mediation appointment. In Chapter Three it was reported that following the issue of an ADR Order by the Commercial Court, only a handful of unsuccessfully mediated cases proceeded to trial, with the overwhelming majority settling either shortly or some time after the mediation or ENE. The CLCC evaluation also found ‘strong support for the argument that mediation promotes settlement and increases the likelihood of settlement following an unsettled mediation’.⁴⁹ This underlines the differences between appeal cases and first instance cases that need to be taken into account when selecting cases for mediation at the appeal level and before applying pressure on the parties to mediate.

Examples of the kinds of cases in which mediation was attempted, but was not successful in achieving a settlement are as follows:

Personal injury liability issue. The case was listed to be heard by two Lords Justices and estimated to last up to one day. Although the mediation was unsuccessful, the parties did manage to agree

⁴⁹ CLCC Report, 1998, op cit, para 7.3.2, p149.

quantum during the mediation in the event that the appeal was ultimately successful. However, at trial the appeal was refused.

Breach of contract. Appeal concerned assessment of damages for loss of opportunity of lease of equipment. The case was listed to be heard by three Lords Justices and estimated to last less than half a day. There were two mediation appointments, but both were unsuccessful. The case proceeded to trial and the appeal was allowed.

Reinsurance contract, appeal from decision of Commercial Court. The case was listed to be heard by three Lords Justices for up to one day. Although the appellant agreed to mediation, the respondent required some chasing before agreeing to enter the mediation scheme. The mediation was unsuccessful and the case proceeded to trial. The appeal was allowed and the hearing lasted for less than a day.

Solicitors' experience of mediating appeal cases

Interviews were conducted with twenty solicitors, including seven involved in the early police misconduct cases. During interviews, solicitors discussed the dynamics of the mediation as well as practical issues to do with the administration of the Court of Appeal scheme and the facilities available in the RCJ.

The mediation

Although there was often a perception of having been pushed or prodded into mediation, this was not necessarily seen as a disadvantage, particularly if the case succeeded in being settled by mediation. For example, one solicitor involved in a police misconduct case that was successfully mediated commented:

“I mediated because Lord Woolf said so. I had never been to a mediation before. The mediator was good, although it was just basic horse-trading. I thought that we wouldn't compromise but getting together face-to-face is important in reaching a settlement. It added value to have a referee and I trusted the mediator. The experience was positive.”

In general, assessments of *successful* mediations were positive, with solicitors commenting on the skill of the mediator and the potential of the process to achieve settlements, sometimes even in very difficult cases that had been the subject of litigation for year. Some examples are as follows:

“Here both parties were keen to have the matter resolved. There were ‘good vibes’ before the mediation, but I think that the formal atmosphere of the mediation helped to settle the matter quickly. I think if it had not been for the mediation then we would have had a round table kind of discussion.... The mediators presence helped...it helped to know that he was an independent party”.

“This case had a five year history. It had already been to the House of Lords and back, and was settled in one day at a mediation at (a large city firm of solicitors). Both parties were very keen to see the back of the case, and I think that helped. It really helps if the court instigates the mediation. I think that boosts the chances of success. The parties did not feel forced into the mediation. It is much better to encourage the parties with the authority of the courts behind you, as otherwise it can be difficult to get the other side involved. There should I think be (generally) more power for the Judges to direct mediation for this reason. This was a 30 million pound case, and to dispose of it in one day was excellent. The prods from the court encouraged the parties to get moving, subject to finding the right mediator. There was a novel point of law involved in this case, but it was far too risky to any of the parties to get a result; the parties had rather deep pockets, and any result would have returned to the House of Lords. We jumped at the chance of mediation....”

“I was full of praise for the mediator who never gave a view on the value of the case. He was calm and I had confidence in him. There was a lot of pressure to settle.”

However, even when cases settled, there were sometimes negative perceptions of aspects of the mediation experience, relating to a sense of pressure to settle. For example:

“My client was in an incredibly weak position vis a vis the Defendant. When the award is appealed the plaintiff risks the entire award if they go to an appeal hearing because of costs orders. Mediation seemed to magnify the imbalances between the parties. There was no public funding for my client to be represented. Mediation focuses on the individual’s own personal interest in compromising. That’s how you bang heads together to get a compromise. The mediator kept banging on about the dangers of going on to appeal asking “Has your solicitor advised you about the costs consequences?” Well frankly that’s insulting. Of course we had considered the consequences. The mediator was leaning heavily on the plaintiff.... I think that the process of mediation was the straw that broke the camel’s back. When you are dealing with the citizen versus the state I don’t like the idea that the mediation is state organised. Clients prefer private negotiations between solicitors. Mediation offered less dignity to the client than they would get from negotiation between solicitors. In the rush to force settlement people’s dignity is not protected. The police have already moved on but the victim is still living with the experience. Comparison is always made between mediation and court but the correct comparison is between mediation and settlement negotiations

between solicitors.”

“It was a disaster from our point of view. There were many issues that were outstanding in this appeal. One problem was that both parties were supposed to disclose [details of the respondent’s valuation of her property] financial details, and this was not done by the other side. That meant that we proceeded to the mediation at a disadvantaged position, and my client almost pulled out at that stage. This was one area where the mediator should have been more proactive I think. My client felt disadvantaged as a result of this throughout the mediation. The other side’s solicitor did not attend, and that was a shame, and made communications between the parties harder. One of the things that was agreed at the mediation was that there were follow up meetings to be arranged with the other side – this was not possible to arrange with them. At the end of the mediation my client was put under a great deal of pressure to sign a consent order. Everyone came into one room and as I remember it the mediator literally put a consent order in front of my client and urged him to agree. Looking back on it I think that counsel and myself were partially to blame, as we should have ensured more thoroughly that he was happy with the consent order before signing it, but he did. He very soon afterwards decided that he was not happy with the consent order, and tried to reinstate his appeal. He eventually backed out of this due to adverse costs fears. He feels slightly bitter about the mediation scheme for this reason.”

As discussed in an earlier section, when mediations had been *unsuccessful*, criticism had been voiced about pressure to enter mediation when there was little scope for compromise, and, occasionally, complaints about the lack of subject-expertise on the part of the mediator, and dissatisfaction with the mediator’s approach. However, some solicitors felt that even an unsuccessful mediation had been constructive in achieving subsequent settlement. For example:

“The mediation was positive. The matter would not have settled but for the mediation, particularly the interventions of the mediator after the event.”

In this case the solicitor had not felt positive at the start of the mediation, nor was it successful on the day, but it did help to move the parties towards settlement.

Scheme Administration

Several of the solicitors who were interviewed commented on the administration of the Court of Appeal scheme, generally in relation to delay. There was a perception that the administration of the scheme was under

pressure and that this created a particular problem in trying to arrange a mediator through the court. This complaint supports the evidence presented earlier that delay in arranging mediations was reduced while a full-time manager was in post and illustrates the value of a dedicated administrator for such in-court ADR schemes.

“When we agreed with the other side who the mediator should be, we heard nothing from the court service for 6 weeks...by the time the mediator was approached by the court he was no longer available, so we had to agree another mediator at the last minute. This was fine, however, as the mediator was accredited and excellent.”

“I think we may have lost out on the opportunity to have our chosen mediator through using the scheme. I suspect if we had approached (the mediator) privately he would have been able to do it...the administrator I spoke to at the court seemed very stretched. It is in no way a criticism of (the administrator) but sometimes we would not hear from (the administrator) for 2-3 weeks.... I would say the scheme seemed under resourced.... I would advise a client that the scheme is good as it is free, but to some extent you get what you pay for.”

The Venue

All of the solicitors who took part in a mediation held at the RCJ criticised the surroundings. The layout of the rooms was criticised, as were the lack of facilities. One suggested that if there had been some administrative support it would have facilitated the drafting of a final settlement at the end of the mediation.

Costs

Several solicitors commented that they were confused as to who should bear the costs of the mediation, and thought this could be clarified before the mediation date. There were mixed opinions on the question of whether mediation saved legal costs, and several solicitors expressed a concern that preparation time for mediations ran up costs. One commented:

“I sometimes think it might be cheaper to appeal a case. It might take half an hour of counsel’s time, and that might be cheaper.... I think that sometimes Judges do not realise the speed [at which] costs rack up.... I don’t think they realise how much solicitors dread calling their clients and suggesting something that is going to run up more costs.”

However, most of the solicitors interviewed considered that the scheme had helped to save costs. Generally, the response was that where mediation was thought to be a potential way to resolve the case, solicitors were happy to recommend it. One solicitor pointed out the commercial advantages of using the scheme in preference to private schemes as follows:

“I am a bit sheltered about (costs) as (in my line of work) we always try mediation first...but the Court of Appeal scheme being free really is excellent and a definite advantage over other schemes – particularly as the fee for the mediations is often a cut of the settlement. As the settlement here was £30 million that was a saving of some £15,000 - £20,000.”

The value of the initiative coming from the Court

Several solicitors commented on the value of the suggestion of ADR having come from the Court, rather than from one side or another. This is consistent with some of the views expressed about ADR Orders in the Commercial Court, that when the initiative to try ADR comes from the Court, it removes the perception that one side is showing weakness. For example:

“There is still the perception with the other side’s solicitors and clients of weakness (concerning mediation), but if the instigation comes from the Court it takes all that away.”

Despite some approval of the Court taking the initiative over ADR, there were suggestions that the Court should be more selective and a more thorough review of cases and identification of issues that were clearly appropriate for ADR could achieve this.

“It might improve the client’s faith in the procedure, if there were just a few lines to say why [ADR] is appropriate, or to persuade the client that it might work.”

Indeed, one solicitor commented that he and his colleagues in a large City firm were becoming dismayed at receiving the standard letter about the ADR scheme from the Court, and suggested that such a letter does not indicate active case management. He thought that parties would agree to mediation more readily if it appeared that the Court had selected the case as being particularly appropriate for ADR. This view supports the point made earlier in this Chapter, that rather than extending blanket invitations to mediate that become routine, the most effective way of encouraging ADR at the appellate

level might be the adoption of a more selective approach, such as that being used in the Commercial Court.

Conclusion

The review of the voluntary ADR scheme in the Court of Appeal has established that between November 1997 and April 2000 some 38 appeal cases were mediated through the scheme. Whether this figure is regarded as being low or high depends on expectations of what an ADR scheme at appellate level might achieve, and views about the potential for compromise in appeal cases, given that one party has already ‘won’ their case at first instance.

Mediations were only conducted when both sides in the appeal accepted the Court’s invitation to attempt mediation, and there were 99 further cases in which *one party only* to the appeal replied positively to the invitation. Although the number of mediations conducted remained fairly stable over the period under review, there is clear evidence that during the time that the scheme was being run by a full-time manager, the proportion of cases in which *both sides* agreed to mediate significantly increased. Putting these findings together suggests that hands-on management of such a scheme can improve the take-up rate, particularly if effort is directed toward those cases where one side has agreed to mediate.

Analysis of reasons for refusing the Court’s invitation to enter the ADR scheme shows that the most common reasons given, by both appellants and respondents, were that a judgment was required for policy reasons, that the appeal turned on a point of law, or that the past history or behaviour of the opponent led to an unwillingness to negotiate.

Around half of the cases that were mediated through the Court of Appeal ADR scheme settled either at the mediation appointment or shortly afterwards. Among those cases in which the mediation did *not* achieve a settlement, a high proportion (62%) went on to trial. This particular finding is out of line with the experience of cases unsuccessfully mediated following ADR Orders in the Commercial Court, and is also out of line with cases mediated in the CLCC mediation scheme. Evaluation of both of those ADR

initiatives found that mediation, even when unsuccessful, tended to promote settlement, with very few cases subsequently proceeding to trial. The high proportion of appeal cases going on to trial following an unsuccessful mediation indicates that there are special characteristics of appeal cases that need to be considered in selecting cases for mediation. Blanket invitations to mediate, particularly with an implicit threat of penalties for refusal, may not be the most effective approach to the encouragement of ADR at appellate level.

Solicitors' experiences of mediating appeal cases were, on the whole, quite positive. However, there were expressions of concern, even among cases that were successfully mediated, about clients' perceptions of being pushed into mediation and sometimes being pressured to settle.

Solicitors involved in cases that had not settled at mediation occasionally complained about having felt compelled to mediate, even though there had been little scope for compromise. There were one or two complaints about mediators not having expertise in the subject-matter of the dispute, and evidence of an occasional mismatch between the mediator's approach to the mediation and the expectations of the parties and their advisers.

Although there was approval expressed by solicitors of the Court of Appeal taking the initiative in encouraging the use of ADR in appropriate cases, there was a need for the adoption of a more selective approach, such as that being used in the Commercial Court.

CHAPTER SIX: LESSONS FROM COURT-BASED ADR INITIATIVES

The development of ADR in England and Wales over the last decade has involved a gradual but relentless campaign by mediation providers to ‘talk-up’ ADR activity and to promote it as the solution to the alleged crisis in civil justice. This campaign had only modest success, even in the field of commercial disputes, until Lord Woolf was seemingly converted to the cause, giving his stamp of approval in the Interim Report on Access to Justice in 1995. In the field of non-family civil disputes this was a turning point for ADR. Lord Woolf toughened-up his approach between the Interim Report and the Final Report. In the Final Report it was made quite clear that litigants should always consider the possibility of ADR before launching into litigation, but more importantly, that the judiciary now had a pivotal role in the diversion of cases away from adjudication and toward settlement by ADR. Under the new Civil Procedure Rules, encouragement or direction to try ADR as a means of dispute settlement is deemed to be an essential aspect of judicial “case management”. The CPR gives judges the power to stay proceedings and direct parties to attempt to settle by means of ADR. This is backed by the threat of punishment for parties judged to have acted unreasonably in refusing to try ADR or to participate in good faith in an ADR process.

When the Interim Report was published in 1995, and even by the time that the Final Report and new Rules were promulgated in 1996, the Government had no apparent policy on the development of ADR in non-family civil disputes. The imagination of certain sections of the judiciary, on the other hand, had already been captured by Lord Woolf’s enthusiasm for this new approach to case resolution. The judicial ADR initiatives in the Court of Appeal and the Central London County Court were announced *prior* to the publication of Lord Woolf’s Final Report in July 1996. The Commercial Court had had a policy of encouraging ADR since 1994, but this was strengthened and revitalised by the issue of a new Practice Statement on ADR in June 1996. Thus judicial activism in the field of ADR had actually run ahead of Lord Woolf’s Final Report and the CPR, and certainly in

advance of any statement of Government thinking on the desirability of promoting ADR in the field civil disputes.

As a result of Lord Woolf's determination to ensure that the judiciary took ADR seriously, a session on ADR was included in the seminars run by the Judicial Studies Board preparing the judiciary for case management under the CPR. Prominent commercial ADR providers and the Judge who devised the CLCC mediation scheme led this part of the seminars.

Unlike judicial support for ADR in the United States, the judicial enthusiasm for ADR in England and Wales does not stem principally from the need to clear court lists, since the rate of issue of fresh proceedings has been decreasing rather than increasing over recent years. The interest in ADR is apparently largely altruistic. It is the desire to spare litigants the cost, delay, and trauma involved in proceeding to trial or continuing with litigation up to the point of a late pre-trial settlement. Although the Government might be interested in the cost-savings potential of ADR for the Community Legal Service Fund budget and the court service bill, this was not the prime motivation for the judiciary.

Since the principal incentive for judicial promotion of ADR was to offer a benefit to litigants, the ADR initiatives reviewed in this Report, together with the results of the Central London County Court mediation scheme, provide an important opportunity to draw some conclusions about the impact and perceptions of court-promoted and court-directed ADR. The material also offers the chance to reflect on what has been learned from the operation of court-based ADR initiatives to date, and to identify issues requiring further consideration and research.

The demand for ADR: open invitation v selective pressure

The experience of the schemes in the Court of Appeal and Central London County Court has been that the voluntary take-up of invitations to enter ADR schemes remains at a modest level, even when the mediator's services are provided free or at a nominal cost. Between November 1997 and April 2000 the Court of Appeal sent out well over 1,000 letters in appeal cases inviting parties to enter the Court's pro bono ADR scheme. The number of

mediations conducted through the scheme, as a result of both parties accepting the court's offer, was thirty-eight.

The voluntary mediation scheme in Central London County Court established in May 1996, has experienced a similar level of take-up. Throughout a two year period during which the scheme was evaluated (May 1996 to March 1998) personalised offers to mediate were sent out to parties' solicitors (or the parties themselves if unrepresented) in over 4,500 defended cases. As a result, some 160 cases were eventually mediated through the Court's scheme, representing a take-up rate of around five percent. Since the end of the evaluation period, that scheme has been placed on a permanent footing, but invitation letters are no longer personalised. Information about the mediation scheme is simply included in the material going from the Court to solicitors in defended cases once the defence has been entered. Routine checks on the number of mediations taking place since 1998 indicate that the take-up rate has actually decreased.

The experience of modest demand for these court-based voluntary mediation schemes is consistent with pilot mediation schemes in other areas. For example, the Department of Health launched a pilot mediation scheme for medical negligence cases in 1995, in response to criticisms of the increased incidence of medical negligence claims, and claims management practice. At the scheme's inception it was anticipated that about 40 cases would be mediated over a two-year period. The scheme was extended for an additional year when the number of referrals remained low. By the end of the third year a total of *twelve* cases had been mediated, although settlement had been reached in eleven of them.⁵⁰

The experience is similar in the field of family disputes. In a three-year study of the Legal Services Commission's family mediation pilot scheme, it was found that the advent of public funding for family mediation *did not* have an immediate impact upon the volume of mediation activity. The subsequent introduction of Section 29 of the Family Law Act 1996, which

⁵⁰ L Mulcahy et al 1999, *Mediation Medical Negligence Claims: An Option for the Future?*, TSO, London, Chapter 7 and pxvi.

required potential legal aid applicants to explore the possibility of mediating their dispute prior to involvement in legal proceedings, led to a significant increase in the number of cases referred to mediation providers, but did not lead to a substantial increase in the number of cases in which mediation was actually undertaken.⁵¹

The Commercial Court practice of issuing ADR Orders is rather different from the voluntary schemes operating in the Court of Appeal and at CLCC. An ADR Order from the Commercial Court does not compel the parties to use an ADR process to settle their dispute. However, the imposition of such an Order sends a clear signal from the Court to the parties about the Court's expectations. This is backed by the requirement that, if the parties wish to continue with Court proceedings following the stay for ADR, they must inform the Court of the steps taken in compliance with the Order. There is also an implicit threat that a punishment might be imposed in the case if there has been an unreasonable refusal to attempt to settle by means of ADR.

The review of the outcome of Commercial Court ADR Orders shows that, over the course of the review period as a whole, about half of the cases in which an ADR Order was made went on to use an ADR procedure. Toward the end of the review period, when the Orders had become a more familiar feature of Commercial Court practice, the proportion using ADR had considerably increased over the take-up rate following the introduction of the practice.

Despite the 'imposition' of ADR Orders, the response on the part of solicitors was generally very positive. In the majority of cases in which an Order was made, the Order itself was not seen to have a negative impact on settlement negotiations and in some cases settlement was judged to have been a direct result of the Order, even though ADR was not used. A little over half of those cases that used ADR following an Order from the Commercial Court settled at the ADR appointment, and among those cases

⁵¹ Gwynn Davis etc al, 2000, *Monitoring Publicly Funded Family Mediation: Report to the Legal Services Commission*, Summary, piv and Chapter 2, p24.

in which ADR was unsuccessful, the majority settled subsequently, with only a very small proportion proceeding to trial.

This presents a rather positive picture of the impact of the kind of selective pressure toward ADR that is being exerted by the Commercial Court. What can be inferred from this? Is this simply a feature of large commercial cases where the pressures on parties are somewhat different from other areas of civil litigation, or does it tell us something about the impact of selected pressure as opposed to open-invitation?

To consider this question it is first necessary to reflect on the theoretical role of ADR in the litigation and settlement process. It is well known that the overwhelming majority of civil disputes conclude on the basis of an out of court settlement, not a judicial determination. The settlement might happen a week after the issue of proceedings or it might occur several years later at the door of the court, but nonetheless settlement as a result of bipartisan solicitor-negotiations is the principal form of civil dispute resolution once legal steps have been taken.⁵²

Why do most civil disputes follow this pattern? Some defendants settle *after* the issue of court proceedings, but *before* trial because they want to delay making a payment to the claimant for as long as possible and to minimise the amount that they will eventually have to pay. Some simply cannot pay. Claimants pursue civil claims for a variety of reasons, but principally in pursuit of money. Having failed to achieve their objective by means of pre-proceedings negotiation, and having launched legal proceedings, claimants eventually agree to compromise their claim as result of the uncertainty inherent in legal processes, cost pressures, and exhaustion. After a period of attrition, the original fervour for 'justice' or sense of outrage at the circumstances leading to the dispute has dissipated and the desire is reduced to wanting an end to litigation on reasonable terms. This is a reflection of the fact that certain changes in emotion or perceptions can only occur after a

⁵² Of course in the vast majority of civil disputes, lawyers are not consulted and no form of legal proceedings are ever commenced, cf. H Genn, *Paths to Justice: What People Do and Think About Going to Law*, Hart Publishing, 1999.

period of time has elapsed, and it has been argued that after a sufficient length of time parties to litigation will settle almost regardless of what settlement procedure is adopted.⁵³

If most cases are eventually going to settle, then court promoted or directed ADR is simply asking the parties to do it earlier, and the reason that the court gives for wanting the parties to settle earlier is that it will save them time and cost.⁵⁴

At the point at which the court invites or directs the parties to use ADR they will either feel ready to settle or they will not. If they are ready to settle, why have they not already settled? The answer to this may be that if the parties are adopting a rather traditional approach to litigation, no side wants to be the first to blink. Several solicitors commented on this factor in the context of the value of Commercial Court ADR Orders. In these conditions, a suggestion from the Court, or pressure from the Court might, in fact, be welcomed by the parties and provide a valuable stimulus to settlement.

If the parties are not ready to settle, or if one side is not ready to settle, there will not be a voluntary move toward ADR based on an invitation from the Court. In this situation what is the effect of a court direction or clear pressure to attempt ADR? It does not provide an *incentive* to settle. It represents the threat of an additional *cost* being imposed on a party who refuses to attempt ADR, and in the cost-benefit analysis which underpins decisions during litigation to proceed to trial or settle, this threat is a factor which might tip the balance. It also achieves something else. A direction to attempt ADR requires the opposing sides to enter into a discussion about whether it is feasible to comply with such a direction.

However, pressure to attempt ADR also has disadvantages. These are the additional direct costs of an unsuccessful mediation, the extra delay

⁵³ Paper on alternative dispute resolution prepared for the Lord Chancellor's Department by Gwynn Davis and Hazel Genn with Gwyn Bevan and Jan Walker, April 2000.

introduced into the litigation process, and a feeling by unwilling parties that they have been pushed into a process to their disadvantage. Not all cases are appropriate for mediation and this is recognised by even the most crusading mediation providers. Some civil disputes will always proceed to trial, for example because of an overwhelming desire on the part of one party for vindication, for public acknowledgement of grievance, because of a need for judicial determination that establishes an enforceable precedent, and so on. It has been suggested that circumstances indicating that ADR processes are unsuitable include cases:

- When a definitive or authoritative resolution of the matter is required for the purposes of precedent
- When the matter significantly affects persons or organisations who are not parties to the ADR process
- When there is a need for public sanctioning of conduct
- When parties are unable to negotiate effectively themselves or with the assistance of lawyers

Moreover, it has been suggested that the timing of a direction or encouragement of ADR is crucial to success. Cases may be pushed toward ADR too early in the life of a dispute or too late to confer any benefit in cost or time saving.

These considerations suggest that an individualised approach to the direction of cases toward ADR is more appropriate and likely to be more effective, than general invitations or pressure by courts in all cases to attempt mediation at an early stage in the litigation process. It is also likely that after a while, invitations to enter ADR schemes that routinely accompany material from the court will lose their impact as solicitors become accustomed to seeing them. There was some evidence of this effect in the Court of Appeal scheme and a similar effect can be inferred from the falling take-up rate in

⁵⁴ See for example J Katz '*Compulsory alternative dispute resolution and voluntarism: Two-headed or two sides of the coin*', (1993) 1 *Journal of Dispute Resolution* 1. "Studies show that ADR does not necessarily reduce caseloads...generally it replaces ordinary settlement negotiation more than it substitutes for trials." Page 52.

the CLCC scheme once the system changed from personalised letters to open invitations.

Experiments in United States courts suggest a tendency to move away from mandatory mediation programmes and toward more selective allocation of cases to ADR by the judiciary. If there is any lesson to be drawn from the experience of the three judicial initiatives discussed in this Report, it is that review of cases and selective pressure toward ADR may be a more appropriate and effective strategy than blanket invitations. However, the process of selection is crucial and it is not evident that there are clearly articulated selection principles in operation in the courts. Even in the Commercial Court there were complaints that Orders had been made inappropriately and the success rate among those cases that mediated was only around 50%, whereas among cases that volunteered in the CLCC scheme the success rate was around 62%.

There is anecdotal evidence that the general power given to the judiciary under the Civil Procedure Rules to make Orders similar to those in the Commercial Court is being used and that this might be leading to an increase in take up of ADR in civil disputes.⁵⁵ However, the extent of the use of the power and the outcome of such stays of proceedings for ADR is currently unknown. This is an area that would benefit from research.

Reasons for refusing to attempt ADR

The evaluations of the operation of ADR Orders in the Commercial Court and the schemes in the Court of Appeal and the CLCC have provided important evidence about the reasons behind the low take-up of ADR in voluntary schemes, and for refusal to attempt ADR following a Court direction to do so. Table 6.1 juxtaposes the most common reasons or

⁵⁵ In November 1999 CEDR issued a press release stating that there had been a “dramatic rise in mediations since the implementation of the Woolf reforms”. CEDR carried out 191 commercial mediations in the six months April to September 1999, which was a 100% increase on the same period the previous year and just 4 short of the total of 195 mediations for the entire previous year. More importantly, CEDR claimed that the number of cases referred by the courts had also risen sharply from 4% in the first quarter since the introduction of the new Civil Procedure Rules to 14% in the second quarter.

justifications offered by solicitors for failure to accept invitations to mediate or to undertake an ADR process following an ADR Order, and in so doing provides evidence that bears on the issues raised above about the selection of cases for direction toward ADR and the circumstances in which ADR may be inappropriate.

Table 6.1: Comparison of reasons given by solicitors for refusing court invitations to mediate or failure to attempt ADR following an ADR Order from the Commercial Court.		
Commercial Court ADR Orders	Court of Appeal ADR scheme	CLCC mediation scheme
The case is not appropriate for ADR: point of law or complex factual evidence Unwillingness to compromise/too far apart The timing of the Order is wrong (too early/too late) No faith in ADR as a process/solicitors are capable of settling it	Judgment required for policy reasons Appeal turns on point of law Unwillingness to negotiate/past history Appeal is of ‘all or nothing’ nature Parties too far apart Procedural reason Appeal on liability alone	Mediation inappropriate: no common ground between the parties/case won’t settle Complex evidence/expert evidence Dispute over fact/law both Case will settle in any case Offer of mediation too early in litigation

The comparison in Table 6.1 shows a high degree of consistency in the reasons for refusal given on behalf of clients by solicitors, despite the different jurisdiction of the courts. One of the most prevalent reasons given in each jurisdiction was that the case involved a point of law or complex factual evidence that would require judicial determination. Since a very large proportion of cases in which ADR is rejected go on to settle, at least outside the Court of Appeal, this reason for refusal requires closer analysis. To state that a case involves a point of law requiring judicial determination in the knowledge that in fact the case will probably settle, may simply be a convenient argument for rejecting a process about which solicitors and their clients are dubious. Alternatively, it may be a reflection of the fact that at the point at which ADR is suggested or directed the case is not yet ready to settle, in that all of the evidence has yet to be collected. However, it may be the case that a dispute does, in fact, involve a point of legal principle

requiring judicial determination both for the private interest of the parties and for the wider public interest. This would clearly apply to many cases in the Court of Appeal, but also to cases being dealt with at other levels in the court system. The high proportion of unsuccessful mediations in the Court of Appeal that subsequently went to trial illustrates the fact that it is difficult to promote settlement where, at the appellate level, a determination is needed or, having won at first instance, one party has no will to settle.

Another very common reason for failure to mediate was unwillingness of parties to compromise at all, or because, at the point at which the ADR invitation or direction was received, the gap between the position of the parties appeared to be impossible to bridge. This category covers cases in which the sense of grievance or desire for justice, on one or both sides, is so strong that compromise is out of the question, as well as cases in which compromise is feasible, but where the parties are not yet willing to yield enough to achieve a settlement. It also covers cases in which one side in the dispute is so certain of the merits of their case that they are simply not prepared to compromise their claim. The issue of willingness to compromise and scope for compromise, discussed above, would benefit from further investigation in order to identify factors that might help determine whether or not a case is appropriate for mediation. In some schemes in the US, cases in which the parties are unwilling to mediate are generally regarded as unsuitable for allocation to an ADR programme.

In all three schemes, invitations or directions to attempt ADR tend to be issued at an early stage in proceedings, on the assumption that at that point successful resolution of the case by ADR would yield the greatest saving of cost, time, and trouble. Other than in the Court of Appeal scheme, a common reason for refusing to try ADR was the view that the invitation or Order had been made too early in the life of the litigation. This again relates to the timing of ADR invitations and directions in relation to readiness to settle and reinforces the point made earlier that individualised decisions to direct parties toward ADR is probably a more appropriate and effective approach.

A further reason, mentioned in relation to all three initiatives was the belief that the cases would be settled by solicitor negotiations, and that the added value of an ADR process was unclear. This reflects the relative unfamiliarity of the legal profession with ADR processes as well as a desire to retain control over the conduct of cases. Although commercial solicitors in City firms have begun to embrace ADR, it has not had the same level of penetration on the High Street. Suspicion of ADR as a novelty and something that does not necessarily fit well with traditional approaches to litigation remains widespread within the legal profession, and the experience of the CLCC scheme suggests that even happy experiences of the successful use of ADR does not necessarily produce armies of converts. The CLCC scheme has been operating now for nearly five years, but very few solicitors who have successfully mediated their cases through the scheme have returned for a second or third time and the volume of mediations has been dropping.

There are three possible, and not exclusive, explanations for this phenomenon. First, that a positive experience of mediation among solicitors is not sufficient to overcome a general reluctance to divert cases to ADR or to overcome the particular problem in any individual case. Second, that although the mediation was a positive experience, in retrospect the inconvenience of preparing for the mediation and the time taken to attend the mediation was not a sufficient incentive to recommend mediation, particularly if the mediation led to any reduction in earnings on a case. Third, it is possible that the Woolf reforms are, indeed, having the desired effect in producing pre-issue settlements and very rapid post-issue settlements. In such a situation the need for an ADR process that avoids the cost, delay and trauma of litigation diminishes.

Impact of ADR on legal costs

The interest in establishing convincingly whether or not ADR saves legal costs has yet to be satisfied. The anecdotal evidence from solicitors who entered the Court of Appeal ADR scheme, and the CLCC voluntary mediation scheme, and those who used ADR following an Order from the

Commercial Court suggests that, when *successful*, ADR has the potential for saving legal costs. It has not been possible rigorously to test those perceptions or to quantify the level of savings achieved. Moreover there needs to be greater clarity about the way in which assessments of cost savings is made. First, in so far as solicitors refer to cost savings achieved as a result of a successful ADR procedure, this is generally, although not invariably, by comparison with the likely cost of the case proceeding to a full trial. Since the majority of cases, below appeal level, settle before trial in any case, the presumed cost savings may be exaggerated. The comparison in cost saving must be between ADR and out of court settlement, not ADR and trial. If, however, as some solicitors have suggested, ADR procedures can lead to earlier settlement in a case that would have gone on to settle at a much later date, there will be some saving of expenditure, but rather less than if the case had proceeded to trial. Despite these caveats, it seems safe to conclude that in most cases, *successful* ADR is likely to lead to some saving of legal costs.

The evidence from all three sources also suggests that when ADR procedures are *unsuccessful*, they can increase the costs for parties. The increase in costs can result both from the direct cost of preparing for and attending at a failed mediation or ENE, and from the overall lengthening of the time to settlement or trial. The fact that unsuccessful ADR has the potential for increasing the burden of legal costs in some cases does not necessarily constitute an argument against its wider use as a settlement tool in civil litigation. It does, however, represent an important factor that should be weighed in the design of judicial ADR initiatives and underlines the need for well-targeted identification and selection of cases for encouragement or direction toward ADR. It is also a factor that must be taken into account in the development of Government policy on the promotion of ADR more broadly.

Customer satisfaction

Solicitors' assessment of mediation and ENE undertaken as a result of the court initiatives discussed in this Report, and parties' assessments of

mediation in the CLCC scheme, were generally very positive. Participants in ADR processes tended to value the opportunity to focus on the central issues of disputes, the ability of ADR to get past logjams in negotiation, and the skill of mediators, although assessments tended to be rather more positive when the ADR process was successful in achieving a settlement than when it was unsuccessful. Issues emerging for further consideration include the need to allocate mediators with expertise in the subject-matter of the dispute. This is particularly so when the dispute concerns matters of legal principle or complicated factual disputes. In order for mediating parties and their advisers to feel confident about the process, they must have respect for the authority of the mediator. This is more easily gained if the mediator can display familiarity with the subject-area and familiarity with the facts of the particular case, as well as excellent mediation skills.

There is also a need to match the approach of mediators with the expectations of the parties and their solicitors. A high pressure, evaluative approach may suit some parties very well and indeed may be what is expected. In other cases, it may lead to parties feeling pressured into settlement.

Administration of court-based ADR schemes

Although the results of the Court of Appeal ADR scheme and the CLCC mediation scheme clearly suggest that the voluntary demand for mediation of non-family civil disputes is not overwhelming, there is additional evidence available from the review of both schemes that needs to be considered. In both the Court of Appeal and the CLCC schemes mediation would only take place where both parties agreed to mediate. However, in both schemes there was a proportion of cases where although a mediation was not held, one side in the dispute had agreed to mediate. In the Court of Appeal scheme during the review period, in 52 cases where an ADR invitation had been sent out by the Court, the Appellant agreed to mediate, but the respondent refused. In a further 47 cases, the Respondent agreed to mediate but the Appellant refused. In the CLCC mediation scheme, although in only five percent of cases both parties agreed to mediate, in an additional 15% of cases in which

invitation letters were sent out by the court, either the plaintiff or the defendant accepted the offer while the other side rejected the offer or failed to reply at all. Although these findings do not change the overall picture of modest take-up of voluntary schemes, they do suggest that there may be scope for increasing take-up by concentrating some effort on cases where one side agrees to the mediation.

This leads to a second issue that emerges from the experience of the Court of Appeal scheme and the CLCC. Both schemes, at one time or another, had the benefit of dedicated administrators who were able to deal swiftly with enquiries regarding mediation, and rapidly move to assist in arranging mediation appointments. In the Court of Appeal there was a six-month period in which the scheme benefited from a full-time administrator. The analysis of take-up presented in Chapter Five shows that during the period in which the full-time administrator was in post, the number of positive responses to letters of invitation rose significantly over the previous twelve months. Perhaps more importantly, however, the proportion of cases in which *both sides* agreed to mediate rose significantly. In the period following the departure of the administrator, although the number of cases in which one side or other agreed to mediate continued to rise, the proportion of cases in which both sides agreed to mediate fell back.⁵⁶

The experience in the CLCC scheme reinforces the suggestion that to maximise take-up in voluntary schemes there may be a need for dedicated administrative support. During the first two years of the CLCC initiative, the scheme had the benefit of at least one full-time administrator. Following the end of the evaluation period of the scheme it was not possible for the court to allocate a full-time administrator to the scheme. This may be a contributing factor to the fall in take-up of the scheme that has been observed during the last year or so. The peculiar demands and different rhythm of such special ADR schemes means that they cannot easily be integrated within normal flow of court administration.

⁵⁶ See Figure 5.1 Chapter Two.

Facilitating further research

In developing any additional experimental court-based ADR schemes that will contribute to the growing body of evidence about ADR, there is a need to take seriously the deficiencies of the existing information base. Although many of the questions underlying the evaluations discussed in this report were relatively straightforward, the process of attempting to answer those questions was disproportionately time-consuming and tortuous. The absence of systems for collecting information about the throughput and outcome of court cases, in a form that is usable by researchers, makes policy evaluation difficult. Where possible, measures need to be taken to establish procedures for collecting the data necessary for evaluation. If a strategy were implemented, answering apparently simple questions about the progress and outcome of non-family civil cases might become more straightforward in the future.

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