ADR: PRINCIPLES AND PRACTICE

THIRD EDITION

HENRY BROWN
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SWEET & MAXWELL

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FOREWORD

Since the late Lord Bingham wrote his characteristically elegant foreword to the first edition of this book in 1993, the practice of ADR in this country has come out of the shadows into the full light of recognition as an important social institution. This development is partly due to the increased cost of litigation, the withdrawal of legal aid and the perception that adversarial proceedings in open court are an unsuitable method of resolving many kinds of dispute. It is also in no small degree due to the pioneering work of the authors in providing a systematic analysis of the many forms of ADR which are available.

What are these forms of dispute resolution alternative to? Litigation before a state tribunal is the obvious answer. In earlier editions, however, the authors also excluded arbitration from their definition of ADR. It was too much like litigation. They drew the line between a process which might or might not result in an agreed resolution to the dispute and a process which declared that one of the parties was right and the other wrong. Arbitration and litigation both fell into the latter category. This edition recognises that there is a broad spectrum of processes alternative to litigation and that arbitration is one of them. It offers alternatives to a venue, tribunal and procedure prescribed by the state rather than the parties. If, having made that choice, the parties elect to adopt a procedure identical in all respects to English or American litigation, that is their affair. The market will determine whether or not such a procedure is acceptable and, as the authors point out, the enormous growth of international arbitration in the last few years suggests that it is.

Perhaps the most remarkable feature of this book is the way in which it anchors its analysis of mediation and allied procedures in current research into decision-making generally. As Lord Bingham pointed out, the wise mediator has been admired since the time of the Bible. But the talents required for the role, the necessary perceptiveness, empathy and persuasiveness, have been regarded as innate, a white art and divine gift. Perhaps that is why the Sermon on the Mount calls peacemakers the children of God. More recently, however, much work has been done on behavioural

psychology and the part played by the emotions and sometimes the irrational in the way we make decisions. We are at the very early stages of inquiry into an immensely complex subject. But even the recognition that there are more things in heaven and earth than rationality is the beginning of wisdom for a successful mediator.

The authors are to be congratulated on another valuable contribution to this most important subject. Not only lawyers but anyone interested in making society function better will gain from reading the book.

Lord Hoffmann of Chedworth

PREFACE

The first edition of this book was published in 1993 at a time when there was considerable interest in using mediation to assist in the resolution of disputes within the civil justice system, principally family cases and commercial disputes. It was a time of change in the approach to the civil justice system whose essential characteristics had been defined after the War with the introduction of the Legal Aid Act of 1949. When Sir Hartley Shawcross KC introduced the Bill in Parliament in 1948, he remarked:

> "I should be inclined to call this Bill a Charter. It is the Charter of the little man to the British Courts of Justice. It is a Bill which will open the doors of the Courts freely to all persons who may wish to avail themselves of British Justice without regard to the question of their wealth or ability to pay. The Magna Charta decreed that "to no one will we sell, deny or delay right of justice". It is an interesting historical reflection that our legal system, admirable though it is, has always been in many respects open to, and it has received grave criticisms on account of the fact that its benefits were only fully available to those had had purses sufficiently long to pay for them."

The introduction of publicly funded representation for civil litigation was unprecedented. The public funding of criminal defence had previously been limited to the provisions of the Poor Persons Defence Act of 1930 which provided very limited legal aid in serious criminal cases.

Forty years later, by the late 80s early 90s, there was serious concern at the extraordinary growth in civil litigation particularly in family cases and at the increase in the legal aid budget for criminal legal aid which was rising at a rate faster than inflation. In the period from 1988 to 1996 it was the fastest growing item of government expenditure.

In the 1990s a serious attempt was made by Lord Woolf's Working Party to reform the civil justice system and Lord Woolf's ideas and proposals found expression in his first and second reports. Lord Woolf's proposals were largely accepted and they expressed the policy of trying to settle cases

before they resulted in litigation or as soon as possible thereafter. The principal means adopted were extensive disclosure of relevant documents and evidence before the commencement of proceedings combined with the encouragement more strongly expressed in the final report than in the first, of the use of ADR to promote settlement. Lord Woolf stopped short of recommending that references to ADR by the courts should be made mandatory. His reluctance to embrace a mandatory regime is likely to be supported by members of the judiciary, the legal profession and indeed by many mediators who would wish mediation to remain an entirely voluntary process. There is however also a body of opinion that does not regard mandatory mediation as inconsistent with the principle of voluntariness, inasmuch as parties in dispute retain total control over whether or on what terms they may wish to resolve the issues and are free to discontinue the process at any time. This difference of view is likely to need further debate.

Opposition to mandatory use in the higher courts remains considerable. For a while following *Halsey* it was thought, quite wrongly, that mandatory mediation might involve a breach of the citizen's rights under Article 6 of the Human Rights Convention which is a guarantee, though not let it be said unlimited, of rights of access to the courts and to a fair trial. However, there is a widespread view, which we share, that requiring parties to litigation to consider mediation or other ADR, or even to try using it as a procedural step in pending litigation, could not properly be regarded as a denial of the right to a fair trial.

These issues are relevant to procedures, both implemented and contemplated, that involve an obligation either to consider mediation or to attempt it in pending court proceedings. The family mediation protocol introduced in April 2011 expects parties to a wide range of family proceedings to attend Mediation Information and Assessment Meetings (MIAMs) in order to explore the possibility and suitability of mediation before proceeding to court. Whether the "expectation" means a formal requirement remains to be clarified.

A consultation process is under way to extend the MIAM principle to the county courts, with a possible widening of its jurisdiction, and to make mediation a mandatory requirement in small claims disputes, again with a widened jurisdiction from £5,000 to £10,000 or perhaps £15,000.

These changes have been produced as a consequence of the problems of funding the civil justice system which is the key to any significant reform leading to an improvement in access to justice. However, it would be unduly cynical to believe that that is the sole motivation. There is we believe a general recognition that alternative dispute resolution has a key part to play in the administration of justice itself and operates to the benefit of the community as a whole. Indeed, at the 2011 Resolution ADR conference in Cambridge, the Justice Minister Jonathan Djanogly emphasised that "we do not see ADR as a means of delivering justice on the cheap." The old Roman law maxim that the interests of the State require an end to litigation is as

valid now as it ever was. The challenge is to find a way of achieving this in as fair, just and efficient a way as possible.

Public sector administration has also benefited from the introduction of ADR schemes. The Government pledge to use ADR for its own disputes—now a dispute resolution commitment—has worked extremely well with significant savings of cost and time. The pledge has clearly been a success and an example to other areas of public administration which could benefit from greater use of alternative dispute resolution such as the National Health Service.

We have also seen the development of ADR systems in the traditional areas of employment, which has a rich history of using conciliation and other informal processes, and in community disputes. The disturbances in London and other major cities during August 2011 suggest that there may well be much more which can be done through community and restorative justice processes that can help to address some of the deep-rooted issues of alienation and, in some cases also recidivism, that exist within our increasingly diverse and pluralistic society.

The private sector has seen a considerable increase in the use of ADR in the resolution of civil and commercial disputes. There is good reason to believe that mediation is of equal, if not perhaps even greater importance, than arbitration in commercial disputes with great emphasis being put by institutions and parties on establishing satisfactory ADR procedures and making them available to those who can afford to use them. In this, the precedent of arbitration is of some interest. We have seen a growth of arbitration in the United Kingdom since the War and internationally since the New York Convention of 1958. Mediation is a somewhat latecomer, but has caught up fast.

The number of mediation and ADR organisations, groups and independent practitioners has grown in addition to existing arbitration institutions, many of which also now offer mediation. Drawn from different professions and backgrounds, mediators deal with a wide range of civil and commercial disputes. These may for example include contractual disputes of all kinds; issues arising in most industries such as construction, banking, shipping, publishing and IT, both domestic and international; disputes involving shareholders, partners, joint ventures and the breakdown of commercial, professional and personal relationships; negligence, personal injury and other tort claims; consumer disputes—the range is simply too extensive to list.

In sheer numbers, the resolution of substantial commercial disputes in the United Kingdom by mediation probably outstrips the resolution by arbitration. Statistics and comparables are difficult to come by and analyse but it is, for example, a fair assumption that the caseload of CEDR or those conducted by the members of PIM Senior Mediators outstrips that of the LCIA or ICC in London. Many professional mediators are settling important cases every week and doing so in an efficient, cost-effective and mutually acceptable way.

Not only has there been a huge increase in the use of mediation and other ADR processes over the last two decades or so, but the processes themselves have developed and matured. We have started to hone and extend the processes to suit more sophisticated needs and expectations, and our understandings of their use have widened.

This is reflected in the fact that most chapters of this book have had to be re-written or amended since the second edition. Judicial decisions, court-related developments, protocols and practice directions, and other factors have materially impacted on the way litigation in the civil and family courts is conducted. Mediation has entrenched itself as the primary consensual ADR process. We have also seen an increased use of contractual adjudication and Dispute Boards, the growth of collaborative law and practice, advances in restorative justice practices and a better understanding and use of non-binding evaluative processes. More attention has also been given to arbitration and to a number of processes such as expert determination, consensus building and public dialogue, the use of mediation in relation to planning, and online dispute resolution.

Developments in the UK have been mirrored in other countries, not least the United States, Australia and Canada where for a longer period than in the United Kingdom practitioners and the courts have been developing the use of ADR and from whom we have learned much. Countries all around the world have or are developing ADR practices, organisations and centres: in Western and Eastern Europe and Russia; in New Zealand, India and other commonwealth common law jurisdictions; in China, Japan, Singapore and other Asian countries; in South Africa, Nigeria and other African countries; in Argentine and other South American countries; and in the Middle East. Cross-border and international mediation and arbitration is commonplace.

These are exciting and challenging times for everyone involved in dispute resolution.

We have been greatly assisted in writing this third edition by the help and advice we have received from a number of friends and colleagues. We would particularly like to acknowledge and thank Robin ap Cynan, Malcolm Birdling, Peter Chapman, Stuart Clark of Clayton Utz, Michael Cohen, David Cornes, Justine D'Agastino, Kim Francis, Lucian Hudson, Michael Hwang SC, Lawrence Kershen QC, Alan Limbury, Michael Lind, Mahnaz Malik, Zannis Mavrogordato, Ian McDonough, Edward Sibley and Shuji Yanase. We are especially grateful to Jan Hammond and Debbie Riley of 12 Gray's Inn Square and to Peter Chare, Sophie Lawler and the team at Sweet & Maxwell for their considerable support.

The ideas on working with high conflict issues have evolved from work done with psychotherapists Neil Dawson and Brenda McHugh and Professor Peter Fonagy, and from work done by Bill Eddy and the US High Conflict Institute. We are grateful to them all.

We were greatly honoured that the foreword to the First Edition and then

to the Second Edition, was written by Tom Bingham. He was a great supporter of our efforts to explain the practice and principles of alternative dispute resolution. He was one of the leading Judges in the Commonwealth since the last war. He was a man of great intelligence and superb judgment. He made a major contribution to the development of English law throughout the whole of his judicial career, culminating in his leadership of the House of Lords. He will be sorely missed.

Henry Brown and Arthur Marriott QC

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