CHAPTER NINE

REGULATING MEDIATION

Ethics and Mediation

Welcome to the "minefield". There are pitfalls and bear traps everywhere for the unwary.

The questions which must be asked and need to be answered are :-

1 What is acceptable behaviour?
2 What is unacceptable behaviour?
3 What are the ethics of the mediation process?

Introduction.

Mediation is a facilitated negotiation and all the "ethical niceties" which are applicable to negotiations are equally applicable to mediations. The questions posed above are meant to make you think about the ethics of the mediation process and what is acceptable behaviour and what is most unacceptable behaviour. Mediation is a process, which involves at least three parties. These are the two parties to the mediation and the mediator.

The common courtesies of professional etiquette must be observed, it is not a "bear pit". Calling someone everything under the sun plus a few extra expletives is not going to lead to a pleasant day out !! The claimant may wish to do this, in order to get it off his chest, but the professional adviser must not in any circumstances act in a similar manner.

Equally the respondent / defendant's professional adviser(s) must also behave with decorum. Theatrical posturing may be an accepted part of court procedures if not actually approved of. It is not acceptable in a mediation, which is a much more informal process and one which relies on the integrity of the participants, including the mediator.

Whilst these are not strictly speaking ethical matters, they are an essential part of the professional codes of practice that all mediators must observe.

Key point to observe.

A note of caution needs to be introduced at this stage and this concerns the mediator. A mediator is, or should be, neutral in any mediation. Any mediator who cannot justifiably claim to be neutral should not mediate on that particular dispute unless it is brought to the attention of the parties who then agree to accept that mediator even though he may not be neutral. The mediator must still act with the utmost integrity.

This does not mean that the parties to the dispute must not know the mediator, only that the mediator has no interest in the outcome of the dispute. Given the large number of potential disputes which can be mediated, it is only common sense that the professional advisers and the mediators will eventually know each other. This is no different to the present system of the Judges knowing the barristers and solicitors who appear before them.

What is acceptable behaviour? What is unacceptable behaviour?

There is a simple rule of thumb for these questions. If you are happy with your behaviour and believe that if a complaint was made to the appropriate professional body, it would be rejected. That is, acceptable behaviour. Conversely, if you are unhappy about the behaviour and believe that a complaint would be upheld that is unacceptable behaviour.

Remember it is not only your behaviour which must be considered ! It may be the other side's behaviour which is unacceptable. If you find either the mediator's behaviour or that of the other side unacceptable tell

them so. There are no prizes or plaudits for accepting behaviour which cannot be countenanced by professional people.

If the mediator and / or the other side are not prepared to moderate their behaviour then walk away. You have nothing to lose by walking away from an unacceptable position, but by so doing you may reinforce your integrity and the perceptions which the mediator and other side have of you. It has been statistically demonstrated that the aggressive party representative rarely achieves the best result for the client and the track record of aggressive mediators compares unfavourably with that of the diplomat.

The objective here is not to describe all the nuances of the ethics of a mediation as such, but the SPIDR, AAA and NMA codes of conduct have been included as an appendix. These codes set the standards one would expect and accept of professional advisers and mediators.

Just because mediation is an informal process that does no mean that the rules of professional behaviour are any different from those in formal processes. This is why you are professionals. You are expected to meet the standards of the legal profession in your dealings with your clients and other professionals whether they are on the other side to you in a case or not. Remember that you are solicitors and are duty bound to meet the standards expected by the law society and must conduct yourselves in accordance with the Law Society's professional codes of conduct.

Principle of Justice.

There are various ethical theories and principles upon which professional ethics and client care are based. Of most importance to mediation is the principle of justice. Justice in ethics can be defined as:

1. The principle of fairness that like cases should be treated similarly.
2. The distribution of benefits and burdens should be fairly undertaken in accord with the conception of what are to count as similar cases.
3. Any punishment should be proportionate to the offence.

Justice has been broken down into various concepts such as fairness, just deserts (what is deserved) and entitlement by philosophers.

The Principle of Formal Justice.

There is a minimum requirement attributed to Aristotle that: "Equals must be treated equally, and unequals must be treated unequally". This principle is called the principle of formal justice. It does not state how equals should be treated only that equals should be treated equally.

Material Principles of Justice.

The material principles of justice are concerned with the relevant characteristics for equal treatment. The following principles have been proposed as valid material principles of distributive justice.

1. To each person an equal share.
2. To each person according to need.
3. To each person according to effort
4. To each person according to contribution.
5. To each person according to merit.
6. To each person according to free-market exchanges.

The principles are not mutually coherent and conflicts can arise between them.

The Fair-Opportunity Rule.

The fair-opportunity rule was developed as a response to the unjust forms of distribution. It is a social rule of distribution and states that no person should be granted benefits on the basis of undeserved advantageous properties and no person should be denied social benefits on the basis of undeserved disadvantageous properties.

This does not equate with treating all the same or giving greater resources to those who are unfairly disadvantaged to the detriment of those who are not similarly disadvantaged. It would be unfair to all if

greater resources than can be justified were given to the disadvantaged as it would not be a just distribution of resources on need.

Justice must not only be done, it must be seen to be done. In a mediation, the onus is on the parties to aim for an equitable result by acting in an ethical manner. The mediator's job is to ensure that an equitable result is attained.

The watch words in a mediation process for all parties are:

INTEGRITY INTEGRITY INTEGRITY

If you act with integrity you cannot "*go far wrong*" and will avoid the pit falls which can trap the unwary and ill prepared.

Regulation of the mediation process.

Whilst conduct in the judicial system is both prescribed and enforced by the courts and frequently by state authorised bodies such as the Law Society and the Bar, the same cannot be said of mediation or for other forms of ADR including adjudication and arbitration. Some states have provided for mandatory mediation as a pre-requisite to trial and there is some provision for court listing of accredited mediators and minimum training requirements.

There is currently a vigorous debate being conducted on both sides of the Atlantic as to whether or not statutory Codes of ADR practice would be desirable but at present self-regulation by the various ADR organisations is the norm. To the extent that the professional participants in ADR processes are members of the Law Society or Bar they must comply with any of their professional codes of conduct. However, since many ADR practitioners are not practising lawyers, the codes of practice and ethics of the ADR organisations are very important for the maintenance of standards of practice and ethical standards.

The following cases involved ethical issues with regard to mediation.

B v O [2004] This case involves aspects of bias and misconduct by the mediators and breach of mediation privilege by on the parties, who attempted to disclose the draft of a failed mediation in court. The Honourable Mrs Justice Baron D.B.E. found that the mediator acted in a clearly uneven handed manner as demonstrated by the following extracts from the judgement.

24. *The parties entered into **mediation** in an attempt to sort out the ramifications of their separation. The Mother found the Nationwide **Mediation** Service from the Yellow pages. Two mediators were involved namely, Steven Dury and his colleague, Patrick Esson. The mediators purported to assist with financial matters by drawing up a Deed of Separation and also sought to persuade the parties to enter into a Parenting Agreement in relation to Harry. A copy of the latter document is exhibited to the Mother's statement. In fact, no agreement was ever reached because the Father would not accept the terms proposed. I must say that I am surprised that the privilege of the **Mediation** process has been invaded by the Mother exhibiting that document. It seems to me that was wholly inappropriate. I do not propose to censure anyone because, to my mind, the document is not relevant and its contents may be misleading because it was never agreed. Even on the Mother's case, the mediator was being partisan in his approach.*

25. *By this date, the Mother's relationship with Mr C had run into difficulties. In fact, by December 2002 he had returned to live with his wife and child. It is asserted that this was for economic and business reasons but I feel confident that Mr C's wife thought that there had been a rapprochement. This must have been a very difficult time for the Mother. Despite Mr C's departure the affair continued but she was living alone and must have wondered about their future.*

26. *In early 2003, it seems that the **mediation** process stalled. The Mother wanted to have residence of Harry and the Father would not agree. The Mother says that Mr Steven Dury told her that he found the Father "difficult". She says and I quote "Having spoken to the school and advised them that Harry would not be in school for a few days. I then, on the advice of the mediator, Steven Dury, took Harry away from his home with me, driving to my sister's in Horsham, Sussex…. I would never have acted as I did, taking Harry away without the specific advice of Steven Drury, the mediator, who told me that this was what I should do". She also stated that Mr Dury said that he would give "Paul a strong talking to. He also said to me that of course I had not got that advice from him, as he was meant to be impartial". The Father accepts that Mr Dury did call him and was aggressive in tone. With hindsight*

(although he cannot possibly know) he suspects that Mr Dury may have given the Mother the guidance that she alleges. Of course, I have no way of knowing the precise words that were used but if this type of advice (or anything like it) was given by a professional mediator I am, quite frankly, flabbergasted. It is not in a child's interest to be removed from home and taken to another location without the knowledge and, even if there is no residence order in place, the permission (tacit or express) of the other parent. To suggest otherwise is wholly wrong. To use it as a tactic to put pressure on a parent to come to an agreement is simply incredible. If the mediator did proffer any such advice or suggestion it is to be deprecated. It may be that the Mother misinterpreted his guidance. If his words were such that they were capable of misinterpretation, then he ought to have been more careful. After all this time, I doubt that he will remember what was said and I note that he has been put on notice about these allegations. Consequently I do not make any findings against him but I hope that my expressions of concern will put all mediators on notice that, this type of advice is not part of their role.

MacCaba v. Lichtenstein [2004] concerned an action for slander. The defendant, a mediator disclosed confidential information, received during mediation, to third parties. The mediator heard allegations of sexual misconduct by an employer against employees (the parties to the mediation) and passed information on to religious leaders and to family members of the alleged victims. The court considered whether public interest policy overrode and duty of confidentiality. The scope of negotiation privilege is examined together with the concept of qualified privilege in this fascinating judgement on mediation ethics. The defendant asserted that under Jewish law he was under a duty to disclose to vulnerable individuals the information that he has received.

In the case of ***John Amorifer Usoamaka v Conflict & Change Ltd*** [1999] [1] tThe court considered the professional conduct of the mediation process. A community mediator, in disregard of rules of community mediation service provider engaged in family mediation in an unprofessional manner. The court held that his dismissal from his position as a community mediator was justified because he had compromised the standing of the organisation with both the council and the local community.

Mediation Rules of Appointing bodies.

The range of bodies appointing mediators globally is immense. It is not practicable to reproduce the rules of all bodies concerned here, or even to attempt to provide a comparison between them. The Mediation and Conciliation Rules of the Institute of Arbitrators and Mediators, Australia,[2] is worth examining since it expressly embraces and distinguishes the two processes, particularly since the rules have been subject to wide ranging comment in Australian Law Journals.

The Society of Professionals in Dispute Resolution Ethical Standards are set out in full below because they are an industry wide product adopted by many of the main stream mediation providers in the US and around the world, and are considered to be very influential.

The European Union has conducted a wide ranging review of mediation provision within the Union and has sought to establish some minimum requirements for mediation. The product of this work, the **The European Code of Conduct for Mediators** is also set out in full below.

1 ***John Amorifer Usoamaka v Conflict & Change Ltd*** [1999] CCRTF 98/0709/2 CA before Henry LJ; Mr Justice Holman

2 ACN 008 520 045

SPIDR ETHICAL STANDARDS Adopted June 1986

1 Introduction.[3]

The purpose of this document is to promote among SPIDR Members and Associates ethical conduct and a high level of competency, including honesty, integrity, impartiality and the exercise of good judgement in their dispute resolution efforts. It is hoped that this document also will help to (1) define the profession of dispute resolution, (2) educate the public, and (3) inform users of dispute resolution services.

2 Application of Standards

Adherence to these ethical standards by SPIDR Members and Associates is basic to professional responsibility. SPIDR Members and Associates commit themselves to be guided in their professional conduct by these standards. The SPIDR Board of Directors or its designee is available to advise Members and Associates about the interpretation of these standards. Other neutral practitioners and organisations are welcome to follow these standards.

3 Scope

It is recognised that SPIDR Members and Associates resolve disputes in various sectors within the disciplines of dispute resolution and have their own codes of professional conduct. These standards have been developed as general guidelines of practice for neutral disciplines represented in the SPIDR membership. Ethical considerations relevant to some, but not to all, of these disciplines are not covered by these standards.

4 General Responsibilities

Neutrals have a duty to the parties, to the professions, and to themselves. They should be honest and unbiased, act in good faith, be diligent, and not seek to advance their own interests at the expense of their parties'.

Neutrals must act fairly in dealing with the parties, have no personal interest in the terms of the settlement, show no bias towards individuals and institutions involved in the dispute, be reasonably available as requested by the parties, and be certain that the parties are informed of the process in which they are involved.

5 Responsibilities to the Parties

Impartiality. The neutral must maintain impartiality toward all parties. Impartiality means freedom from favouritism or bias either by word or by action, and a commitment to serve all parties as opposed to a single party.

Informed Consent. The neutral has an obligation to assure that all parties understand the nature of the process, the procedures, the particular role of the neutral, and the parties' relationship to the neutral.

Confidentiality. Maintaining confidentiality is critical to the dispute resolution process. Confidentiality encourages candour, a full exploration of the issues, and a neutral's acceptability. There may be some types of cases, however, in which confidentiality is not protected. In such cases, the neutral must advise the parties, when appropriate in the dispute resolution process, that the confidentiality of the proceedings cannot necessarily be maintained. Except in such instances, the neutral must resist all attempts to cause him or her to reveal any information outside the process. A commitment by the neutral to hold information in confidence within the process also must be honoured.

Conflict of Interest. The neutral must refrain from entering or continuing in any dispute if he or she believes or perceives that participation as a neutral would be a clear conflict of interest and any circumstances that may reasonably raise a question as to the neutral's impartiality. The duty to disclose is a continuing obligation throughout the process.

Promptness. The neutral shall exert every reasonable effort to expedite the process.

[3] The Society of Professionals in Dispute Resolution (SPIDR) was established in 1972 to promote the peaceful resolution of disputes. Members of the Society believe that resolving disputes through negotiation, mediation, arbitration and other neutral interventions can be of great benefit to disputing parties and to society. In 1983, the SPIDR Board of Directors charged the SPIDR Ethics Committee with the task of developing ethical standards of professional responsibility. The Committee membership represented all the various sectors and disciplines within SPIDR. This document, adopted by the Board on June 2, 1986, is the result of that charge.

The Settlement and its Consequences. The dispute resolution process belongs to the parties. The neutral has no vested interested in the terms of a settlement, but must be satisfied that agreements in which he or she has participated will not impugn the integrity of the process. The neutral has a responsibility to see that the parties consider the terms of a settlement. If the neutral is concerned about the possible consequences of a proposed agreement, and the needs of the parties dictate, the neutral must inform the parties of that concern. In adhering to this standard, the neutral may find it advisable to educate the parties, to refer one or more parties for specialised advice, or to withdraw from the case. In no case, however, shall the neutral violate section 3, Confidentiality, of these standards.

6 Unrepresented Interests

The neutral must consider circumstances where interests are not represented in the process. The neutral has an obligation, where in his or her judgement the needs of parties dictate, to assure that such interests have been considered by the principal parties.

7 Use of Multiple Procedures

The use of more than one dispute resolution procedure by the same neutral involves additional responsibilities. Where the use of more than one procedure is initially contemplated, the neutral must take care at the outset to advise the parties of the nature of the procedures and the consequences of revealing information during any one procedure which the neutral may later use for decision making or share with another decision maker. Where the use of more than one procedure is contemplated after the initiation of the dispute resolution process, the neutral must explain the consequences and afford the parties an opportunity to select another neutral for the subsequent procedures. It is also incumbent upon the neutral to advise the parties of the transition from one dispute resolution process to another.

8 Background and Qualifications

A neutral should accept responsibility only in cases where the neutral has sufficient knowledge regarding the appropriate process and subject matter to be effective. A neutral has a responsibility to maintain and improve his or her professional skills.

9 Disclosure of Fees

It is the duty of the neutral to explain to the parties at the outset of the process the basis of compensation, fees, and charges, if any.

10 Support of the Profession

The experienced neutral should participate in the development of new practitioners in the field and engage in efforts to educate the public about the value and use of neutral dispute resolution procedures. The neutral should provide pro bono services, where appropriate.

11 Responsibilities of Neutrals Working on the Same Case

In the event that more than one neutral is involved in the resolution of a dispute, each has an obligation to inform the others regarding his or her entry in the case. Neutrals working with the same parties should maintain an open and professional relationship with each other.

12 Advertising and Solicitation

A neutral must be aware that some forms of advertising and solicitations are inappropriate and in some conflict resolution disciplines, such as labour arbitration, are impermissible. All advertising must honestly represent the services to be rendered. No claims of specific results or promises which imply favour of one side over another for the purpose of obtaining business should be made. No commissions, rebates, or other similar forms of remuneration should be given or received by a neutral for the referral of clients.

THE EUROPEAN CODE OF CONDUCT FOR MEDIATORS[4]

1. COMPETENCE AND APPOINTMENT OF MEDIATORS

1.1 Competence

Mediators shall be competent and knowledgeable in the process of mediation. Relevant factors shall include proper training and continuous updating of their education and practice in mediation skills, having regard to any relevant standards or accreditation schemes.

1.2 Appointment

The mediator will confer with the parties regarding suitable dates on which the mediation may take place. The mediator shall satisfy him/herself as to his/her background and competence to conduct the mediation before accepting the appointment and, upon request, disclose information concerning his/her background and experience to the parties.

1.3 Advertising/promotion of the mediator's services

Mediators may promote their practice, in a professional, truthful and dignified way.

2. INDEPENDENCE AND IMPARTIALITY

2.1 Independence and neutrality

The mediator must not act, or, having started to do so, continue to act, before having disclosed any circumstances that may, or may be seen to, affect his or her independence or conflict of interests. The duty to disclose is a continuing obligation throughout the process.

Such circumstances shall include

- any personal or business relationship with one of the parties,
- any financial or other interest, direct or indirect, in the outcome of the mediation, or
- the mediator, or a member of his or her firm, having acted in any capacity other than mediator for one of the parties.

In such cases the mediator may only accept or continue the mediation provided that he/she is certain of being able to carry out the mediation with full independence and neutrality in order to guarantee full impartiality and that the parties explicitly consent.

2.2 Impartiality

The mediator shall at all times act, and endeavour to be seen to act, with impartiality towards the parties and be committed to serve all parties equally with respect to the process of mediation.

3. THE MEDIATION AGREEMENT, PROCESS, SETTLEMENT AND FEES

3.1 Procedure

The mediator shall satisfy himself/herself that the parties to the mediation understand the characteristics of the mediation process and the role of the mediator and the parties in it.

The mediator shall in particular ensure that prior to commencement of the mediation the parties have understood and expressly agreed the terms and conditions of the mediation agreement including in particular any applicable provisions relating to obligations of confidentiality on the mediator and on the parties.

The mediation agreement shall, upon request of the parties, be drawn up in writing.

The mediator shall conduct the proceedings in an appropriate manner, taking into account the circumstances of the case, including possible power imbalances and the rule of law, any wishes the parties may express and the need for a prompt settlement of the dispute. The parties shall be free to agree with the mediator, by reference to a set of rules or otherwise, on the manner in which the mediation is to be conducted. The mediator, if he/she deems it useful, may hear the parties separately.

3.2 Fairness of the process

The mediator shall ensure that all parties have adequate opportunities to be involved in the process.

[4] v1.6 (040604) 1

The mediator if appropriate shall inform the parties, and may terminate the mediation, if::-

- a settlement is being reached that for the mediator appears unenforceable or illegal, having regard to the circumstances of the case and the competence of the mediator for making such an assessment, or
- the mediator considers that continuing the mediation is unlikely to result in a settlement.

3.3 The end of the process

The mediator shall take all appropriate measures to ensure that any understanding is reached by all parties through knowing and informed consent, and that all parties understand the terms of the agreement.

The parties may withdraw from the mediation at any time without giving any justification.

The mediator may, upon request of the parties and within the limits of his or her competence, inform the parties as to how they may formalise the agreement and as to the possibilities for making the agreement enforceable.

3.4 Fees

Where not already provided, the mediator must always supply the parties with complete information on the mode of remuneration which he intends to apply. He/she shall not accept a mediation before the principles of his/her remuneration have been accepted by all parties concerned.

4. CONFIDENTIALITY

The mediator shall keep confidential all information, arising out of or in connection with the mediation, including the fact that the mediation is to take place or has taken place, unless compelled by law or public policy grounds. Any information disclosed in confidence to mediators by one of the parties shall not be disclosed to the other parties without permission or unless compelled by law.

Self Assessment Exercise No 9a

Charlotte Springfield is employed by Readable Books Limited to sell books to bookshops in her area. She has been selling for Readable for a long time and she is really very good at it. Readable, however, have in mind to rationalise their selling methods and concentrate on the Internet. They want to terminate Charlotte's employment. They don't need her any more.

You have mediated a number of matters for Readable and mediating these termination arrangements promises to be attractive business for quite a while. So you agree to mediate between Charlotte and Readable. You tell yourself that it is right that employees should have the benefit of a fair and neutral mediator.

Readable have offered Charlotte terms which are more or less her statutory entitlement, but she may not know that. In return, they want an undertaking that she will not take employment from any other publisher or book wholesaler for a period of ten years. In the open session, Charlotte seems unhappy, but doesn't make any suggestions. She isn't represented.

When you talk with Mark Myword, the personnel director (he's going to call it "Human Resources Director" soon) , he tells you that he was speaking to Norman Conquest, of Conquest Press plc., at a recent book fair. Norman had said that, if Readable had in mind to dispense with Charlotte at any time, he would be happy to employ her, probably at twice her present salary.

That, says Mark, is why you must get her to agree to the undertaking. Conquest are a serious competitor. Now, having spoken with Mark, you are going to see Charlotte on her own.

- Or are you?
- What do you do next?

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CHAPTER NINE

"ACCREDITING MEDIATORS"

Currently, if the parties to a dispute wish to avail themselves of the services of a mediator they have several options. Either they can defer to a mediation service providing organisation, (MNB) which offers some guarantee as to the mediation credentials of their members, to appoint or nominate/ recommend a mediator; they can choose an individual on the basis of personal recommendation; or they can consult a list of mediators and make a selection from it. There is no shortage of mediators who offer their services on the web and through other commercial directories supported by glossy presentations, which often make sweeping, grandiose statements in support of the mediator(s) and their apparent track record of success. The choice for the uninitiated is baffling. Which, if any, of the mediation service providers should they put their trust in? There is no single official source of mediators. Anyone can legally declare themselves to be a mediator and set themselves up in business.

The services of a commercial mediator do not come cheap. How can the parties to a dispute be sure that the mediator chosen to assist them in their search for a resolution to their dispute will be "*up to the job*?" A debate is currently raging about quality assurance in the mediation market.[5] It is hardly surprising. All of us will have heard anecdotal evidence of mediations that have failed miserably, apparently because the mediator was incompetent, or of settlements that have been achieved in-spite of the worst efforts of the mediator. Happily there are also those of us who have been congratulated on bringing about a resolution to a dispute, to the mutual satisfaction of the parties, by a party who entered the process as a confirmed "Doubting Thomas".

There is a danger that the mediation movement, with all the benefits that it has to offer, could be derailed by loss of consumer confidence, if quality assurance mechanisms are not introduced to ensure that clients are protected from incompetent mediators. There are strong arguments for and against regulation. If compulsory regulation is to be adopted, who will provide it, a state body or the industry itself? For the industry to provide effective self regulation it would need first to acquire an overarching body recognised by all providers and individual practitioners, somewhat like the Law Society or Bar Council. Voluntary recognition of such a body is unlikely, so statutory intervention to make membership a prerequisite of practice would be required. However, once in existence the body could render superfluous the pre-existing organisations. Furthermore there would be a cost implication for the profession in establishing such a body, which would no doubt quickly acquire disciplinary powers. Where would the body draw its officers from and who would appoint them? Who in turn would regulate the conduct of the body and what degree of accountability would it have towards the professionals it holds sway over?

How practicable is it to firstly regulate the conduct of mediators, secondly to accord a quality stamp of approval for mediators and thirdly, what happens to the quality assurance body if and when a rogue mediator slips through the net and the parties, having relied upon that stamp of approval, end up with a mediation that goes pear shaped? A further difficulty lies in the fact that the reason why a mediation fails is often because the differences between the parties simply proved to be too great to be bridged, or because one or both of the parties was either not prepared to compromise at all, let alone make realistic concessions.

The problem is compounded by the plethora of organisations that act as mediation service providers, trainers and accreditors, both domestically and internationally. This is amply demonstrated by the European Commission Green Paper, which charts the principal providers across Europe and examines the range of differing governmental / institutional approaches of member states to mediation. Whilst it is possible that the European Union may produce a Mediation Directive in due course, the extent to which it will regulate the profession and establish minimum standards, as opposed to merely providing broad generalist guidance, is yet to be seen. It is submitted that the flexible nature of mediation is part of its strength given the diverse range of social interests that are served by it. Any form of regulation that imposed too severe a straight jacket on the conduct and practice of mediation would inhibit both its present use and its adaptability for the future.

[5] See Commission of the European Union Green Paper COM (2002) 196 ; See also The Department for Constitutional Affairs at http://dca.gov.uk/civil/adr, previously the Lord Chancellor's Department (LCD), which has taken a keen interest in the ADR movement and the scope for regulation.

The contrast between the approach to date of the US and Europe to this issue is very telling. The modern mediation movement was invented by an initially small group of US legal practitioners, judges and interest groups, who were dissatisfied with the high costs of litigation, the time element involved in litigation and the hazards of jury trial. The practices and procedures of mediation developed by trial and error and different sectors adopted radically different approaches to the art to suit their various needs. The client base for mediation expanded rapidly as its value and worth gained recognition.

No doubt the progress of the movement was littered with examples of both good and bad practice, but as long as the positive outcomes outnumbered the failures, the risk of mediation for users, despite its lack of regulatory quality assurance mechanisms, was patently less than that of litigation. The movement evolved to critical mass before the authorities even took cognisance of its existence. Eventually first individual states such as Texas[6] and latterly the Federal Government[7] produced mediation legislation, an event that R.Faulkner and I made a humble contribution to. Even so, the legislation, which represented an extremely light touch, leaves regulation primarily in the hands of the ADR industry. The primary effect of the legislation is not to regulate but rather to encourage the use of ADR and forges a link between ADR and the courts. The US courts have in turn broadly supported the ADR movement, enforcing mediated settlements. A similar process is currently underway with respect to the Dispute Review Board movement. The courts have intervened on a few occasions in respect of patently biased mediators and in respect of misconduct by DRB panellists[8] but otherwise both movements have been largely left to their own devices by the law.

That said, both in the US and in the UK the flood gates of professional liability have been well and truly opened. It is too late to try and bolt the stable door. As King Canute found, attempts to stem the tide are futile. All areas of commercial and professional practice have been forced to take a belt and braces approach to protecting themselves against liability both by the adoption of best practice rules and professional conduct regulation and further by taking up professional indemnity just in case these measures prove to be insufficient to ward off legal action for the consequences of events that in previous times would not have been deemed to involve a duty of care.

Despite the standard provisions in mediation appointment documents that seek to provide immunity for the mediator, it is advisable that all mediators carry professional indemnity (PI) insurance. Equally, despite the fact that it is the parties who ultimately accept / appoint the mediator not the mediator nominating, appointing, recommending body (MNB), again it appears that it is now necessary for the MNB to also carry PI cover. All this despite the fact that, as the law currently stands, in the absence of bad faith, neither is likely to be held to account by a court.

The requirements for a careful MNB are not too difficult to ascertain. What it would take for them to fulfil the requirements is less easy to deal with.

The MNB should first ensure that the mediators they recommend are competent, but what is the measure of competence? Is it professional qualifications? If so, how rigorous should the examination be when one is assessing skills as opposed to academic achievement? It is prior track record? If so, how does a mediator acquire a track record in the first place? "Chicken and Egg" and "Catch 22" come to mind.

Secondly, the MNB should ensure that the mediator has a clean record establishing that he is professional. Whilst, it is possible for the MNB to monitor through feed back forms the performance of its active mediators (assuming parties bother to make returns), first time mediators present a problem for the MNB. Furthermore, the private nature of mediation is such that the short comings of a mediator engaged in mediations outside the sphere of influence of the MNB are unlikely to become public knowledge.

Addressing both of these issues may therefore be difficult, though that alone is no reason for doing nothing, unless it can be demonstrated that the danger represented by the problem is insignificant and the cure would be potentially worse than the disease.

6 S154 Texas Civil Practice and Remedies Code 1987.

7 Federal Arbitration Act : Alternative Dispute Resolution Act 1998 : Uniform Mediation Act. 28 USC 651 :

8 ***Los Angeles County Metropolitan Transportation Authority v Shea-Kiewit-Kenny***. 4 Dec'97 Cite as 97 C.D. O. S. 8960

CHAPTER NINE

Independence : A prerequisite of appointment?

How important is it that a mediator be an independent, impartial outsider? The answer, in respect of adjudicators is well established. In order for justice not only to be done, but also "*to be seen to be done*," the adjudicator should be independent, since no man should be the judge in his own cause.[9] Nonetheless, the bar, where it exists, is against secret conflicts of interest. Where a conflict is well known to and accepted by both parties the arbitrator is entitled to serve. The circumstances in which it is inappropriate for someone to serve as an arbitrator is complex, but it should be noted that the mere fact that an individual is known to the parties should not be a bar to office. However, on times, the erecting of Chinese Walls may be needed, in order for a close colleague within a chamber or practice to serve on a dispute if a party to a dispute, is represented by a colleague.

In the public sector, the mere fact that a quasi-judicial decision maker is a civil servant working for and in the relevant, affected government department is not a bar to office in state tribunals. In the private sector, it is not deemed unacceptable for contract administrators, who have been appointed by and are remunerated by the employer, to decide quality and completion matters, which affect the interests of both the employer and contractor.

So where does all this leave mediators and conciliators? Should they be totally independent or is it permissible for the mediator to be known to, work for or be in some other way related to either of the parties? In house dispute settlement processes, amongst others, are very likely to breach such a requirement.

The absence of legal authority on the matter indicates that the matter has not caused concern to date. Most mediation service providers require their mediators to confirm an absence of conflicts of interest before accepting an appointment or otherwise declare their interest and leave it to the parties to decide whether or not to proceed with the appointment. It is submitted that this is a sensible precaution, but is it a legal requirement, and if not should it be? If it is made a legal requirement, what consequences should the law ascribe to a breach and what impact would a breach have on the enforceability of a settlement?

Regulating the conduct of mediators – what should the rules stipulate?

Bias - Impartiality :

Continuing the previous theme, what if the mediator subsequently becomes aware of a conflict of interest after appointment? Should the conflict of interest be declared? If not, what implications arise for the validity and enforceability of the settlement agreement, if any, from a failure to declare that interest to the parties?

External Confidentiality:

In common with most professional callings and in line with a central feature of private ADR, namely that the parties are able to ensure the privacy and confidentiality of their private affairs, away from the glare of the press and the public scrutiny, the mediator and the parties alike[10] are traditionally bound to preserve confidentialities and are not permitted to benefit from or trade on confidential information disclosed during the mediation process. This is a standard provision of most mediation process agreements, a breach of which has direct and enforceable legal consequences.

Apart from reinforcing the law, it is difficult to know what else might be usefully added to an already complicated area of law. Any attempt at codification could, unless it went far beyond the scope of mediation and applied to general practice, result in different standards for mediation than for other instances of privilege.

Balance – fairness - equal opportunity **:**

Clearly, each of these are desirable and objectives mediators should strive to achieve. The greatest problem however is in establishing what standard of due process should apply to the myriad of different circumstances served by the mediation process. Certainly, a single standard to fit all is not possible or desirable, without seriously limiting the scope of coverage of the process. If on the other hand the lowest possible standard is set, then it would achieve nothing worthwhile. However, to establish a range of standards for different forms of process would be both complicated and difficult to enforce. To start with it is far from clear that the list of categories is established and thus closed. The market is continually finding and establishing new applications

[9] ***Dimes v Grand Junction Canal*** [1852] 3 HLC 759.

[10] See Mediation Corner, ADR NEWS Vol 4 No2 2004 for commentaries on privileged without prejudice agreements.

for the process, with the new providers making up rules that they deem appropriate, as they proceed. It is difficult to perceive how else this might be achieved.

Fair outcomes :

To what extent, if at all, should the mediator concern himself with the fairness of the outcome of a mediation and if so, what is the consequence of a failure to do so? Assuming there is a duty, as discussed below for the mediator to abstain from providing advice particularly in respect of offers on the table (a fortiori providing advice advocating unfair terms) it is difficult to see what a mediator can do to guard against unfair outcomes. Where the parties are represented then the mediator should be able to rely on the representative performing his duty to the client. What, if anything at all should a Mediator do if it becomes apparent that one of the party representatives is incompetent and the party is likely to suffer in consequence? Is this simply the party's problem for choosing an incompetent advisor? The mediator is not there to judge the professionalism of advisors. Perhaps inviting the party to consider the implications of relevant factors and how the party would address those factors is the best way forward, without directly exposing the perceived deficiencies of the representative, might be appropriate.

It is difficult however to see how the mediator might be held accountable for failing to adopt such a precaution. Furthermore, a danger for the mediator in getting involved is that the representative may have very good reason for the advice given to his client, which the mediator is unaware of.

Internal Confidentiality :

Are there any circumstances where a mediator should break the covenant against revealing confidential information disclosed in a private session to the other party without consent? Since confidence in the discretion of the mediator is central to the success or mediation, the answer must be a firm no. However, a mediator may find himself in a dilemma once appraised of information that indicates wrongdoing by one party, which is prejudicial to the other, who is unaware of that wrongdoing. Lawyers owe an overriding duty to the court and justice, which requires disclosure in extreme situations and provides an exception to the rules on legal privilege. These do not extend to the mediator, so it is advised that a mediator should either seek consent to disclose, or resign, though the problem is that resignation sends a warning signal to the others party that there is a significant problem that they are unaware of.

Advice **:**

To what extent, if at all, should a mediator abstain from providing a party(ies) with advice, whether legal or practical, and if so what is the consequence of wrongfully offering advice or worse, bad advice? Many mediators will not have professional indemnity cover for advice giving. Furthermore, the mediator will need to ensure that he does not cross over the professional boundary into legal practice, particularly if not a member of the legal profession.

It is standard practice for the mediator to tell the parties that he is not there to provide legal advice to either or both of the parties. Most mediation rule-books require the mediator to abstain from providing legal advice. Where as discussed above (*Fair outcomes*) the parties are represented there should be no need for the mediator to provide advice. However, where a party represents himself the temptation to provide advice may arise, particularly where a party is evidently at sea and does not recognise let alone understand the position they have placed themselves in.

The distinction between asking a party to consider whether or not a particular course of action is tenable as opposed to intimating that you are of the opinion that a proposed course of action is not tenable (or alternatively inviting a party to consider a course of action and recommending a course of action) is significant, albeit that the change in wording is slight. Whilst such advice may move the resolution process forward to the mutual benefit of both parties, on other occasions it might befit one party, potentially to the detriment of the other, affecting the balance of fairness in the process.

To move from expecting mediators to exercise common sense and good judgement over such matters to the drawing up of an express "Advice Rule" is likely to prove to be a challenging task for the draftsman and if it places too tight a straight jacket over mediation conduct could limit the flexibility of the process and do more harm than good. It should not be forgotten for instance that in social mediation the parties may both expect and

rely on the mediator providing advice, particularly in respect of what is considered to be acceptable social codes of conduct. Hence, the dividing line between conflict management and dispute resolution comes once more to the fore. Another hazy distinction, namely that between conciliation and mediation is also relevant here.

Decision making **:**

To what extent, if at all should a mediator be allowed to make and impose decisions? Is this a matter for the parties to agree in advance or subsequently, during the process? If, in the absence of agreement, a mediator, faced with an impasse, proposes a decision (or more subtly strongly suggests a solution) and the parties concur, can either party subsequently disown the decision/suggestion on the grounds of undue pressure? It would appear to be unlikely, in that the acceptance amounts to voluntary adoption so that the solution becomes the property of the parties.

If a mediator is empowered to make decisions, does it cease to be a mediation and become an adjudicatory forum or alternatively a conciliation process?[11] If the latter, will separate and distinct rules need to be drafted in respect of conciliation and mediation, to include for the first time a definitive definition of both processes that distinguishes between them in a meaningful and workable manner? It is submitted that achieving a consensus on this alone may be no mean feat.

A central problem here is that the mediation industry has grown and expanded into new applications, all the time maintaining the word mediation as a central descriptor, whilst at the same time defining the rules for that specific area of activity. A modern development that exemplifies this is "Victim /offender mediation." A local so called "Victim/Offender Mediation Scheme" in operation in South Wales appears to concern the offender rather than the victim. The pressure on the offender to participate is strong, since the alternative is a court sentence. The objective appears to be to mediate the offender's attitude towards their offending conduct, central to which is an acknowledgement of wrongdoing and an expression of regret. The mediator lets the offender know in no uncertain terms what is expected of the offender. The penalty for failing to play the game is a return to court for sentencing. How such a model would fit into any regulatory mediation mechanism is anyone's guess. Perhaps specific regulations are needed for victim/offender mediation, assuming these would be acceptable to the operators of such schemes.

Pressure – undue influence **:**

How much pressure, if any, should a mediator be allowed to apply in order to achieve a settlement, and what is the consequence of overstepping the mark? Is a party to a mediated settlement able, on the grounds of undue influence able to get a settlement set aside and if so is this more likely to be the case where a party is self represented, since presumably a central part of the role of a party representative will be to support the client and ensure that sufficient advice is provided to enable the client to resist any undue pressure to settle on disadvantageous terms.

Exerting pressure is encouraged under the rules of some mediation service providers and frowned upon by others. There is little or no consensus on this issue at the present time. In particular the providers of conciliation type mediation services will view the exertion of pressure by the mediator as an essential part of the closure process.

Given the popularity of the mini-trial type mediation process, regulation here is again likely to prove difficult to draft to accommodate the various models of mediation, without resorting to sub-categorisation of forms of mediation. Otherwise, if regulation outlaws some forms of mediation practice this is likely to prove extremely controversial and unacceptable to those practitioners displaced by the new rules.

Control and Authority **:**

To what extent, if at all, is there a duty (over and above the fact that it is probably desirable and necessary in order for the mediation to be effective) for the mediator to establish control and authority over the process, and what implications are there for the enforceability of a settlement arising out of a mediation where the mediator has failed to establish his authority?

[11] For distinctions between mediation and conciliation and the relevant rules of due process that apply see Chapter One above.

This question is most likely to arise where a mediation fails to produce an agreement and one or other of the parties seeks to recover the cost of the failed process on the grounds of mediator incompetence.

The problem however is that respect and authority are derived from many sources and cannot be imposed. Rather it has to be earned. Where a mediator assumes that respect is automatically due a rude awakening is often in order. An unbridled, belligerent, rude party can rapidly derail a mediation forcing the other party to withdraw.

The mediation process is strewn with pitfalls for the unwary mediator who is unlikely to know of sensitive factors private to the parties. The problem is greatest for the enthusiastic hands on mediator, generally a major plus in a communications led process, but one with the drawback that rushing in can lead to regrettable gaffs which might be hard to subsequently undo. It is easy to say that listening carefully to the parties and quietly observing, with the use of circumspect language can avoid such gaffs occurring, but too much caution can lead to a failure to generate momentum, confidence and enthusiasm.

Place that then in the context of the obstructive party, full of their own beliefs and self importance, but yet capable of changing their own mind (and recollection of events) when the occasion calls for it. Whilst singularly responsible for the failure of a mediation, it falls quite easily to such a party to refuse to accept their own role in the failure and to seek to apportion responsibility to the mediator. At that stage the slightest gaffs become exaggerated and any sense of proportion is lost.

However, any attempt to hold the mediator to account for a failed mediation, whether the allegation is justified or not, is problematical since the mediation process is bound by rules of privacy.

A final twist to this question regards the allocation of court costs. Where a party has obstructed and thwarted the mediation process this may be a reasons for the courts awarding costs under the CPR for subsequent litigation in respect of the dispute. Under some jurisdictions the mediator is called upon to issue of certificate of co-operation/non-cooperation with the process, which may go beyond a bland declaration that the parties attended. It is not hard to imagine the day arriving when the obstructive party denies non-cooperation and attributes responsibility for the failure to the mediator, all in the cause of preserving costs.

Representation :

To what extent, if at all, should the parties be required to be legally or otherwise professionally represented at a mediation? If a party is not represented, should the mediator proceed with, defer or abandon the mediation? The SPIDR mediation rules for instance require that the parties are represented. If that is the case, should they be legally represented or is any representation sufficient? In some US states such as California legal representation at mediation is mandatory. This does however raise the difficult question of how to react to a court ordered mediation when a party wishes to appear pro-se at the mediation and has likewise presented themselves pro-se before the court.

In contrast to the above, many social mediation providers explicitly exclude lawyers. For example, in the US the DRBF advises against legal representation. If lawyers attend, they are denied a right of audience and are only permitted to advise their clients from the wings. However, where legal rights are at stake, the pressure on the mediator to ensure fairness is increased if a party appears pro-se, since the mediator cannot play the client off against their representative and has to supply the reality check directly and perhaps even to provide some form of evaluation or advice, a practice frowned upon by some mediation service provider organisations.

This, it is clear, is yet another matter on which there is an absence of consensus. Can there be a single rule on this issue or should there be different rules for different types of mediation? Or alternatively should it be a matter for the discretion of the mediator and/or the parties?

Mediation and counselling :

To what extent, if at all, should a mediator act as a counsellor to the parties and what is the interrelationship between counselling and advising? This is an issue which inevitably arises in relation to social and family mediation, but has little relevance to commercial mediation. Nonetheless, there are occasions where the mediator may be faced with mediating viewpoints on normative behaviour, particularly where questions of entitlement and the "reasonable man" are at issue. The dividing line between counselling and advising is likely to be very thin on times.

CHAPTER NINE

***Mediation Fees* :**

What is a reasonable mediation rate? Is there a standard rate or is the rate dependent upon the standing of the mediator and what the market will bear? Should court mediation scheme rates act as a benchmark? Should the cost of mediation be in anyway proportionate to the dispute at hand? Complex matters can be involved with small sums at stake but where reputation is thrust to the fore, whereas a dispute over large sums of money may in fact be quite straightforward to deal with. Rates currently range from pro-bono/token fess upwards.

***Duration of Mediation* :**

How long should a mediation take? This is related to the last issue, since the longer a mediation lasts, where an hourly rate is applied the more it will cost. The problem is that this is like asking how long is a piece of string. If it is remembered that a mediation is not about establishing facts and liability but rather about canvassing viewpoints, it is possible to mediate large disputes with many facets in a relatively short period of time. The longer a mediation lasts, particularly in terms of days, the harder it is to achieve a settlement. However, apart from the parties withdrawing in frustration, what liability, if any can attach to a mediator who makes an unnecessary meal out of a mediation? Perhaps the only practical answer is that this may ultimately impact upon his reputation and acceptability as a mediator by the industry.

Joint or private sessions?

Some mediators refuse to engage in private sessions insisting that all communication should be open and fully disclosed, whereas for others the caucus is standard practice and deemed essential in order to explore options without prejudice to the bargaining position of the parties. Should this be regulated or be left to the discretion of the mediator? Joint sessions have the advantage of relieving the mediator of any responsibility for internal confidentiality. However, they increase the burden of the mediator to maintain control of the process and require very high levels of diplomatic skill.

What is the measure of competence?

Reputation / confidence :

What makes a good mediator? The following is not an uncommon response : "*I don't know but I can recognise one when I see one, or at least, I know the names of the famous mediators who must therefore be good*." Whilst this does not assist very much, it points out the problems of introducing regulations that might cut out recognised mediators who do not fulfil the regulatory criteria but who will continue to be in demand whatever the regulations say. Frequently high-profile mediations are put in the hands of respected members of the community who have no mediation experience, but are respected for their political / managerial skill. This is particularly so in the case of public international disputes. US Presidents and Senators it would appear are naturals at the art of mediation and diplomacy!

Reputation and confidence cannot be formally measured. A regulation is likely therefore to be based on formal qualifications. What should be specified as a minimum training standard? What should the benchmark contain and how would it be measured / assessed? Whilst there are extensive bench marks for legal practice there is no independent universal bench mark for arbitration practice.

Criminal records :

Should those with criminal records, un-discharged bankrupts and individuals with other relevant stains on their character be barred from mediation practice? Or do such experiences add to the knowledge and understanding of the practitioner in specialised areas of practice? Can the poacher turn gamekeeper?

Training / Examinations :

In the US the bench-mark is attendance for 40 hours under the guidance of a certified mediation training organisation. In the UK the Law Society has set out a core curriculum for solicitors to practice as mediators. A wide range of community mediation organisations and private mediation service providers also offer training programs of differing lengths and with varying content, some concentrating on hands on practical skills whilst others concentrate on theory. Yet others depend on varying periods of mentoring or pupilage. A further requirement of some providers is either a minimum number of appointments or continuing professional development.

There is little cross accreditation in the industry which means that it is difficult to establish any degree of accepted practice or standards in mediation training in the UK.

Should a mediator be merely an expert mediator or in addition an expert in a given area of practice? Some providers consider that mediation itself is sufficient of a skill and art to enable the mediator to handle any dispute, whatever professional discipline or commercial field happens to be involved. Others consider that expertise in a field relevant to the dispute is essential to being able to mediate effectively. Should any prior knowledge include relevant legal understanding? This is deemed unnecessary by many supporters of interests based mediation but would be strongly commended by risks analysis/reality check/evaluative mediators.

Accountability of nomination bodies

Accountability to the parties :

To what extent could and should a MNB be accountable to a dissatisfied party, for nominating a mediator who commits mal-practice? Would accountability depend on whether or not the mediator had a bad track record or was unqualified in some way? The problem with track records is that they are rarely made public. Perhaps a public record would be needed to make such accountability meaningful. In the meantime, insurance cover is likely to become the norm "just in case" liability is ever imposed.

Accountability to an overarching body :

Might an overarching body have disciplinary powers over MNB's? If so, what would the nature of these powers be? Financial or regulatory, with or without supervision and inspections? And if so who will pay for all this?

Perhaps MNB's will be required to monitor mediation provision, but from experience the client response to feed back forms is poor. Should feed back forms be the property of the mediator or should they be logged into a register of complaints? Could an MNB be required to submit an audit to the overarching body, perhaps with copies of feed back forms? If an MNB gets a negative feed back return from a client what should it do next?

Determining who is at fault : without prejudice and confidentiality.

Establishing bias or other wrongdoing by a mediator in the course of a mediation is likely to prove to be problematical given the confidentiality of the process. Most mediation appointment agreements include a statement that the mediator will not testify in court, establishing an immunity for the mediator and privileged status. Legal authorities on the issue of mal-practice are few and far between. The famous California judgement against a group of insurance claims mediators is the exception rather than the rule. The mediators concerned were single party appointed and regular players, each time for the same insurance underwriters. The court was able to conclude that there was overwhelming evidence of a pattern of bias in favour of the carriers and against the interests of the assured claimants. However, in the absence of a track record it is likely to be virtually impossible to establish wrong doing.

If an MNB is to operate a professional standards tribunal, who will have the right and or duty to give evidence, the complainant, the other party and the mediator? It is likely that the other party may not wish to attend, give evidence or bear any of the costs and expenses involved, particularly if the hearing will have no impact upon the settlement agreement.

Could and should charges include "Bringing the MNB into disrepute" and what does this entail ?

Once a tribunal process is initiated, what impact does that have on the enforceability of a mediation settlement agreement?

What are the disciplinary options available to the MNB tribunal – a warning, a fine, suspension? Are the tribunal proceedings subject to judicial review and does the mediator have the right to a full hearing? Should there be an appeals process? The answer to all three is likely to be YES. That being the case, who pays for all of this?

Once an individual has been de-listed by an MNB should other MNB's take note and follow suit? Is there a duty to inform other bodies or should there be a central register?

CHAPTER NINE

CONCLUSION

This review has raised far more questions than answers. Mediation is a clearly a business. It is less clear to what extent mediation is a profession. More so than adjudication or arbitration, the inter-personnel skills of the mediator are paramount, followed closely by the degree of authority that the mediator can exert, by virtue of reputation and standing and by establishing and maintaining a presence during the process. These are quite different qualities to those measured to establish and maintain professional standards for lawyers and arbitrators. Measuring and monitoring these is likely to prove difficult, if not impossible.

Is it therefore unreasonable to consider whether or not regulation of the mediation business should best be left to the market place, based on the reputation and standing of nominating bodies, service providers and their self-regulatory mechanisms, and to the reputation of the individual mediation practitioner? In many other walks of life, it is perfectly reasonable to advise that the "***buyer beware***" and make necessary inquiries before making an investment.

The jury at present is out – we will have to wait and see what the verdict of the industry and consumer pressure groups is in due course. This is an issue, which is due to run and run.

Self Assessment Exercise No 9b

1 To what extent, if at all, is it either desirable, or practicable for the state to impose standards for the training and accreditation of mediators, given that the parties to disputes may wish to engage the services of someone in the community that they respect, who they consider can assist them in brokering a settlement to their dispute?

Do different rules apply where an individual is nominated or appointed by a body?

If so, might this simply force mediators into becoming individual operators, touting their services to commerce through adverts and the web, without allegiance to any appointing bodies, replicating the US model?

2 Should it be a criminal offence to accept to assist in such circumstances where the mediator has no formal qualifications?

If that is the case, perhaps Senator Mitchell should be indicted for getting involved in the Northern Ireland Peace Process and the last three Presidents of the USA for engaging in the Israeli / Palestinian conflict at summits in Camp David !

If not,

What, if any, penalty might be imposed on an individual who accepted such a charge?

ADDITIONAL READING

EU Commission Green Paper on alternative dispute resolution in civil and commercial law. (COM(2002) 196 – C5-0284/2002 – 2002/2144(COS)) . Committee on Legal Affairs and the Internal Market Rapporteur: Diana Wallis

"The Status of ADR Training in Legal Education in the United Kingdom"

INTRODUCTION

This paper considers whether or not the concepts and practice of Alternative Dispute Resolution (ADR) should form an integral part of legal training in the United Kingdom (UK). This might seem like a surprising question to ask, particularly for colleagues from the US where ADR, particularly mediation, is firmly established as an integral part of training in many law schools, but as will be demonstrated below, this most certainly not the case in the UK at the present time.

Undergraduate legal education in the UK serves two distinct and separate though complementary functions. On the one hand the Law Degree forms a key stage on the road to legal practice, on the other, it is simply one more discipline (albeit an important and prestigious one) within the University portfolio. Both functions are important. As a platform for the first stage of qualification as a legal practitioner the focus is on substantive law with an emphasis on the assimilation, analysis and application of legal rules and principles. Less than 50% of law graduates enter into legal practice, with the majority of graduates using the status of the law degree as a mark of excellence in academic and intellectual achievement as a passport other careers. From this perspective the emphasis is less upon the acquisition of legal knowledge and rather on the development of critical analytical skills and transferable skills in general. Subsequent professional training courses (Legal Practice Course and Bar Finals) are self evidently practice courses, with the greater part of the syllabus dictated by the professional bodies which both monitor and sanction the programs.

Whilst any law school might chose to incorporate some element of ADR training into its program of study (competition between lecturers for the limited opportunities afforded for optional subjects is considerable), this would not occur across the board unless the legal profession were to mandate it as a core requirement of a qualifying law degree or professional course. Equally, the extent to which such training would be mandated would again be a matter for the professional bodies. For the professions to so determine they would have to reach the conclusion that ADR practice had become an essential and integral part of legal practice. Is there a case for reaching such a conclusion?

INTER-RELATIONSHIP BETWEEN LEGAL AND ADR PRACTICE

The right of audience before the courts in the UK is the sole preserve of the legal practitioner and the judiciary are drawn exclusively from the legal profession. The legal profession plays a major role in client representation in ADR. This is inevitable since the first port of call for a member of the public involved in a legal dispute is likely to be the profession. However, in the UK the exclusive right of audience accorded to the profession does not extend to ADR. Equally, the ranks of ADR practitioners are not the exclusive reserve of the legal practitioner in the UK. ADR forms an important area of legal practice for some specialist practitioners, but many others will have had little or no engagement in ADR at any level whatsoever. This may be in the process of changing, particularly with the advent of court based / promoted mediation which potentially could impact on every civil litigation practice. Already there are a number of specialist areas where some form of ADR is the norm.[12]

Whilst the courts remain the primary vehicle for the resolution of civil disputes a significant number of disputes are resolved by alternative means, ranging from arbitration, adjudication, conciliation and expert determination to mediation, supplemented by a few exotic variations such as mini-trial and dispute resolution boards. To the extent that it is true to say that supply expands to satisfy demand, recourse to ADR is increasing in the UK, as evidenced by the ever growing range of ADR service providing bodies who promote the benefits of their services to the public and private sector. Admittedly, the converse might apply, namely that there are increasing numbers of suppliers chasing a diminishing market, but for the fact that the market has broadened out from the traditional construction and maritime arbitration base to such an extent that today there are few

[12] Note that in specialist areas of practice such as Family Law, mediation is an everyday fact for the practitioner. Similarly, Patent Office mediation is likely to become the norm for those engaged in the field of Intellectual property dispute resolution. Construction adjudication under the aegis of the Housing Grants Construction and Regeneration Act 1996 is the norm in commercial construction dispute resolution practice. Etc. As specialist areas, from the legal training perspective their impact alone would not be sufficiently pervasive to justify a change in the general curriculum of the law school, as opposed to integration into specialist courses

areas of human endeavour which cannot be accommodated by an off the peg private dispute resolution service.[13]

In addition, the government has committed itself both to encouraging litigants to settle disputes[14] and to embracing ADR procedures for the settlement of disputes involving government agencies.[15] The Government has a vested interest in the growth of ADR since it relieves pressure on the limited resources of the state subsidised court system. Furthermore, ADR is seen by the Government as a vehicle to promote both commercial efficiency and social harmony. Potential benefits to the court's clients from the adoption of ADR highlighted by Her Majesties Court Service include the timely settlement of disputes and a higher degree of party autonomy. ADR offers a degree of procedural flexibility unobtainable before the courts and provides the court's clients with enhanced opportunities to play an active role in the process. Negotiated settlement processes provide clients with autonomy over settlement terms and the ability to fashion outcomes which are not available to the court. There is also a worry that the high costs involved in litigation may act as a barrier to justice which can to some extent be bridged by cost effective ADR services.

Whilst the recent advances of ADR in the UK has been quite remarkable, it is submitted that progress is likely to stall in the foreseeable future, despite the sterling support of Her Majesties Court Service, if ADR is not embraced and promoted by the legal profession. At present support from the profession is patchy. Even as new court based mediation schemes are being established in some parts of the country, other established centres are struggling to survive, starved of support by the local legal community. Thus court mediation referrals and applications to the court to defer to mediation have risen dramatically in some areas and fallen away in others. This can partly be attributed to variable support for court based mediation by the judiciary and partly to variable support by the profession from region to region.

The role of the legal practitioner in the choice of dispute resolution process be it some form of ADR or litigation is significant. Firstly, contract drafting is often performed by legal practitioners. Outside the standard form contract which routinely provides for ADR the inclusion of an ADR provision in a contract is likely to be dependent on advice from the drafting lawyer. In the absence of knowledge by the lawyer of the benefits of ADR this is unlikely to occur. Ad hoc references to ADR require the consent of both parties which is difficult to achieve after the event. The support of ADR by the legal profession is thus central to the continued growth of commercial ADR. Secondly, as noted above, the courts are the primary vehicle for the resolution of civil disputes. The normal expectation when a client seeks advice from a legal practitioner is that the case will go to court. Whilst it is not uncommon in certain fields[16] for disputes to be settled through ADR processes without recourse to the services of a legal practitioner, because the levels of public knowledge and understanding about ADR are quite limited, unless a legal practitioner directs a client towards ADR where the practitioner is unable to broker a settlement any outstanding issues will inevitably be referred to the court. The exception is where the client knows of and requests ADR.

Clearly it is in the interests both of ADR practitioners and the government that legal practitioners direct clients towards ADR. Before that can occur, practitioners must firstly know about ADR[17] and secondly value it as a service to their clients which they can profitably engage in. Whilst it is not universally accepted that ADR is in all circumstances valuable to clients or to the profession, let us assume for present purposes that that is the

[13] Eg. Community, family, consumer, commercial, sport, travel etc.

[14] The overriding objective of the Civil Procedure Rules is the provision of cost effective dispute resolution procedures, proportionate to the issues at stake. S1 Civil Procedures Rules 1998.

[15] Public Statement on ADR by Lord Irvine, March 2001.

[16] Eg community meditation; construction and maritime disputes where industry consultants play a major role representing clients in arbitration and adjudication particularly since ADR is a common feature of such standard form contracts.

[17] The profession has been quick to take on board the cost risks of ignoring mediation by virtue of s44 CPR 1998 epitomised by ***Halsey v Milton Keynes General NHS Trust : Steel v Joy & Halliday*** [2004] EWCA (Civ) 576 and fire fighting strategies to gain cost advantages by proposing mediation are now common. This demonstrates that the profession can and will take note of ADR when there is a perceived need and potential tactical benefit to be gained from proposing ADR, but many such offers do not demonstrate a genuine commitment to or understanding of ADR processes. The courts have not been fooled by spurious last minute offers of mediation and have robustly resisted applications for reductions of costs in such circumstances, see e.g. the recent judgment of Mr Justice Jacks in ***Patricia Mary Wright v HSBC Bank Plc*** [2006] ADR.L.R. 06/23

case. The question then arises as to how legal practitioners should acquire ADR expertise, be it as an integral part of their legal education in the class room or as an optional part of continuing professional development.

LEGAL EDUCATION

The majority of legal practitioners in the UK will have undertaken a Bachelor's Degree in law (LLB)[18] accompanied by professional training to become a solicitor (The Legal Practice Course or LPC) or barrister (Bar Finals) followed by articles or pupilage.

- The traditional LLB degree course involves three years full time study or part time equivalent.
- The LPC and Bar Finals involve a year of full time study or two years part time study.
- Articles and pupilage will account for a further two years of on the job training.

Accordingly it usually takes a minimum of six years to become a qualified legal practitioner in the UK. At this stage formal education comes to an end and thereafter continuing professional development takes centre stage. Six years sounds like a long time but, during that period the trainee will be exposed to a great deal of information, much of which has to be assimilated and applied. The question therefore is whether or not there is a need to add to that work load by including ADR practice and procedure (be it a little or a lot). If so, would it be in addition to what is already covered, or would something have to be omitted to make room for it, and if so what would be omitted?

The Law Degree.[19]

The primary focus of the Law Degree is substantive law. Total face to face class room exposure will be somewhere between 12 – 15 hours per week. The core content of a qualifying law degree is set by the Law Society. Thus core subjects,[20] namely the substantive law of contract, tort, equity and trusts, property, crime together with Legal Systems, Constitutional law and European Community law account for approximately 60% of most qualifying law degrees.[21] The remainder of the program will be optional, with some facility for non-law subjects such as foreign languages.

Within a law school program ADR could be integrated into Legal Systems and / or Legal Skills. A law school could chose to offer a distinct ADR module, most likely as an option rather than as a core module. Alternatively, ADR could feature as part of extra-curricular activity.

It is quite likely that some reference is already made to ADR during the course of many Legal Systems programs, though how much emphasis and coverage is likely to be variable, ranging from a brief reference without any assessment to in depth evaluation of the systems coupled with a coursework or exam question. Some legal systems text books provide a respectable amount of coverage of ADR though others leave it out completely. If it is not in the chosen core text it is unlikely to be dealt with.

Legal skills may be offered as a distinct module or integrated into Legal Systems. With legal skills there is the scope for students to be ***briefly*** exposed to client interviewing, negotiation/mediation and advocacy skills in addition to study skills, essay writing, problem solving and research techniques. Emphasis is placed upon the word briefly because law school cohorts tend to be large and given the breadth of coverage within the syllabus time is at a premium.

Assessing interpersonal skills for large numbers places enormous strain on staff resources which few law schools are willing or able to accommodate. Furthermore, since legal skills underpin legal study such courses tend to take place at the beginning of a law course. It would be unrealistic to expect high degrees of sophisticated interpersonal skills from the average school leaver.

[18] There are alternative routes including the Common Professional Examinations, a graduate conversion course in law, legal executive courses, HND and HNC law courses with fast track conversion to LLB. There is also provision for foreign lawyers to undertake practice conversion courses.

[19] Given the diversity of provision in undergraduate law programs, the discussion below is pitched in general terms.

[20] The subjects areas are described here in broad terms. The exact scope and title for such subjects will vary from institution to institution.

[21] The number of modules in a law program can vary radically from one school to another. At the tightest level students might study a 4/4/4 program, moving upward to a 5/5/5 program or even a 6/6/6 program over three years. To further complicate matters some faculties will offer half modules.

CHAPTER NINE

Legal skills training has a chequered history in law schools. Such courses tend to be introduced by members of staff dedicated to its development, who have a passion for it and have the requisite skills to teach it well. They often expend enormous amounts of additional time and effort developing and delivering the program and do an extremely good job. However, when that staff member moves on to other things, it can prove difficult or indeed impossible to find another member of staff able to deliver the program and/or willing to commit themselves to so doing. The program eventually fades away or is diluted and merged into another program.

The provision of a distinct ADR module is perhaps the best that a law school could offer the undergraduate in the current context. However, as an option, it would not go far towards ensuring that all graduates had been exposed to ADR before graduating. Take up for such an option would be dependent upon reputation and student perceptions. Premium options such as commercial law, evidence, family and succession would no doubt continue to take precedence in most institutions. Also, given the breadth of specialist areas of practice embraced by ADR, the choice of subject matter and the breadth of coverage would inevitably be both limited and idiosyncratic.

A significant role in skills training has been fulfilled by extra-curricular activities. Many, but far from all law schools engage in debating, mooting, client counselling and negotiation competitions, both national and international. In some institutions this is supported by staff. In others the initiative is taken by the student law society, with or without help and assistance from staff. There are competitions for all these activities and at the final stages standards are extremely high. Some of these competitions are open to both undergraduates and post graduates whilst other competitions provide separate streams.

Less than 50% of the law schools take part in such programs. The level of investment, both in terms of library resources and staff commitment, required from a school to take part in international mooting for instance is considerable. In the absence of sponsorship most law schools are unlikely to make the additional investment required to take part such programs.

The uptake in skills competitions of law schools with modular programs is very low since inter-sessional examinations coincide with the preliminary rounds for most of these competitions. Understandably, few students are prepared to juggle with extra-curricular skills commitments and examinations at the same time. This is particularly the case today when so many students also undertake part time work to help finance their studies.

The percentage of students from those institutions that take part in the first knock out stage of these competitions, let alone those who progress to the finals is both self selective and rapidly shrinks as the competitions progress through the stages. It is notable that a high percentage of the students that take an active part in extra-curricular activities are older students rather than those who have entered University directly from high school. For those who take part the quality and quantify of skills exposure, even at the earliest stages, is likely to far exceed anything that is delivered in formal classes, but the conclusion again must be that it is not a prospective vehicle for ensuring that all future graduates would have been exposed to ADR.

Professional Training.

The primary focus of both the Law Practice Course and the Bar Course is legal skills and practice. As such they would be an ideal vehicle for ADR training courses. The content of these courses is regulated by the professions and is very extensive and complete, leaving little scope for additional coverage. Whilst such courses involve eighteen hours of class contact per week, candidates are advised to treat the course like a full time job so that a full 40 hours a week need to be dedicated to the successful pursuit of the course.

The core texts for both courses contain several pages on ADR but, it is submitted, far from sufficient for present purposes. Clearly it is open to staff to develop this material further and no doubt some do so and provide ADR electives. However, it should be noted that whilst negotiation was previously a core skill, it was dropped from the curriculum five years ago, the view having been taken that whilst practitioners require drafting skills, negotiation skills are not central to what they do. It could take some doing to reverse this decision.

That said, the legal practice course is currently in the process of radical change and the present program (The LPC which replaced the LSF) is due to be replaced by LPC 2 in 2008. This will apparently be a modular program with trainees being able to accumulate credits from a variety of training providers. It is far too early to

be able to make any predictions as to whether or not ADR will be mandated under the new scheme, though there appears to be a current in favour of non-adversarial dispute resolution being projected by the regulating bodies at the present time.

Conclusion on ADR coverage at law schools.

Whilst there may well be law schools that provide more than adequate coverage of ADR at some stage during the four formal years of legal education in the UK, it is submitted that at the present time coverage is minimal. It would be possible for law schools to improve upon this state of affairs but it is most unlikely that coverage would ever be sufficient across the board to ensure full ADR awareness amongst all future graduates.

UNIVERSITY ADR PROVISION OUTSIDE THE LAW SCHOOL PROGRAM

None of the above is to suggest that the Universities in the UK have completely ignored ADR. This is far from the case, as the wide range of institutions in the UK which have Chartered Institute of Arbitrator accreditation for their post graduate ADR programs is testament. Even so, the number of Universities that offer post graduate ADR courses is modest. The majority do not.

The LLM, MSc, MBA etc is an ideal vehicle for ADR education, both academic and professional. The masters program dedicated to ADR has the ability to deliver a comprehensive training package, though many such programs such as construction concentrate on specific fields of ADR practice. The added maturity and experience of post graduate students means that they are often in a position to take the best advantage of and profit from ADR programs. The primary focus of many LLM ADR students is ADR practice. They are likely to be drawn from many disciplines, not just from law. The number of post graduates that are from or will go into legal practice is quite limited.

Law is taught on a great variety of undergraduate and post graduate programs. Where ADR is particularly relevant to a discipline it may well receive considerable coverage. A good example of this is the construction field. Thus, an undergraduate or post graduate construction program in the UK today would be incomplete without at least some reference to adjudication. Similarly, it is not surprising that negotiation skills feature alongside partnering and conflict management in many business and management study programs.

CONCLUSION.

It is important for ADR to engage the legal community. The continuing growth and uptake of ADR is at least in part dependant upon the support of the legal profession, in particular those members of the profession who are not as yet converts to ADR. This cannot be achieved by bland CPD courses that merely extol the virtues of ADR as given statements of fact without proof. That message has already been delivered to, but not necessarily been received by, the profession. Whilst most in the profession can reiterate the ADR mantra, often without conviction, far fewer have a real understanding of ADR or the ability to engage in it effectively. The legal profession will need to be convinced that ADR offers benefits both to clients and to the profession. How to convince the profession is another matter.

The efficacy of ADR is more a matter of belief and opinion than fact. In the absence of outside imperatives such as court ordered mediation or cost penalties, it is the perceptions of the profession that will carry the day. ADR has both its supporters and its detractors. There is no shortage of material demonstrating the benefits clients have reaped from engaging in ADR but then again neither is there a shortage of examples of clients who have had their fingers burnt by so doing. On the basis that "*good news is no news*" it is more likely that negative rather than positive experiences will be shared between members of the profession, which makes it even harder to project a positive ADR image.

In the grander scheme of things ADR in still in its early developmental stages in the UK. It continues to evolve and adapt to suit the needs of specific fields of practice. There are so many models of ADR in current use that generalisations, the bread and butter of what a law school can provide, are of limited value. It is likely that over time ADR will gradually undergo a process of rationalisation, trading off flexibility for certainty. Minimum standards of training, accreditation and enforceable codes of ethical practice are likely to be established in the not too distant future at least in specific fields of practice such as court based mediation. Some degree of accountability may be imposed upon appointing bodies with knock on effects for the way they regulate the

activities of their members. The teaching of standardised rules, regulations, practices and procedures are more likely to be within the reach of the average law school.

Certainly if ADR were to be built into the law school's core curriculum prevailing gaps in the profession's knowledge and understanding of ADR could be plugged for future generations. Even so there remain limits to what law schools could achieve. It is most unlikely that the entire gamut of ADR and its specific applications could or would be catered for. The most obvious candidate for expanded coverage is mediation as Her Majesties Court Service raises it profile. Even so, such coverage is likely to be basic and rudimentary. Whether or not it would also imbue enthusiasm and commitment to mediation as well is yet another matter. At the very least, since some of the failures of ADR may be attributable to inappropriate choices of ADR process and or a failure of practitioners to engage effectively in that process, assuming sufficient ADR coverage is provided by the law schools such defects could be remedied for the future. Whatever the law schools do is unlikely to turn around disillusioned practitioners who have had "*bad*" ADR experiences and in such cases the new recruit might still encounter stiff resistance to ADR as they enter into practice.

Without wishing to detract from the important role played by the law schools, it should be remembered that formal legal education is limited. The legal practitioner builds upon the basics inculcated at law school and really learns his craft on the job, be it before the court, arbitral tribunal or mediation. The remaining vehicle for ADR training within the legal profession lies in continuing professional development, with a focus on representing clients within all aspects of ADR rather than in training to become an ADR practitioner. It is submitted that this is an area that the ADR community could and should actively engage in, but first the legal profession needs to be convinced that it is worthwhile investing in such training.

The fact that many legal practitioners specialise in the ADR field is proof that some in the profession can benefit from engagement in it. This provides a starting point upon which we in the ADR community can build.

Self Assessment Exercise No 9c

1 Is there, and can there ever be, a right or a wrong way to mediate?

2. To what extent, if at all, is it possible and or desirable, to establish state rules for the conduct of the mediation process?

   If so, should there be different and distinct rules of different types of dispute and different types of relationship?

   If that is the case, how would one ensure that the users of the services did not get confused?

   I not, would regulation stifle the development of and impede the effectiveness of the mediation process?

UNCITRAL Model Law on International Commercial Conciliation (2002)

Part One

Article 1. Scope of application and definitions

1. This Law applies to international[22] commercial[23] conciliation.

2. For the purposes of this Law, "conciliator" means a sole conciliator or two or more conciliators, as the case may be.

3. For the purposes of this Law, "conciliation" means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ("the conciliator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.

4. A conciliation is international if:
   (a) The parties to an agreement to conciliate have, at the time of the conclusion of that agreement, their places of business in different States; or
   (b) The State in which the parties have their places of business is different from either:
      (i) The State in which a substantial part of the obligations of the commercial relationship is to be performed; or
      (ii) The State with which the subject matter of the dispute is most closely connected.

5. For the purposes of this article:
   (a) If a party has more than one place of business, the place of business is that which has the closest relationship to the agreement to conciliate;
   (b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

6. This Law also applies to a commercial conciliation when the parties agree that the conciliation is international or agree to the applicability of this Law.

7. The parties are free to agree to exclude the applicability of this Law.

8. Subject to the provisions of paragraph 9 of this article, this Law applies irrespective of the basis upon which the conciliation is carried out, including agreement between the parties whether reached before or after a dispute has arisen, an obligation established by law, or a direction or suggestion of a court, arbitral tribunal or competent governmental entity.

9. This Law does not apply to:
   (a) Cases where a judge or an arbitrator, in the course of judicial or arbitral proceedings, attempts to facilitate a settlement; and
   (b) [. . .]

Article 2. Interpretation

1. In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

[22] States wishing to enact this Model Law to apply to domestic as well as international conciliation may wish to consider the following changes to the text:
— Delete the word "international" in paragraph 1 of article 1; and
— Delete paragraphs 4, 5 and 6 of article 1.

[23] The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

Article 3. Variation by agreement

Except for the provisions of article 2 and article 6, paragraph 3, the parties may agree to exclude or vary any of the provisions of this Law.

Article 4. Commencement of conciliation proceedings[24]

1. Conciliation proceedings in respect of a dispute that has arisen commence on the day on which the parties to that dispute agree to engage in conciliation proceedings.
2. If a party that invited another party to conciliate does not receive an acceptance of the invitation within thirty days from the day on which the invitation was sent, or within such other period of time as specified in the invitation, the party may elect to treat this as a rejection of the invitation to conciliate.

Article 5. Number and appointment of conciliators

1. There shall be one conciliator, unless the parties agree that there shall be two or more conciliators.
2. The parties shall endeavour to reach agreement on a conciliator or conciliators, unless a different procedure for their appointment has been agreed upon.
3. Parties may seek the assistance of an institution or person in connection with the appointment of conciliators. In particular:
   (a) A party may request such an institution or person to recommend suitable persons to act as conciliator; or
   (b) The parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.
4. In recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, where appropriate, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.
5. When a person is approached in connection with his or her possible appointment as conciliator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. A conciliator, from the time of his or her appointment and throughout the conciliation proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him or her.

Article 6. Conduct of conciliation

1. The parties are free to agree, by reference to a set of rules or otherwise, on the manner in which the conciliation is to be conducted.
2. Failing agreement on the manner in which the conciliation is to be conducted, the conciliator may conduct the conciliation proceedings in such a manner as the conciliator considers appropriate, taking into account the circumstances of the case, any wishes that the parties may express and the need for a speedy settlement of the dispute.
3. In any case, in conducting the proceedings, the conciliator shall seek to maintain fair treatment of the parties and, in so doing, shall take into account the circumstances of the case.
4. The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute.

Article 7. Communication between conciliator and parties

The conciliator may meet or communicate with the parties together or with each of them separately.

[24] The following text is suggested for States that might wish to adopt a provision on the suspension of the limitation period:
Article X. Suspension of limitation period
1. When the conciliation proceedings commence, the running of the limitation period regarding the claim that is the subject matter of the conciliation is suspended.
2. Where the conciliation proceedings have terminated without a settlement agreement, the limitation period resumes running from the time the conciliation ended without a settlement agreement.

Article 8. Disclosure of information

When the conciliator receives information concerning the dispute from a party, the conciliator may disclose the substance of that information to any other party to the conciliation. However, when a party gives any information to the conciliator, subject to a specific condition that it be kept confidential, that information shall not be disclosed to any other party to the conciliation.

Article 9. Confidentiality

Unless otherwise agreed by the parties, all information relating to the conciliation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.

Article 10. Admissibility of evidence in other proceedings

1. A party to the conciliation proceedings, the conciliator and any third person, including those involved in the administration of the conciliation proceedings, shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding any of the following:
   (a) An invitation by a party to engage in conciliation proceedings or the fact that a party was willing to participate in conciliation proceedings;
   (b) Views expressed or suggestions made by a party in the conciliation in respect of a possible settlement of the dispute;
   (c) Statements or admissions made by a party in the course of the conciliation proceedings;
   (d) Proposals made by the conciliator;
   (e) The fact that a party had indicated its willingness to accept a proposal for settlement made by the conciliator;
   (f) A document prepared solely for purposes of the conciliation proceedings.
2. Paragraph 1 of this article applies irrespective of the form of the information or evidence referred to therein.
3. The disclosure of the information referred to in paragraph 1 of this article shall not be ordered by an arbitral tribunal, court or other competent governmental authority and, if such information is offered as evidence in contravention of paragraph 1 of this article, that evidence shall be treated as inadmissible. Nevertheless, such information may be disclosed or admitted in evidence to the extent required under the law or for the purposes of implementation or enforcement of a settlement agreement.
4. The provisions of paragraphs 1, 2 and 3 of this article apply whether or not the arbitral, judicial or similar proceedings relate to the dispute that is or was the subject matter of the conciliation proceedings. is otherwise admissible in arbitral or judicial or similar proceedings does not become inadmissible as a consequence of having been used in a conciliation.

Article 11. Termination of conciliation proceedings

The conciliation proceedings are terminated:

(a) By the conclusion of a settlement agreement by the parties, on the date of the agreement;
(b) By a declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration;
(c) By a declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or
(d) By a declaration of a party to the other party or parties and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

Article 12. Conciliator acting as arbitrator

Unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator in respect of a dispute that was or is the subject of the conciliation proceedings or in respect of another dispute that has arisen from the same contract or legal relationship or any related contract or legal relationship.

Article 13. Resort to arbitral or judicial proceedings

Where the parties have agreed to conciliate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to conciliate or as a termination of the conciliation proceedings.

Article 14. Enforceability of settlement agreement[25]

If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable . . . [*the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement*].

Part Two

Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (2002)

Purpose of this guide

1. In preparing and adopting model legislative provisions on international commercial conciliation, the United Nations Commission on International Trade Law (UNCITRAL or "the Commission") was mindful that such provisions would be a more effective tool for States modernizing their legislation if accompanied by background and explanatory information. The Commission was also aware of the likelihood that the model provisions would be used in a number of States with limited familiarity with conciliation as a method of dispute settlement. Primarily directed to executive branches of Governments and legislators preparing the necessary legislative revisions, the information provided in this Guide should also provide useful insight to other users of the text, including commercial parties, practitioners, academics and judges.

2. Much of this Guide is drawn from the *travaux préparatoires* of the UNCITRAL Model Law on International Commercial Conciliation. The Guide explains why the provisions in the Model Law have been included as essential basic features of a statutory device designed to achieve the objectives of the Model Law. When it drafted the model provisions, the Commission assumed that explanatory material would accompany the text of the Model Law. For example, some issues are not settled in the Model Law but are addressed in the Guide, which is designed to provide an additional source of inspiration to States enacting the Model Law. It might also assist States in considering which provisions of the Model Law, if any, might have to be varied to accommodate particular national circumstances.

3. This Guide has been prepared by the Secretariat pursuant to a request made by UNCITRAL. It reflects the deliberations and decisions of the Commission during the session at which the Model Law was adopted, and the considerations of UNCITRAL's Working Group II (on Arbitration and Conciliation) that conducted the preparatory work.

4. The Commission entrusted the Secretariat with the finalization of the Guide, based on the draft prepared by the Secretariat (A/CN.9/514) and on the deliberations of the Commission at its thirty-fifth session (held from 17 to 28 June 2002), taking into account comments and suggestions made in the course of discussions by the Commission and other suggestions in the manner and the extent that the Secretariat determined in its discretion. The Secretariat was invited to publish the finalized Guide together with the Model Law.[26]

[25] When implementing the procedure for enforcement of settlement agreements, an enacting State may consider the possibility of such a procedure being mandatory

[26] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17* (A/57/17), para. 144

I. Introduction to the Model Law

A. Notion of conciliation and purpose of the Model Law

5. The term "conciliation" is used in the Model Law as a broad notion referring to proceedings in which a person or a panel of persons assists the parties in their attempt to reach an amicable settlement of their dispute. There are critical differences among the dispute resolution processes of negotiation, conciliation and arbitration. Once a dispute arises, the parties typically seek to resolve their dispute by negotiating without involving anyone outside the dispute. If the negotiations fail to resolve the dispute, a range of dispute settlement mechanisms is available, including arbitration and conciliation.

6. An essential feature of conciliation is that it is based on a request addressed by the parties in dispute to a third party. In arbitration, the parties entrust the dispute resolution process and the outcome of the dispute to the arbitral tribunal that imposes a binding decision on the parties. Conciliation differs from party negotiations in that conciliation involves third-person assistance in an independent and impartial manner to settle the dispute. It differs from arbitration because in conciliation the parties retain full control over the process and the outcome, and the process is non-adjudicatory. In conciliation, the conciliator assists the parties in negotiating a settlement that is designed to meet the needs and interests of the parties in dispute (see A/CN.9/WG.II/WP.108, para. 11). The conciliation process is an entirely consensual one in which parties that are in dispute determine how to resolve the dispute, with the assistance of a neutral third party. The neutral third party has no authority to impose on the parties a solution to the dispute.

7. In practice, proceedings in which the parties are assisted by a third person to settle a dispute are referred to by expressions such as conciliation, mediation, neutral evaluation, mini-trial or similar terms. Various techniques and adaptations of procedures are used for solving disputes by conciliatory methods that can be regarded as alternatives to more traditional judicial dispute resolution. The Model Law uses the term "conciliation" to encompass all such procedures. Practitioners draw distinctions between these expressions in terms of the methods used by the third person or the degree to which the third person is involved in the process. However, from the viewpoint of the legislator, no differentiation needs to be made between the various procedural methods used by the third person. In some cases, the different expressions seem to be more a matter of linguistic usage than the reflection of a singularity in each of the procedural method that may be used. In any event, all these processes share the common characteristic that the role of the third person is limited to assisting the parties to settle the dispute and does not include the power to impose a binding decision on the parties. To the extent that "alternative dispute resolution" (ADR) procedures are characterized by the features mentioned in this paragraph, they are covered by the Model Law (see A/CN.9/WG.II/WP.108, para. 14). However, the Model Law does not refer to the notion of ADR since that notion is unclear and may be understood as a broad category that includes other types of alternatives to judicial dispute resolution (for example, arbitration), which typically results in a binding decision. To the extent that the scope of the Model Law is limited to non-binding types of dispute resolution, the Model Law deals only with part of the procedures covered by the notion of ADR.

8. Conciliation is being increasingly used in dispute settlement practice in various parts of the world, including regions where until a decade or two ago it was not commonly used. In addition, the use of conciliation is becoming a dispute resolution option preferred and promoted by courts and government agencies, as well as in community and commercial spheres. This trend is reflected, for example, in the establishment of a number of private and public bodies offering services to interested parties designed to foster the amicable settlement of disputes. Alongside this trend, various regions of the world have actively promoted conciliation as a method of dispute settlement, and the development of national legislation on conciliation in various countries has given rise to discussions calling for internationally harmonized legal solutions designed to facilitate conciliation (see A/CN.9/WG.II/WP.108, para. 15). The greater focus on these methods of dispute settlement is justified particularly because the success rate of these methods has been high; in fact, in some countries and industrial sectors, it has been surprisingly high.

9. Since the role of the conciliator is only to facilitate a dialogue between the parties and not to make a decision, there is no need for procedural guarantees of the type that exist in arbitration, such as the prohibition of meetings by the conciliator with one party only or an unconditional duty on the conciliator to disclose to a party all information received from the other party. The flexibility of conciliation procedures and the ability to adapt the process to the circumstances of each case and to the wishes of the parties are thus considered to be of crucial importance.

10. This flexibility has led to a widespread view that it is not necessary to deal legislatively with a process that is so dependent upon the will of the parties. Indeed, it was believed that legislative rules would unduly restrict and harm the conciliation process. Contractual rules were widely considered to be the suitable way to provide certainty and predictability. The UNCITRAL Conciliation Rules,[27] adopted in 1980, were prepared to offer parties an internationally harmonized set of rules suited for international commercial disputes. The Rules were also used as a model by many institutions that were drafting their own rules for offering conciliation or mediation services.

11. Nevertheless, States have been adopting laws on conciliation. They are doing so in order to respond to concerns by practitioners that contractual solutions alone do not completely meet the needs of the parties, while remaining conscious of the need to preserve the flexibility of conciliation. The single most important concern of parties in conciliation is to ensure that certain statements or admissions made by a party in conciliation proceedings will not be used as evidence against that party in other proceedings, and it was considered that a contractual solution was inadequate to accomplish this goal. In order to address this and other matters (such as the role of the conciliator in subsequent court or arbitral proceedings, the process for the appointment of conciliators, the broad principles applicable to the conciliation proceedings, and the enforceability of the settlement agreement), UNCITRAL decided to prepare a model law on the topic to support the increased use of conciliation. It was noted that while certain issues, such as the admissibility of certain evidence in subsequent judicial or arbitral proceedings or the role of the conciliator in subsequent proceedings, could typically be solved by reference to sets of rules such as the UNCITRAL Conciliation Rules, there were many cases where no such rules were agreed upon. The conciliation process might thus benefit from the establishment of non-mandatory legislative provisions that would apply when the parties mutually desired to conciliate but had not agreed on a set of conciliation rules. Moreover, in countries where agreements as to the admissibility of certain kinds of evidence were of uncertain effect, uniform legislation might provide useful clarification. In addition, it was pointed out with respect to certain issues, such as facilitating enforcement of settlement agreements resulting from conciliation, that the level of predictability and certainty required to foster conciliation could only be achieved through legislation.[28]

12. Conciliation proceedings may differ in procedural details depending on what is considered the best method to foster a settlement between the parties. The provisions in the Model Law governing such proceedings are designed to accommodate those differences and leave the parties and conciliators free to carry out the conciliatory process as they consider appropriate. Essentially, the provisions seek to strike a balance between protecting the integrity of the conciliation process, for example, by ensuring that the parties' expectations regarding the confidentiality of the conciliation are met while also providing maximum flexibility by preserving party autonomy.

B. The Model Law as a tool for harmonizing legislation

13. A model law is a legislative text that is recommended to States for incorporation into their national law. Unlike an international convention, model legislation does not require the State enacting it to notify the United Nations or other States that may have also enacted it. States are strongly encouraged, however, to inform the UNCITRAL secretariat of any enactment of the new Model Law (or any other model law resulting from the work of UNCITRAL).

14. In incorporating the text of the model legislation into its legal system, a State may modify or leave out some of its provisions. In the case of a convention, the possibility of changes being made to the

[27] United Nations publication, Sales No. E.81.V.6.

[28] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 342.

uniform text by the States parties (normally referred to as "reservations") is much more restricted; in particular, trade law conventions usually either totally prohibit reservations or allow only very few, specified ones. The flexibility inherent in model legislation is particularly desirable in those cases where it is likely that the State would wish to make various modifications to the uniform text before it would be ready to enact it as national law. Some modifications may be expected in particular when the uniform text is closely related to the national court and procedural system. This, however, also means that the degree of, and certainty about, harmonization achieved through model legislation is likely to be lower than in the case of a convention. Because of the flexibility inherent in a model law, the number of States enacting model legislation is likely to be higher than the number of States adhering to a convention. In order to achieve a satisfactory degree of harmonization and certainty, States should consider making as few changes as possible in incorporating the Model Law into their legal systems; however, if changes are made, they should remain within the basic principles of the Model Law. A significant reason for adhering as much as possible to the uniform text is to make the national law as transparent and familiar as possible for foreign parties, advisers and conciliators who participate in conciliations in the enacting State.

C. Background and history

15. International trade and commerce have grown rapidly with cross border transactions being entered into by a growing number of entities, including small and medium-sized ones. With the increasing use of electronic commerce, where business is frequently conducted across national boundaries, the need for effective and efficient dispute resolution systems has become paramount. UNCITRAL has drafted the Model Law to assist States in designing dispute resolution processes that are intended to reduce costs of dispute settlement, foster maintaining a cooperative atmosphere between trading parties, prevent further disputes and inject certainty into international trade. By adopting the Model Law, and by educating parties engaged in international commerce about its purposes, the parties will be encouraged to seek non-adjudicative dispute settlement methods that will increase cost-effectiveness in the marketplace.

16. The objectives of the Model Law, which include encouraging the use of conciliation and providing greater predictability and certainty in its use, are important for fostering economy and efficiency in international trade.

17. The Model Law was developed in the context of recognition of the increasing use of conciliation as a method for settling commercial disputes. The Model Law was also designed to provide uniform rules in respect of the conciliation process. In many countries, the legal rules affecting conciliation are set out in various pieces of legislation and take differing approaches on issues such as confidentiality and evidentiary privilege and exceptions thereto. Uniformity on such topics helps to provide greater integrity and certainty in the conciliation process. The benefits of uniformity applicable law may not be self-evident.

18. At its thirty-second session, in 1999, the Commission had before it a note entitled "Possible future work in the area of international commercial arbitration" (A/CN.9/460). Welcoming the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration, the Commission generally considered that the time had come to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration (1985),[29] as well as the use of the UNCITRAL Arbitration Rules (1976)[30] and the UNCITRAL Conciliation Rules, and to evaluate in the universal forum of the Commission the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices. The Commission entrusted the work to one of its working groups, which it named Working Group II (Arbitration and Conciliation) (hereinafter referred to as "the Working Group"), and decided that the priority items should include work on conciliation. The Model Law was drafted over four sessions of the Working Group: the thirty-second, thirty-third, thirty-fourth and thirty-fifth sessions (reports of

[29] United Nations publication, Sales No. E.99.V.3.
[30] United Nations publication, Sales No. E.77.V.6.

those sessions are published as documents A/CN.9/468, A/CN.9/485, A/CN.9/487 and A/CN.9/506, respectively).

19. At its thirty-fifth session, the Working Group completed its examination of the provisions and considered the draft guide to enactment. The secretariat revised the text of the draft guide to enactment and use of the Model Law, based on the deliberations in the Working Group. The draft model law, together with the draft guide to enactment and use, was circulated to member States and observers for comment and presented to the Commission for review and adoption at its thirty-fifth session, held in New York from 17 to 28 June 2002 (see A/CN.9/506, para. 13). Comments received were compiled in document A/CN.9/513 and addenda 1 and 2. UNCITRAL adopted the Model Law by consensus on 24 June 2002 (for the deliberations of the Commission on that topic, see the report of UNCITRAL on the work of its thirty-fifth session).[31] During the preparation of the Model Law, some 90 States, 12 intergovernmental organizations and 22 non-governmental international organizations participated in the discussion. Subsequently, the General Assembly adopted the resolution reproduced at the beginning of this publication recommending that all States give due consideration to the enactment of the Model Law, in view of the desirability of uniformity of the law of dispute settlement procedures and the specific needs of international commercial conciliation practice. The preparatory materials for the Model Law have been published in the six official languages of the United Nations (Arabic, Chinese, English, French, Russian and Spanish). These documents are available on the UNCITRAL web site (www.uncitral.org; under "Travaux préparatoires"). The documents are also compiled in the UNCITRAL Yearbook.

D. Scope

20. In preparing the draft model law and addressing the subject matter before it, the Commission had in mind a broad notion of conciliation, which could also be referred to as "mediation", "alternative dispute resolution", "neutral evaluation" and similar terms. The Commission's intent was for the adopted model law to apply to the broadest range of commercial disputes. The Commission agreed that the title of the model law should refer to international commercial conciliation. While a definition of "conciliation" is provided in article 1, the definitions of "commercial" and "international" are contained in a footnote to article 1 and in paragraph 4 of article 1, respectively. While the Model Law is restricted to international and commercial cases, the State enacting the Model Law may consider extending it to domestic, commercial disputes and some non-commercial ones (*see footnote 1 to article 1).*

21. The Model Law should be regarded as a balanced and discrete set of provisions and could be enacted as a single statute or as a part of a law on dispute settlement.

E. Structure of the Model Law

22. The Model Law contains definitions, procedures and guidelines on related issues based upon the importance of party control over the process and outcome.

23. Article 1 delineates the scope of the Model Law and defines conciliation in general terms and its international application in specific terms. These are the types of provisions that would generally be found in legislation to determine the range of matters that the Model Law is intended to cover. Article 2 provides guidance on the interpretation of the Model Law. Article 3 expressly provides that all the provisions of the Model Law except for article 2 and paragraph 3 of article 6 may be varied by party agreement.

24. Articles 4-11 cover procedural aspects of the conciliation. These provisions have particular application to circumstances where the parties have not adopted rules governing a conciliation; thus, they are designed to be in the nature of default provisions. They are also intended to assist parties in dispute that may have defined dispute resolution processes in their agreement, in this context acting as a supplement to their agreement. In structuring the Model Law, the focus was on seeking to avoid

[31] *Official Records of the General Assembly, Fifty-seventh session, Supplement No. 17* (A/57/17), paras. 13-177.

situations where information from conciliation proceedings spill over into arbitral or court proceedings.

25. The remaining provisions of the Model Law (articles 12-14) address post-conciliation issues to avoid uncertainty resulting from an absence of statutory provisions governing those issues.

F. Assistance from the UNCITRAL secretariat

26. In line with its training and assistance activities, the UNCITRAL secretariat may provide technical consultations for Governments preparing legislation based on the Model Law. UNCITRAL provides technical consultation for Governments considering legislation based on other UNCITRAL model laws or considering adhesion to one of the international trade law conventions prepared by UNCITRAL.

27. Further information concerning the Model Law, as well as the Guide and other model laws and conventions developed by UNCITRAL, may be obtained from the secretariat at the address below.[32] The secretariat welcomes comments concerning the Model Law and the Guide, as well as information concerning enactment of legislation based on the Model Law.[33]

UNCITRAL CONCILIATION RULES

Article 1 APPLICATION OF THE RULES

(1) These Rules apply to conciliation of disputes arising out of or relating to a contractual or other legal relationship where the parties seeking an amicable settlement of their dispute have agreed that the UNCITRAL Conciliation Rules apply.

(2) The parties may agree to exclude or vary any of these Rules at any time.

(3) Where any of these Rules is in conflict with a provision of law from which the parties cannot derogate, that provision prevails.

Article 2 COMMENCEMENT OF CONCILIATION PROCEEDINGS

(1) The party initiating conciliation sends to the other party a written invitation to conciliate under these Rules, briefly identifying the subject of the dispute.

(2) Conciliation proceedings commence when the other party accepts the invitation to conciliate. If the acceptance is made orally, it is advisable that it be confirmed in writing.

(3) If the other party rejects the invitation, there will be no conciliation proceedings.

(4) If the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate. If he so elects, he informs the other party accordingly.

Article 3 NUMBER OF CONCILIATORS

There shall be one conciliator unless the parties agree that there shall be two or three conciliators. Where there is more than one conciliator, they ought, as a general rule, to act jointly.

Article 4 APPOINTMENT OF CONCILIATORS

(1) *(a)* In conciliation proceedings with one conciliator, the parties shall endeavour to reach agreement on the name of a sole conciliator;
(b) In conciliation proceedings with two conciliators, each party appoints one conciliator;
(c) In conciliation proceedings with three conciliators, each party appoints one conciliator. The parties shall endeavour to reach agreement on the name of the third conciliator.

(2) Parties may enlist the assistance of an appropriate institution or person in connexion with the appointment of conciliators. In particular,

[32] UNCITRAL secretariat. Vienna International Centre. PO Box 500. A 1400 Vienna. Austria. Telephone: +(43) (1) 26060-4060 or 4061. Telefax: +(43) (1) 26060-5813. Electronic mail: uncitral@uncitral.org. Internet home page: http://www.uncitral.org.

[33] See further Part III of the UN text for a detailed Article by Article commentary on the Model Law

(a) A party may request such an institution or person to recommend the names of suitable individuals to act as conciliator; or

(b) The parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.

In recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

Article 5 SUBMISSION OF STATEMENTS TO CONCILIATOR

(1) The conciliator,[34] upon his appointment, requests each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party sends a copy of his statement to the other party.

(2) The conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party sends a copy of his statement to the other party.

(3) At any stage of the conciliation proceedings the conciliator may request a party to submit to him such additional information as he deems appropriate.

Article 6 REPRESENTATION AND ASSISTANCE

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons are to be communicated in writing to the other party and to the conciliator; such communication is to specify whether the appointment is made for purposes of representation or of assistance.

Article 7 ROLE OF CONCILIATOR

(1) The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

(2) The conciliator will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

(3) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.

(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.

Article 8 ADMINISTRATIVE ASSISTANCE

In order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

Article 9 COMMUNICATION BETWEEN CONCILIATOR AND PARTIES

(1) The conciliator may invite the parties to meet with him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately.

(2) Unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place will be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings.

[34] In this and all following articles, the term "conciliator" applies to a sole conciliator, two or three conciliators, as the case may be.

Article 10 DISCLOSURE OF INFORMATION

When the conciliator receives factual information concerning the dispute from a party, he discloses the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate. However, when a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator does not disclose that information to the other party.

Article 11 CO-OPERATION OF PARTIES WITH CONCILIATOR

The parties will in good faith co-operate with the conciliator and, in particular, will endeavour to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings.

Article 12 SUGGESTIONS BY PARTIES FOR SETTLEMENT OF DISPUTE

Each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

Article 13 SETTLEMENT AGREEMENT

(1) When it appears to the conciliator that there exist elements of a settlement which would be acceptable to the parties, he formulates the terms of a possible settlement and submits them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

(2) If the parties reach agreement on a settlement of the dispute, they draw up and sign a written settlement agreement.[35] If requested by the parties, the conciliator draws up, or assists the parties in drawing up, the settlement agreement.

(3) The parties by signing the settlement agreement put an end to the dispute and are bound by the agreement.

Article 14 CONFIDENTIALITY

The conciliator and the parties must keep confidential all matters relating to the conciliation proceedings. Confidentiality extends also the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

Article 15 TERMINATION OF CONCILIATION PROCEEDINGS

The conciliation proceedings are terminated:

(a) By the signing of the settlement agreement by the parties, on the date of the agreement; or

(b) By a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or

(c) By a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) By a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

Article 16 RESORT TO ARBITRAL OR JUDICIAL PROCEEDINGS

The parties undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.

Article 17 COSTS

(1) Upon termination of the conciliation proceedings, the conciliator fixes the costs of the conciliation and gives written notice thereof to the parties. The term "costs" includes only:

(a) The fee of the conciliator which shall be reasonable in amount;

(b) The travel and other expenses of the conciliator;

[35] The parties may wish to consider including in the settlement agreement a clause that any dispute arising out of or relating to the settlement agreement shall be submitted to arbitration.

(c) The travel and other expenses of witnesses requested by the conciliator with the consent of the parties;
(d) The cost of any expert advice requested by the conciliator with the consent of the parties;
(e) The cost of any assistance provided pursuant to articles 4, paragraph (2)*(b)*, and 8 of these Rules.

(2) The costs, as defined above, are borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party are borne by that party.

Article 18 DEPOSITS

(1) The conciliator, upon his appointment, may request each party to deposit an equal amount as an advance for the costs referred to in article 17, paragraph (1) which he expects will be incurred.

(2) During the course of the conciliation proceedings the conciliator may request supplementary deposits in an equal amount from each party.

(3) If the required deposits under paragraphs (1) and (2) of this article are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination to the parties, effective on the date of that declaration.

(4) Upon termination of the conciliation proceedings, the conciliator renders an accounting to the parties of the deposits received and returns any unexpended balance to the parties.

Article 19 ROLE OF CONCILIATOR IN OTHER PROCEEDINGS

The parties and the conciliator undertake that the conciliator will not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings. The parties also undertake that they will not present the conciliator as a witness in any such proceedings.

Article 20 ADMISSIBILITY OF EVIDENCE IN OTHER PROCEEDINGS

The parties undertake not to rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings;

(a) Views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;
(b) Admissions made by the other party in the course of the conciliation proceedings;
(c) Proposals made by the conciliator;
(d) The fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

MODEL CONCILIATION CLAUSE

Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force. (The parties may agree on other conciliation clauses.)

Self Assessment Exercise No 9d

1 To what extent, if at all, does the Model Conciliation Law provide a useful model for adoption by the British Legislature?

2. To what extent, if at all, would it be desirable for the Model Conciliation Rules to govern all mediation procedures in the United Kingdom?