Alternative Dispute Resolution

Introduction

The term 'ADR' does not have a fixed technical meaning, but encompasses a wide range of dispute resolution processes that may be used as alternatives to litigation in the courts. It is frequently regarded as a modern development, but parties have been negotiating settlements of disputes since time immemorial, and arbitration can be traced back to ancient Greece.[1]

In broad terms, the wide range of dispute resolution processes can be split into adjudicative and non-adjudicative types. Entire books have been written on single ADR methods and the reader is directed to these for more detailed analysis of them. The purpose of this chapter is to provide an introduction to ADR and to explain how it fits into commercial dispute resolution.

So, what is wrong with 'mainstream' litigation? As Voltaire[2] once said 'I was never ruined but twice: once when I lost a lawsuit, and once when I won one.' First, litigation is often seen as potentially the most disruptive factor a business is likely to encounter and, lawyers aside, few people enjoy it or gain financially from it. It is also hugely expensive and can be an incredibly disruptive process. Mummery LJ observed in *Pennock & Another v Hodgson*[3] that 'the unfortunate consequences of [litigation is] that, in the absence of any compromise, someone wins, someone loses, it always costs a lot of money and usually generates a lot of ill-feeling that does not end with the litigation. None of those things are good . . . '.

The outcome of litigation can also be very unpredictable and many parties who succeed at trial struggle to recover their judgment award from their opponents due to insolvency or other factors.

Notwithstanding recent attempts to make the courts more accessible to more people, many simply cannot afford it. Alternative methods of dispute resolution, therefore, are needed. Many such alternative methods are also often based on consensus where the parties agree to use them. Many agree that it is preferable to negotiate and agree a resolution rather than have one imposed by a court. Litigation, on the other hand, is not voluntary and provided the court has jurisdiction to hear the dispute the parties will be subject to the legal process, whether or not they agree to such participation.

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[1] Blake et al, *A Practical Approach to Alternative Dispute Resolution* (3rd edn, OUP 2014) Preface.

[2] François-Marie Arouet (1694–1778), known by his *nom de plume* Voltaire.

[3] [2010] EWCA Civ 873.

The Civil Procedure Rules played a significant part in the advancement of ADR. When introducing the Rules in 1998, Lord Woolf declared that one of the working objectives for the new system of civil litigation was for the parties, whenever it was reasonable for them to do so, to settle their disputes before resorting to the courts. The promotion of ADR has not slowed down since. At the 2003 ADR Group Conference, Lightman J remarked that access to justice, rather than access to the courts, should be society's prime obligation. The judiciary is in no doubt about the value of ADR and increasingly sees the promotion of it, and especially mediation, as part of active case management.

In summary, the objective of ADR is to allow parties to conclude disputes in a more satisfactory and mutually advantageous manner by focusing on their interests and commercial objectives.

Some commentators suggest that ADR explains only non-adjudicative dispute resolution methods, for example, mediation, whereas others use ADR as a generic term defining every other alternative method of resolving disputes apart from traditional litigation.

Sir Geoffrey Vos MR has stated that ADR should be an integral part of the dispute resolution process and no longer seen an alternative to litigation. Further, the Civil Justice Council's latest report, 'Compulsory ADR',[4] concluded that parties could lawfully be compelled to participate in ADR and proposed conditions for when compulsion could be a desirable and effective development as part of a dispute resolution process. The court's case management powers could include powers to order parties to engage in an ADR process and breach of such an order could be subject to sanction. Retaining the fundamental constitutional right to court access is crucial and there should never be compulsion to settle.

Adjudicative processes

(a) Arbitration

Arbitration is a non-judicial process for the settlement of disputes where an independent third party makes a decision that is binding on the parties. This third party is known as the arbitrator. An arbitrator can sit alone or as a panel.

Although the role of an arbitrator is similar to that of a judge, the procedures are often less formal. Arbitrators are often selected as a result of their specific industry expertise.

As with traditional court proceedings, an arbitrator reaches their decision following a hearing, although this takes place at a venue that is agreed between the parties rather than a court.

Unlike court proceedings which are usually held in public, an arbitration is confidential to which the public does not have access. The entire arbitration process is usually speedier than a similar process running in the courts and can also be tailored to the parties' specific needs and circumstances.

A dispute will be heard by arbitration where the parties have agreed this method of dispute resolution in their contracts. A typical arbitration clause will provide that in

[4] 'Compulsory ADR', Civil Justice Council, 12 July 2021 (www.judiciary.uk).

the event of a dispute or difference arising out of the contract any such dispute or difference shall be determined by the appointment of an arbitrator to be agreed between the parties. In the absence of the parties reaching agreement as to the arbitrator's appointment, the clause will typically provide a mechanism for such appointment. In any case where there is no arbitration clause in the agreement the parties can nevertheless still agree between themselves to refer the dispute to arbitration.

An award made in arbitration is registrable as a judgment.

(b) Adjudication

There are many different adjudication schemes whereby an adjudicator determines the dispute that has been referred to him.

Certain types of adjudications operate under regulation while others proceed by agreement between the parties to the dispute. An adjudication is most likely to be seen in cases of specialist commercial disputes where the parties to the dispute require a system of dispute resolution that can be tailored to the specific needs of the industry or dispute. The adjudicator is likely to have sector-specific experience and qualifications.

Adjudications are frequently seen in the construction industry where the process is speedy and can result in 'rough and ready' justice. As Coulson J explained in *CSK Electrical Contractors Ltd v Kingwood Electrical Services Ltd*:[5]

> The plain fact is that adjudication is a rough and ready process because it has to be carried out within a very strict timetable. That often causes particular pressure for the responding party. That is, I am afraid, a fact of adjudication life; it is inherent in the whole process.

This rough and ready approach was earlier justified by the Court of Appeal because 'the need to have the "right" answer has been subordinated to the need to have an answer quickly'.[6]

The entire process requires the adjudicator to reach his decision within 28 days of being appointed. The adjudicator's decision is binding and therefore enforceable, typically by summary judgment in the court. It is, however, only temporarily binding as it can be followed by a full arbitration or court hearing if either party disagrees with the adjudicator's decision. Any tension between the enforceable but temporary nature of an adjudicator's decision can be answered by the 'pay now and argue later' policy that applies to construction adjudications.[7] The Court of Appeal explained the harshness of this policy in the following terms: 'The [Act] . . . gave the important and practical right to refer [construction] disputes to adjudication so as to provide a quick enforceable interim decision under the rubric of "pay now, argue later".'[8]

(c) Expert determination

Expert determination refers to a process whereby an expert is appointed by the parties either to reach a determination in the case or to resolve a specific issue that will then enable the parties to agree a way forward.

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[5] [2015] EWHC 667 (TCC).

[6] *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358 [86] (Chadwick LJ).

[7] See, for example, *RJT Consulting Engineers Ltd, DM Engineering (Northern Ireland) Ltd* [2002] EWCA Civ 270.

[8] Ibid, [1], Ward LJ.

Expert determination can also be used during adjudication where the adjudicator requires specialist expert assistance. In such a case, the adjudicator may appoint an expert to determine a specific technical point which in turn will assist him in determining the dispute. Although this necessarily involves an additional person in the dispute-resolution process it can prove extremely cost effective as without it the parties are likely to need to engage their own expert witnesses and present their reports to the adjudicator. This can prove more costly and time consuming.

Non-adjudicative processes

Unlike with an adjudicative ADR process where a third party imposes a decision on the parties, a non-adjudicative process typically involves a third party who merely facilitates a resolution and does not impose a decision or outcome. The parties themselves remain in control of the process.

(a) Party discussions and meetings

As a first option, many parties sensibly attempt to resolve their differences themselves. They may consult lawyers to advise them 'behind the scenes' as to their strict legal rights and obligations but prefer to attempt to resolve the issues directly.

In such a situation, the parties' lawyers will be on hand in the event of any difficulties that might arise and to prepare settlement or other agreements in the event the discussions prove fruitful.

(b) Offers to settle

Any party to a dispute is at liberty at any time to make an offer to the other party or parties to settle the dispute. Offers to settle are usually made in writing or, if made orally, confirmed in writing and given the 'without prejudice' protection. Unless the offer is accepted it has no effect: if accepted it takes effect as an agreement in the usual way.

Offers to settle are often made under Part 36 of the Civil Procedure Rules. In addition to the offer attempting to settle the case a Part 36 offer also has a tactical advantage if the offer made is not accepted and the party making the offer fails to beat it when the matter comes on for hearing at trial. In order for the party making such offer to settle they must follow the strict requirements set out in the Rules.

(c) Negotiation

Negotiation can be a very informal process which, in its simplest form, is a discussion between the parties in an attempt to resolve the issues in dispute or, if this is not possible, to narrow them down. There is no set formula for a negotiation which can take the form of any, or all, of the following: correspondence, telephone discussions, face-to-face meetings. Neither is there a timescale for negotiation which can start as soon as a dispute arises or as late as the door to the court.

Parties will sometimes instruct their lawyers during negotiations and, depending on the value or complexity of the matter, can be present during the course of the negotiations. Because of the informal nature of a negotiation, the parties can agree to involve others in the process, such as an expert or accountant.

In the event that the negotiations fail to resolve the issues, the issues discussed during the process cannot be raised in any subsequent litigation.[9]

(d) Mediation

Mediation lies at the heart of ADR. It is an extremely common and effective way of resolving disputes without the need to go to court. A core principle of mediation is that control of the process, and outcome, is entirely in the hands of the parties.

Unlike with the process of negotiation, with mediation a mediator is appointed by the parties and is tasked with facilitating dialogue and communication between the parties in a structured way with the aim of assisting them to reach a voluntary settlement. The mediator has no decision-making power so the dispute is resolved on the parties' own terms.

Mediation is an extremely flexible, speedy and confidential process. It is a non-binding procedure unless and until the parties reach agreement.

Mediation is arguably the most significant aspect of ADR. With mediation, a mediator is an appointed third party neutral who acts as a 'go-between' to help parties in dispute reach a negotiated settlement. Mediation is the most popular and preferred method of ADR in England and Wales, perhaps as a result of a major drive by the judiciary and the Lord Chancellor's Department. It is quick, without prejudice, non-binding, and confidential.

Typically, mediations follow a set format. The parties usually attend a neutral venue; settle themselves in different rooms, known as their private rooms; the mediator introduces himself or herself to each party in their private room and explains the structure of the opening session; the parties go into a larger room for the joint opening session; the parties break out into the private rooms (also referred to as caucuses); the mediator chooses which private room to attend first and from then on discusses each party's case in the private rooms and explores possible avenues for concession.

There then follows an indefinite period of 'shuttle diplomacy'. This is where the mediator comes into their own, darting about between private rooms facilitating the negotiation process. For parties entrenched in personal dispute, negotiation would not have been possible were it not for this method of acting as a 'go-between'. It is a simple concept, but its effect and (proven) success should not be underestimated.

A mediator's focus and determination to find middle ground is not always successful. Some parties simply do not want to settle. When they do, parties typically record settlements in a manuscript 'Heads of Terms' signed at the closing stages of the mediation. The outcome of a successful mediation is a binding agreement which provides a certain and enforceable resolution of the dispute.

If ever a case shouted out for the need to use ADR, especially mediation, it is *Egan v Motor Services (Bath) Ltd*.[10] The amount in dispute was around £6,000 yet the parties had between them spent in the region of £100,000 arguing over the claim. Egan was a case involving the purchase of an Audi motor car which had an apparent defect. Although various attempts to correct the defect were made the purchaser remained dissatisfied. The parties' positions became entrenched and proceedings commenced

[9] *Rush & Tompkins v GLC* [1989] AC 1280, HL.

[10] [2007] EWCA Civ 1002.

for the return of the purchase price plus incidental expenses. Ward LJ had this criticism of the parties, and it seems, their lawyers:

> What I have found profoundly unsatisfactory, and made my views clear in the course of argument, is the fact that the parties have between them spent in the region of £100,000 arguing over a claim which is worth about £6,000. In the florid language of the argument, I regarded them, one or other, if not both, of them, as 'completely cuckoo' to have engaged in such expensive litigation with so little at stake. At the time of writing this judgment I rightly do not know whether any, or if so what, attempts have been made to settle this case and the remarks that follow are of general application. I raise that matter again in this judgment to make the point, as firmly as I can, that this is a paradigm case which, if it could not have been settled by the parties themselves, customer and dealer, then it behoved both solicitors to take the firmest grip on the case from the first moment of instruction. That, I appreciate, may not always be easy, but perhaps a copy of this judgment can, at the first meeting, be handed to the client, bristling with righteous indignation, in this case the customer who has paid a small fortune for a motor car which does not meet his satisfaction, and the dealer anxious to preserve the reputation of his prestige product. 'This case cries out for mediation', should be the advice given to both the claimant and the defendant. Why? Because it is perfectly obvious what can happen. Feelings are running high, early positions are taken, positions become entrenched, the litigation bandwagon will roll on, experts are inevitably involved, and, before one knows it, there will be two/three day trial and even, heaven help them, an appeal. It is on the cards a wholly disproportionate sum, £100,000, will be to fight over a tiny claim, £6,000. And what benefit can mediation bring? It brings an air of reality to negotiations that, I accept, may well have taken place in this case, though, for obvious reasons, we have not sought to enquire further into that at this stage. Mediation can do more for the parties than negotiation. In this case the sheer commercial folly could have been amply demonstrated to both parties sitting at the same table but hearing it come from somebody who is independent. At the time this dispute crystallised, the car was practically brand new. It would not have been vastly different from any demonstration car. The commercial possibilities are endless for finding an acceptable solution which would enable the parties to emerge, one with some satisfaction, perhaps a replacement vehicle and the other with its and Audi's good name intact and probably enhanced, but perhaps with each of them just a little less wealthy. The cost of such a mediation would be paltry by comparison with the costs that would mount from the moment of the issue of the claim. In so many cases, and this is just another example of one, the best time to mediate is before the litigation begins. It is not a sign of weakness to suggest it. It is the hallmark of common sense. Mediation is a perfectly proper adjunct to litigation. The skills are now well developed. The results are astonishingly good. Try it more often.

The enormous potential of mediation has also been recognized at the very highest level by the judiciary. For example, in a speech on 29 March 2008, Lord Phillips, then Lord Chief Justice, made his views clear:

> Let me end by nailing my colours firmly to the mast. I number myself with Sir Anthony Colman and Sir Gavin Lightman as an enthusiastic supporter of ADR . . . It is madness to incur the considerable expense of litigation . . . without making a determined attempt to reach an amicable settlement. The idea that there is only one just result of every dispute, which only the court can deliver is, I believe, often illusory . . . . Parties should be given strong encouragement to attempt mediation before resorting to litigation. And if they commence litigation, there should be built into the process a stage at which the Court can require them to attempt mediation – perhaps with the assistance of a mediator supplied by the Court. I believe that we are moving in that direction in England.

This approach had earlier been voiced by Lord Woolf in *R v Plymouth City Council*[11] when he stated that 'lawyers acting on both sides of a dispute of this sort are under

[11] [2002] 1 WLR 803.

a heavy obligation to resort to litigation only if it is really unavoidable . . . they should resolve the dispute so far as it seems practicable without involving litigation'. Furthermore, in *Hurst v Leeming*[12] it was explained that: 'Mediation is not in law compulsory . . . But alternative dispute resolution is at the heart of today's civil justice system, and any unjustified failure to give proper attention to the opportunities afforded by mediation, and in particular in any case where mediation affords a realistic prospect of resolution by dispute, there must be anticipated as a real possibility that adverse consequences may be attracted.'

Dyson LJ had this to say about ADR in *Halsey v Milton Keynes NHS Trust; Steel v Joy (Joint Appeal)*:[13]

> The value and importance of ADR have been established within a remarkably short time. All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR.

Finally, Lord Phillips CJ (speaking extrajudicially in India in March 2008) said:

> How can you compel parties to indulge in a voluntary activity? You can take a horse to water but you cannot make him drink. To which those in favour of compulsory mediation reply – yes but if you take a horse to water it usually does drink.

It ought to be hoped that a party who engages in mediation does so for genuine reasons of wanting to resolve the dispute and many mediations proceed this way. However, since it is the case that a party who unreasonably refuses to engage in mediation (or another appropriate method of ADR) runs the risk of an adverse order of costs, some mediations proceed solely to avoid such sanctions. The question of what amounts to an unreasonable refusal to mediate is one that has generated a considerable amount of judicial attention and will be discussed in the next section.

(e) Conciliation

The meaning and process of conciliation is often unclear and is sometimes used as another term for mediation. This is because both processes utilize a neutral third party to assist the parties in resolving their dispute. One practical difference between mediation and conciliation is that with the former the third party neutral takes a more active role in actually mediating the dispute whereas with the latter he takes a more back-seat facilitator position.

(f) Early neutral evaluation

As its name suggests, early neutral evaluation (ENE) is a process where a neutral third party provides an independent evaluation of a dispute or part of it, including its strengths and weaknesses. The evaluator is typically a senior lawyer. Where the evaluator is a judge then he plays no further part in any proceedings between the parties. The process is entirely voluntary and the evaluation does not bind either party. The parties provide to the evaluator a case summary which sets out their case at its best. It can also include settlement proposals.

The key benefit of ENE is that it provides the parties with a clear idea of how their case (or a specific aspect of it) might be viewed by a judge. As such it can fairly be described as providing a 'quick reality check'.

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[12] [2002] EWHC 1051. [13] [2004] EWCA Civ 576.

Since ENE can help clarify and narrow the issues in dispute it can be a particularly useful alternative to a trial of a preliminary issue. Strategically, and, of course, provided all parties agree, ENE can prove beneficial in identifying the litigation risk to parties who are proving otherwise to be intransigent with the aim of demonstrating why they should explore the possibility of a negotiated settlement.

The benefits of ENE must be weighed against the likelihood that the 'winner' may become more entrenched in their position whereas the 'loser' may find it more difficult to further negotiate a satisfactory outcome.

ENE has traditionally been used more in other jurisdictions (in particular America and Australia) but its use is likely to increase in the UK. The process has been included for several years in both the UK's Technology and Construction Court Guide[14] and the Admiralty and Commercial Courts Guide[15] and has more recently received positive judicial comment by Norris J in *Seals v Williams*[16] where, in a probate case, he praised the legal representatives for proposing ENE when mediation had stalled. He further commented that ENEs are being adopted in the Birmingham and Manchester District Registries, noting that 'the move is warmly to be welcomed.'[17]

Norris J held that the court's wide jurisdiction under CPR 3.1(m) gave it the power to order ENE. He also stated that the expression of provisional views with a view to assisting the parties was 'an inherent part of the judicial function.'[18] Since *Seals v Williams* this view has now been codified in CPR 3.1(m), which empowers the court to 'take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case'.[19] Since this is now codified in the CPR it is to be presumed that the parties' consent is not required.

The Pre-Action Practice Direction (PD) requires litigation to be used as 'a last resort' and for parties to consider the possibility of reaching a settlement at all times, including after proceedings have commenced. The PD goes on to list several forms of ADR which parties might consider, including 'early neutral evaluation, a third party giving an informed opinion on the dispute'.[20]

In *Lomax v Lomax*[21] the Court of Appeal held that it had the power to order ENE even where one or more of the parties did not consent to it. This is significant for two key reasons. First, it has the potential to increase the use of ENE and, second, the decision could have wider significance in the context of whether the courts' encouragement of ADR should extend into compulsion.

In *Telecom Centre (UK) Ltd v Thomas Sanderson Ltd*,[22] Master McCloud raised the option of using ENE (which the parties had already considered on their own initiative) to assist them in attempting to settle the case. Commenting on the lack of specific information on the use of ENE in the Queen's Bench Guide, the Master shared her approach to the process in order to inform other litigants and, potentially, the current author of the Queen's Bench Guide. She set out in her judgment how ENE procedures could be structured, when the process might be helpful, and how it may assist the parties as well as the court.

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[14] See section 7.5. [15] See paragraph G2. [16] [2015] EWHC 1829 (Ch), Norris J.
[17] Ibid, [10]. [18] Ibid, [5]–[6]. [19] As from 1 October 2015. [20] para 10(c).
[21] [2019] EWCA Civ 1467. [22] [2020] EWHC 368 (QB),

Parties will, of course, reflect on whether they prefer ADR processes which are centred on party choice and control, such as mediation, or processes which enlist the assistance of a quasi-decision-maker, as in ENE, even where the resulting evaluation is not binding.

Mediation and the unreasonable refusal argument

The encouragement of the use of ADR and, in particular mediation, comes with the judicial stick of costs penalties. The general rule with costs is that the court will award costs to the winning party. However, the court has wide discretion in this regard and the conduct of the parties is a hugely relevant factor.

As noted above, if a party unreasonably refuses to mediate they are likely to be penalized in costs. But what does 'unreasonable' mean? One of the earlier key cases is *Dunnett v Railtrack plc*.[23] It was held that if a party in litigation unreasonably refuses to mediate their dispute, they may face adverse cost consequences, even if they win at trial. This was the warning given by the Court of Appeal in this case. Miss Dunnett, at first instance, brought a claim against Railtrack for damages resulting from the death of three of her horses on a railway line. Her claim was unsuccessful. She appealed to the Court of Appeal arguing that as the gate separating the field from the railway lines was not self-closing Railtrack had not appropriately fulfilled their statutory duty under the Railways Clauses Consolidation Act 1845. Unfortunately this had not been pleaded by the claimant's original solicitors. However, before the case went to the Court of Appeal, Railtrack offered to settle her case for £2,500. Miss Dunnett refused. The Court of Appeal also advised Miss Dunnett to explore the possibilities of ADR. Miss Dunnett was in favour of mediation if Railtrack were also prepared to participate. However, Railtrack, presumably because they were so confident of their case, were not even prepared to discuss the possibility of mediation. They presumably took the view that they did not want to pay the costs of mediation and were not prepared to offer anything above what they had already offered.

In the Court of Appeal, Miss Dunnett was unsuccessful and the first instance decision was upheld. Not surprisingly, at the end of the appeal, Railtrack asked for their costs. The court took the time to consider this request and indeed made a separate judgment on the issue of costs. The Court of Appeal held that, in light of the fact that Railtrack had refused to participate in ADR, they could not recover their costs.

Brooke LJ issued a harsh warning to litigators:

> Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve . . . it is to be hoped that any publicity given to this part of the judgment of the court will draw the attention of lawyers to their duties to further the overriding objective . . .

When asked why it had not contemplated ADR, Railtrack said that it would necessarily involve payment of sums over any offer already made to the claimant and refused. The Court of Appeal said that that was a misunderstanding of the purpose of alternate dispute resolution.

[23] [2002] 2 All ER 850.

This decision, on the surface, would appear rather harsh on Railtrack. They may have had very good reasons for not participating in the mediation and the final result might be said to have vindicated their judgment. One might be tempted to say that as a result of this decision mediation has now become compulsory. Despite this case, however, mediation is not compulsory and nor should it be. Part of the mediation process is that the parties should want to come voluntarily to the mediation. Certain key advantages of the mediation process are lost if it becomes compulsory.

As a result of the *Dunnett* case, parties in civil litigation have become quite skilled in turning down mediation in such a way that they do not expose themselves to an adverse costs penalty in the event that the matter does eventually go to trial. Endless correspondence concerning the choice of mediator, location of mediation, duration of mediation, date of mediation, etc., can go on until the matter is more or less at trial, and then it is too late to have a mediation.

Was *Dunnett* sensibly decided? A court should only make an adverse costs order, however, if it considers there would have been a 'real prospect' of settling the case. If there was no such prospect, a party may be able to establish it reasonably refused the offer to mediate.

This was the position held by Lightman J in *Hurst v Leeming*[24] where the 'offering' litigant was pursuing claims with such a lack of particularity and focus (the offering party accepted at the final hearing that his claim was 'hopeless'), it could not have been said that any mediation would have had a 'real prospect' of reaching settlement. Lightman J described ADR as being 'at the heart of today's civil justice system' and noted that mediation often proves successful through producing a recognition of the strengths and weaknesses by each party of his own case and that of his opponent. Although on the particular facts, the defendant's refusal to mediate was accepted by the court as a reasonable one, the hurdle which this case established is a high one. In order to avoid possible sanctions for refusing to mediate, it is now necessary to satisfy the court that the mediation had no real prospect of success. This might be an uphill task. We will return to this case later.

An embarrassing situation arose for the defendant in *Royal Bank of Canada Trust Corporation v Secretary of State for Defence*.[25] The Secretary of State for Defence was the tenant of properties belonging to the bank. Particular clauses in the lease allowed the determination of the lease with two years' notice. Clause 10 of the lease went even further, permitting the tenant to surrender any part or parts of the premises if they became surplus to requirements with six months' notice. In consequence, the rent would be reduced pro rata. In June 2002 the premises had become surplus to the tenant's requirements leading the Secretary of State to serve four termination notices under various clauses of the lease. Disputes arose between the parties relating to the lease, culminating in the bank issuing legal proceedings. The Secretary of State was substantially successful on the legal issues but unsuccessful on the factual question. Earlier the bank had offered to attempt to settle the claim by mediation but the Secretary of State failed to take up the offer. Somewhat embarrassingly for the government, on 23 March 2001, the Lord Chancellor's Department had issued a press notice in which it had declared its formal commitment to ADR:

> Government departments and agencies make these commitments on the resolution of disputes involving them. Alternative dispute resolution will be considered and used in all suitable cases wherever the other party agrees to it.

[24] [2002] EWHC 1051. [25] [2003] EWHC 1841.

In dealing with costs, Lewison J went straight to CPR 44.3. The court has wide discretion on how to assess the entitlement to costs even if the starting point remains that the winner should recover his costs from an unsuccessful litigant.[26]

According to Lewison J:

> I must . . . take into account the conduct of the parties both before as well as during the proceedings, and it is the case that on a number of occasions the claimant expressed a willingness to mediate the claim. The defendant refused that request . . . The dispute was, in my judgement, suitable for ADR even though the main issue was one of interpretation of the lease. Although technically that is a question of law rather than a question of fact, it is only so because traditionally the interpretation of documents has been said to be a question of law for a court rather than of fact for the jury. In my judgement, the formal pledge given on behalf of all government departments is something which I must take into account and to which I ought to attach great weight.

His Lordship then referred to the decision of the Court of Appeal in *Dunnett* and continued:

> Excepting, of course, that in that case alternative dispute resolution was suggested by the court itself rather than by the other party to the dispute, it seems to me that a willingness to mediate is something which is significant in deciding were costs should lie.

Here, the message from the judiciary is stark. Legal practitioners have routinely advised clients that ADR might not be suitable in situations where the dispute was founded more on legal interpretation than fact. However, Lewison J scuppered that preconception.

It remains to be asked, though, what is a suitable case for ADR in terms of adverse costs consequences. Practitioners will continue to experience an element of uncertainty in how courts may address the particular litigant's failure to mediate. In *Hurst*, Lightman J had concluded that to reject mediation on the ground that as the defendant you have a 'watertight case' is 'no justification for refusing mediation'. The real question was 'did mediation offer any realistic prospect of success?'

Paying mere lip-service to a mediation is unlikely to provide protection against a costs sanction. In *Watson Wyatt v Maxwell Batley*[27] the court dealt with a situation where one party refused to enter into a mediation with the other when the latter's motives for suggesting mediation was primarily to further their own ends and not to settle the dispute. It was held that parties who merely pay lip service to ADR and enter into the process with no intention of settling will be penalized in the same way as those who unreasonably refuse to mediate.

It should follow that once a party has agreed to mediate it should see the process through. In *Leicester Circuits v Coates Brothers plc*[28] a mediation was arranged, only for Coates to withdraw two days before it was due to be held, allegedly at their insurer's insistence. Coates asserted there was no realistic prospect of a successful outcome. Judge LJ was unsympathetic:

> The whole point of having mediation, and once you have agreed to it, proceeding with it, is that the most difficult of problems can sometimes, indeed often are, resolved . . . Having agreed to mediation it hardly lies in the mouths of those who agree to it to assert that there is no realistic prospect of success . . . We do not of course assume that mediation would have been successful, but there is certainly a prospect that it would have done if it had been allowed to proceed.

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[26] CPR rule 44.3(2). [27] [2002] EWHC 2401. [28] [2003] EWCA Civ 333.

This case can be contrasted with the following case where a significant issue was the professional reputation of one of the parties. In *Hurst v Leeming*[29] the court again confirmed that a party refusing to proceed to mediation or arbitration without good and sufficient reasons can be penalized for that refusal in relation to costs. It is no excuse that substantial costs have already been incurred at the point at which the offer to mediate has been made and refused. Neither is it reasonable to refuse an offer to mediate if a party thinks it has a watertight case that is unlikely to fail at trial. In *Hurst*, a barrister (Mr Leeming) had been sued for professional negligence by a former client. After proceedings had begun, Mr Leeming was invited to mediate but refused to do so, citing the legal costs already incurred, the seriousness of the allegations which he wanted to be determined by the court, and the lack of substance in the claim. He also pointed to the lack of any real prospect of the mediation being successful and the obsessive character of Mr Hurst as revealed by his history of litigation. The court rejected all of these reasons save that, on the facts of this case, Mr Leeming was justified in refusing an offer to mediate as it had no realistic chance of success given the character and attitude of the other party. The court made it clear, however, that the circumstances were exceptional and that a party would ordinarily be taking a great risk in refusing to mediate on this ground.

The Court of Appeal in *Valentine v Allen*[30] considered the real effect of a party refusing to mediate. The court found that as the respondents had made real efforts, by making reasonable offers to try and settle the dispute, it was not unreasonable for them then to refuse an offer of mediation. Further, because it was not clear whether the case could have been resolved through mediation, their refusal had no causative effect.

In *Corenso (UK) Ltd v Burnden Group plc*[31] HHJ Reid QC held that a failure to mediate did not automatically preclude the recovery of costs. The dispute related to the claimant's supply of core board. The defendant had made an offer to settle by way of CPR Pt 36 in the sum of £64,000 and shortly before trial increased this to £90,000. The court's permission to accept the offer was necessary, trial being less than 21 days away. Before the Part 36 offer, Burnden had proposed mediation which Corenso rejected. The question of costs was in issue. Corenso argued that they had been largely successful. Burnden had had a £300,000 counterclaim and there had been without prejudice meetings to attempt to reach mediation. According to the judge:

> ADR is not synonymous with mediation. The requirement on parties is to attempt to resolve their differences without resorting to court by alternative dispute resolution. In some cases, the only available way may be by mediation . . . So long as parties are showing a genuine and constructive willingness to resolve the issues between them it does not seem to me that a party will be automatically penalised because that party has not gone along with a particular form of alternative dispute resolution proposed by the other side . . . This was not a case . . . where there was an absolute refusal to negotiate . . . [or] an absolute refusal to negotiate but it was held to be justified.

A key consideration in whether or not a court will impose costs sanctions for refusing to mediate is the likelihood of success had mediation been attempted. In *Patel & Anr v Barlows Solicitors & Ors (No. 2)*[32] the claimants were successful at trial but the

[29] [2002] EWHC 1051. [30] [2003] EWCA Civ 915. [31] (2003) CILL 2023.
[32] [2020] EWHC 2795 (Ch).

second defendant argued that they should be denied costs because of their alleged failure to engage in mediation. HHJ Mithani QC stated that parties to a dispute should consider the resolution of the dispute by an appropriate ADR procedure and that the unreasonable failure on the part of a party to do so may be visited by a sanction in costs. However, in this case, the judge said that the claim against the second defendants was a very strong one and other settlement methods had been attempted but failed. Further, the costs of the proposed mediation would have been high and 'the plain fact is that it is difficult to see how the ADR would have succeeded'. Furthermore, the judge noted that the claimants did not reject the offer of mediation outright. The second defendants had made an offer of £40,000, which was rejected. Then they suggested mediation. The claimants were not against mediation per se but, in an attempt to keep costs down, were working with their lawyers to try and put forward an offer, which if unsuccessful, they suggested a possible route to mediation. HHJ Mithani QC thought it was difficult to see what else could have been achieved by mediation and held that there was no proper basis upon which the claimants could be criticized for refusing to mediate when without prejudice communication had been attempted and proved wholly unsuccessful. Either party could have improved on the offer to settle but neither did so. Accordingly, the costs' argument failed.

The appeals in *Halsey v Milton Keynes NHS Trust; Steel v Joy (Joint Appeal)*[33] once again concerned parties resisting orders for costs against them on the basis that the other party had unreasonably refused mediation. The Court of Appeal emphasized that it was the duty of the court to encourage mediation and the duty of the parties to contemplate it. However, the court fell short of saying that courts should compel it. The court considered that any such compulsion could fall foul of Article 6 of the European Convention on Human Rights, by unfairly providing an obstacle to a party's right of access to the court. The court also referred to paragraph 1.4.11 of the 2003 White Book which refers to ADR as a voluntary process. Compulsory mediation that is opposed by the parties would only add to the costs and postpone a final determination by the court. The Court of Appeal laid down the principle that litigants must be encouraged to mediate but cannot be ordered to do so by the courts. Also, while many cases are suitable for ADR, there should not be a presumption in favour of mediation.

Dyson LJ (as he was then) laid down clear guidelines for the use of mediation which can be summarized thus:

1. The court may displace normal costs rules to order a winning party to pay costs if it acted unreasonably in refusing to mediate.
2. The burden of showing that the refusal was unreasonable should be on the unsuccessful party, thus reversing previous case law.
3. The unsuccessful party must also show that the mediation had a reasonable chance of success.
4. When deciding how a dispute should be settled, there should be no presumption in favour of mediation.
5. It is the court's role to encourage mediation, not to compel it which would violate human rights legislation.

The Court of Appeal ruled against penalizing Milton Keynes NHS Trust for declining mediation. It found that the claimant's application for mediation was 'somewhat

[33] [2004] EWCA Civ 576.

tactical', and upheld the Trust's defence that the costs of mediation were disproportionately high. In *Steel v Joy*, a personal injury case, the court ruled that mediation would not have succeeded because the defendant reasonably believed the claim had no merit.

It was noted above that one of the arguments in *Halsey* was the suggestion that to impose mediation could infringe a person's right under Article 6 of the Human Rights Act of freedom of access to the court. It is submitted that this argument is wrong; something that Lord Dyson now accepts to be the case.[34] The courts have long used costs orders at the conclusion of litigation to express their disapproval of those who fail to negotiate or who spurn reasonable offers of settlement. Nobody can dispute that a court has to manage its diary. Every case that settles enables the speedier trial of those that proceed to trial. In other words, it enhances the Article 6 rights of others. The idea that requiring the parties to attend on a given day before a neutral facilitative mediator crosses some impermissible line and becomes an infringement of human rights simply seems wrong. The process barely delays at all their day in court should they ultimately require one. Above all, the parties are not being ordered to settle; they are merely being ordered to attend at the scene of a potential negotiation.

Further, a number of European states such as Belgium and Greece, both signatories to the Human Rights Convention, have introduced compulsory ADR schemes without successful Article 6 challenges.[35] Equally, Germany's federal states can legislate to require litigants to either engage in court-based or court-approved conciliation prior to the formal commencement of litigation. The European Union itself acknowledges in its Directive on Mediation the encouragement it offers to mediation where it says that:

> this process may be . . . suggested or ordered by a Court . . . Without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not impede the right of access to the judicial system.

Compulsory ADR schemes have also been introduced in a number of US jurisdictions. For instance, New York has established mandatory arbitration in claims coming before a trial court where an official arbitration programme has been established for claims of a certain value. Similar schemes have been introduced in other states, for instance California. The federal district courts can also require parties to mediate disputes under a power granted by the Alternative Dispute Resolution Act (28 USC) s 652.

Taken together, what could be described as the European and US approach to ADR, appears to demonstrate that compulsory ADR does not in and of itself give rise to a violation of Article 6 nor of the equivalent US constitutional right of due process.

Is there any support for the view that the court mistakenly confused mediation with arbitration? The court relied on the decision of the European Court of Human Rights in *Deweer v Belgium*[36] in arriving at its decision. That case was reported in *Halsey* as having established that 'the right of access to a court may be waived', for example by means of an arbitration agreement, but such waiver should be subjected to a 'particularly careful review' to ensure that the claimant is not subject to 'constraint'.

The context in *Deweer* is important. The claim arose out of an alleged infringement of a Belgian Ministerial Decree which required butchers to reduce the price of

[34] Civil Justice Council's report 'Compulsory ADR', paragraph 46 (www.judiciary.uk).
[35] See, for example, Article 214 of the Greek Civil Code.
[36] (1980) 2 EHRR 439.

retail pork and beef in accordance with the terms of the decree. As a consequence of the breach the butcher's shop was closed and he became liable to imprisonment. The butcher was however given the option of paying a fine fixed at 10,000 francs by way of what was described as a 'friendly settlement'. If he paid, his shop could reopen and the criminal proceedings against him would be barred. On the face of it this is far away from mediation, which both parties enter as equals. The Strasbourg Court said this at paragraph 49 of its judgment:

> By paying the 10,000 francs which the Louvain procureur de Roi 'required' by way of settlement . . . Mr Deweer waived his right to have his case dealt with by a tribunal. In the Contracting States' domestic legal systems a waiver of this kind is frequently encountered both in civil matters, notably in the shape of arbitration clauses in contracts, and in criminal matters in the shape, inter alia, of fines paid by way of composition. The waiver, which had undeniable advantages, does not in principle offend against the Convention . . . Nevertheless, in a democratic society too great an importance attaches to the 'right to a court' . . . for its benefit to be forfeited solely by reason of the fact that an individual is party to a settlement reached in the course of a procedure ancillary to court proceedings. In an area concerning the public order. . . of the member States of the Council of Europe, any measure or decision alleged to be in breach of Article 6 calls for careful review.

This statement is a long way away from declaring that mediation is contrary to Article 6. It acknowledges that agreements waiving the right to fair trial are compatible in principle with Article 6. It does, however, call for caution where that right is waived in proceedings ancillary to court proceedings, such as where parties enter into arbitration agreements. Such caution is clearly justified in the situation identified in *Deweer*. Is it as clearly called for in mediation proceedings?

Mediation does not, of course, require parties to waive their rights to a fair trial. Mediation and ADR form part of the civil procedure process. They are not simply ancillary to court proceedings but form part of them. They do not preclude parties from entering into court proceedings in the same way that an arbitration agreement does. In fact all a mediation does is at worst delay trial if it is unsuccessful and it need not do that if it is properly factored into the pre-trial timetable. If the mediation is successful it does obviate the need to continue to trial, but that is not the same as to waive the right to a fair trial. If it were, any consensual settlement reached either before or during civil process could arguably amount to a breach of Article 6 which clearly cannot be the case.

It is reasonably safe to conclude from the above that *Halsey* was wrong on the Article 6 point.

Cases where the courts have had to consider the question of costs for failing to engage in a mediation process have not slowed down.

In *Thakkar & another v Patel & another*[37] the Court of Appeal held that the judge was entitled to make a costs order (albeit one that was 'tough') reflecting the fact that it had been reasonable for the claimants to refuse an offer to settle at an early stage of the litigation and the fact that the blame for failing to mediate was primarily that of the defendants. Both parties had initially been positive about mediation. However, the defendants subsequently failed to engage with the ADR process without good reason which left the claimants disillusioned about the benefits of pursuing the prospects of

[37] [2017] EWCA Civ 117.

mediation any further. As a result, they concluded that they had no option but to continue with the litigation. The Court of Appeal noted that there was a real prospect of settlement if mediation had occurred. The parties' offers were only £10,000 apart and costs were disproportionate to the claim. If the case had been settled in August 2011, a significant proportion of the parties' costs (approximately £300,000) would have been saved. Jackson LJ pointed out that:

> The message which this court sent out in PGF II[38] was that to remain silent in the face of an offer to mediate is, absent exceptional circumstances, unreasonable conduct meriting a costs sanction, even in cases where mediation is unlikely to succeed. The message which the court sends out in this case is that in a case where bilateral negotiations fail but mediation is obviously appropriate, it behoves both parties to get on with it. If one party frustrates the process by delaying and dragging its feet for no good reason, that will merit a costs sanction. In the present case, the costs sanction was severe, but not so severe that this court should intervene.[39]

Thakkar can be contrasted with *Gore v Naheed & Ahmed*[40] where the Court of Appeal held that a refusal to mediate will not always be seen as unreasonable and will not therefore always preclude a successful party from recovering their costs. Patten LJ explained:

> [Counsel] referred us to the decision of this Court in PGF II SA v OMFS Company I Ltd in which Briggs LJ emphasised the need, as he saw it, for the courts to encourage parties to embark on ADR in appropriate cases and said that silence in the face of an invitation to participate in ADR should, as a general rule, be treated as unreasonable regardless of whether a refusal to mediate might in the circumstances have been justified. Speaking for myself, I have some difficulty in accepting that the desire of a party to have his rights determined by a court of law in preference to mediation can be said to be unreasonable conduct particularly when, as here, those rights are ultimately vindicated. But, as Briggs LJ makes clear in his judgment, a failure to engage, even if unreasonable, does not automatically result in a costs penalty. It is simply a factor to be taken into account by the judge when exercising his costs discretion.[41]

Patten LJ observed that a failure to engage in mediation will not always be treated as unreasonable and will not therefore automatically result in a costs penalty. His Lordship emphasized that conduct as regards participation in ADR is simply one of many factors to be taken into account when the court exercises its discretion on costs. Here the case was complex, and the claimant's solicitor suggested that the dispute was unlikely to be capable of settlement at mediation; both factors influenced the decision of the first instance judge as well as Patten LJ.

More recently, the courts have imposed indemnity costs on parties who have failed to engage in mediation notwithstanding the parties' belief in the strength of their case which the court held did not warrant a refusal to engage in settlement negotiations. In both *DSN v Blackpool Football Club Ltd*[42] and *BXB v Watch Tower & Bible Tract Society of Pennsylvania & Ors*[43] the claimants were successful in their vicarious liability claims for sexual assault. The Master (in both cases) had issued an Order requiring the parties to consider settling their claims by ADR. The respective claimants sought an order for indemnity costs arguing (amongst other things) that the defendants had not been willing to engage in ADR. In both cases, the defendants attempted to justify their refusal in part on their belief in the strength of their case. In the result, the court in both cases ordered costs to be assessed on the indemnity basis.

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[38] See later. [39] ibid [31]. [40] [2017] EWCA Civ 369. [41] ibid [49].
[42] [2020] EWHC 670 (QB). [43] [2020] EWHC 656 (Admin).

In *DSN*, the Court observed that the defendant's repeated refusal to engage in mediation on the basis of its belief it had a strong case was 'inadequate'. Griffiths J noted that:

> No defence, however strong, by itself justifies a failure to engage in any kind of alternative dispute resolution. Experience has shown that disputes may often be resolved in a way satisfactory to all parties, including parties who find themselves able to resolve claims against them which they consider not to be well founded. Settlement allows solutions which are potentially limitless in their ingenuity and flexibility, and they do not necessarily require any admission of liability, or even a payment of money. Even if they do involve payment of money, the amount may compare favourably (if the settlement is timely) with the irrecoverable costs, in money terms alone, of an action that has been successfully fought. The costs of an action will not always be limited to financial costs, however. A trial is likely to require a significant expenditure of time, including management time, and may take a heavy toll on witnesses even for successful parties which a settlement could spare them.[44]

In *BXB*, the court further commented on the possible advantages of ADR even when a defendant believes in the strength of its case. The court contended that the belief in a strong case does not:

> necessarily mean that there was nothing to discuss. One important purpose of a joint settlement meeting is to convey a defendant's view about the strength of its case. In any event, the possibility of agreeing quantum subject to liability provides a good reason to engage in discussions even in a case where the defendant is confident about its case on liability.[45]

These cases show that a party refusing to engage in ADR on the basis of a belief in the strength of its own case has to satisfy a high bar to succeed in such an argument.

Where a party ignores the other's request to mediate, rather than refuses it, a court is likely to conclude that this constitutes unreasonable behaviour and costs penalties should apply. This was seen in *PGF II SA v OMFS Co Ltd*[46] where the Court of Appeal held that refusing even to discuss the possibility of engaging in ADR is likely to be viewed as more serious than refusing to mediate itself and therefore is likely to conclude that such behaviour is unreasonable.

Given the judiciary's positive attitude to the resolution of disputes by mediation it might be surprising to note that not every successful mediation will receive judicial support. In *Thakrar v Ciro Citterio Menswear plc (In Administration)*[47] the court refused to authorize a Tomlin order[48] incorporating the terms of a mediated agreement, re-opened the dispute, and listed it for a further hearing. Ciro Citterio, a high street menswear retail shop, was owned by three brothers. The family attempted to exclude one of the brothers, Kirit, who had a 21.78% share in the business. After an argument, Kirit issued an unfair prejudice application under (what was then) section 459 of the Companies Act 1985.[49] On 20 January 2000 he obtained a consent order requiring the company to buy his shares subsequently valued at £6.14m. The company went into administration on 14 March 2001. The administrative receivers were keen to

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[44] [2020] EWHC 670 (QB) [28].
[45] [2020] EWHC 656 (Admin) [10], Chamberlain J.
[46] [2013] EWCA Civ 1288.
[47] [2002] EWHC 1975.
[48] A Tomlin order is a form of order used to give effect to a compromise of litigation in the High Court. It is based on a Practice Direction issued by Tomlin J in 1927. The order is made by consent of the parties and provides that on terms agreed between them (which are scheduled to the order) all further proceedings are to be stayed except for the purpose of putting the agreed terms into effect.
[49] Now, section 994 of the Companies Act 2006.

avoid paying Kirit, and in February 2002 they issued an application (albeit out of time) for leave to appeal all orders arising out of the section 459 proceedings.

At a subsequent mediation, all the matters in dispute were settled for a percentage of the full £6.14m, and Kirit was certain to receive this lower sum. The mediation agreement was drafted by legal representatives, signed, and formalized in a draft Tomlin order. Usually, a Tomlin order is rubber-stamped by the court. However, in this case, the court refused to authorize it. The court has jurisdiction to interfere in insolvency proceedings; a principle which seems at odds with the friendly, post-CPR relationship between mediation and litigation. It is, of course, important that a court takes its role in policing administration orders seriously. As Neuberger J stated in Re C E King Ltd (In Administration):[50]

> First, what the administrator should do about the contract . . . is a commercial decision. Secondly, as least in principle and in general, it is not for the court to interfere with such commercial decisions: those are to be left to the administrator. Thirdly, if the administrators are proposing to take a course which is based on a wrong appreciation of the law and/or is conspicuously unfair to a particular creditor or contractor of the company, then the court can, and in appropriate cases, should be prepared to interfere. I put it in that somewhat neutral way because even if it is appropriate for the court to interfere, the actual course the court should take must depend inevitably on the actual facts and circumstances of the case.

This will apply equally to an administrative receiver, who is appointed by the debenture holder. The court's right of 'veto' is designed to protect creditors who have a real interest in the assets of the company and is therefore justified. But what does that mean where a unanimous creditor's committee has consented to the agreement? The decision in *Thakrar* is in stark contrast to that in *Dunnett v Railtrack* where the Court of Appeal endeavoured to sell mediation in the strongest language possible, even though on the facts of the case such a strong stance was not necessarily justified.

How is this paradox to be resolved? On the one hand the court urges litigants to mediate, on the other it retains the right to throw out their efforts. *Thakrar* has highlighted the need to 'judicialize' the mediation process for insolvency cases. The court was bound to become embroiled in the process sooner or later, solely due to its power of veto over the administrator or liquidator's decision. This decision clearly turned on its own facts (insolvency) and must not be seen as the death knell for mediation.

[50] [2000] 2 BCLC 297.