

The development of commercial mediation in South
Africa in view of the experience in Europe, North
America and Australia

by

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DECLARATION

I, Ronán Feehily, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university. I authorise the University to reproduce for the purpose of research either the whole or any portion of the contents in any manner whatsoever.

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Date: 28 August 2008

DEDICATION

To my mother
And the memory of my father and brother

In memory of my supervisor Mike Larkin

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ABSTRACT

Mediation is not a novel process in South Africa. It was used as the primary method of dispute resolution in some traditional pre-industrial societies. Corporate South Africa is beset by conflict and urgently requires processes such as mediation which dignify and empower participants to tackle commercial conflict at source.

Statutes, case law, books, journals and numerous other publications were reviewed in order to assess the relevant issues in the development of commercial mediation and investigate how this process could become a viable alternative to arbitration and the court system in South Africa. Empirical research gleaned from interviews conducted in Cape Town and Johannesburg reflects the experience of those who currently act as commercial mediators.

The ultimate aim of this process is to reach agreement. In light of the extensive jurisprudence that has developed in this area in other jurisdictions, careful drafting of agreements can go a long way in avoiding enforcement complications. The conversion of a settlement agreement into a judgment or award has proved useful on the small number of occasions when compliance with a settlement appears that it may be an issue.

A delicate balance is required between supporting mediation, on the one hand, and not freezing litigation or upholding illegality, on the other. Absolute rules or uniform statutes, while appearing to offer straightforward rules for an informal process, can in practice prove overreaching or inappropriate. A possible middle path could protect mediation confidentiality and also allow evidence about the mediation to be admitted in limited circumstances to be specified by the court on a case-by-case basis.

As the use of this process develops, there is inevitably a need to ensure that mediators are sufficiently and continuously trained and accredited. Clarity will also be required regarding ethical and professional standards. There must be a clear understanding of the role of the commercial mediator. Lawyers must also be adequately trained in order to appreciate the distinct role they have to play in the process. Education in mediation should become an essential part of law school curricula, long before lawyers enter into commercial practice.

What the mediation industry needs is a 'tipping point', to propel mediation into the business mainstream. The legislature has already adopted the concept of a costs sanction in specific circumstances. Legislative or judicial intervention will prove critical if this process is to develop as a viable alternative.

Despite the necessity of formal statutory or judicial persuasion, the arguments for the development and systematic use of mediation remain best understood and adopted from the voluntary standpoint to see what clients really want, and how commercial mediation can be built into the thinking of law firms, the Bar and, most significantly of all, the parties who are their clients.

ABBREVIATIONS

AAA	American Arbitration Association
ABA	American Bar Association
ACR	Association for Conflict Resolution (USA)
ADR	alternative dispute resolution
ADRASA	Alternate Dispute Resolution Association of South Africa
AFSA	Arbitration Foundation of South Africa
CCMA	Commission for Conciliation Mediation and Arbitration
CEDR	Centre for Effective Dispute Resolution
CPR	Civil Procedure Rules (England)
EC	Evidence Code (California, USA)
EU	European Union
ICC	International Chamber of Commerce
IMSSA	Independent Mediation Service of Southern Africa
IOD	Institute of Directors
JAMS	Judicial Arbitration Mediation Services
LCIA	London Court of International Arbitration
SADC	Southern African Development Community
SCMA	Southern California Mediation Association
SPCA	Short Process Court and Mediation in Certain Civil Cases Act 2001 (South Africa)
UMA	Uniform Mediation Act 2001 (USA)
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
WIPO	World Intellectual Property Organisation

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CHAPTER ONE: INTRODUCTION

In jurisdictions such as England,¹ the USA and Australia, where the common law is the foundation of legal principle, litigants are likely to have access to a sophisticated and rigorous legal process. In order to achieve a judgment or award, lengthy pleadings will be exchanged, document disclosure undertaken, witness statements prepared and exchanged, and a full trial will ensue with a judge or arbitrator hearing oral evidence, examination, cross-examination, and speeches from lawyers. The system is based on the presumption that there is a correct way of deciding every issue in dispute and those involved in the process work within that presumption. The system, by its nature, is adversarial. As one commentator put it, the assumption is that if you let the parties engage in battle in a controlled environment, the cut and thrust of the process will elicit the important facts and ensure that all relevant arguments are adduced as an aid to the judge or arbitrator in reaching a conclusion.²

For those whose rights are being tested or contested the expense has become onerous. Clients are advised that even disputes over millions of pounds cannot economically be taken to trial.³ As a result, there has been a move in such jurisdictions from court adjudication and arbitration towards mediation.

Many years ago, former US Chief Justice Warren Burger observed that people want a rapid resolution of their disputes. He wrote that ‘[t]he notion that ordinary people want black-robed judges, well dressed lawyers and fine courtrooms as settings to resolve their disputes is incorrect. People with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible.’⁴ The emerging popularity of commercial mediation as an alternative form of dispute resolution would appear to be a realisation of this logic.

¹ References to England include Wales, as they are parts of the same jurisdiction.

² Fergus Armstrong ‘Business Litigation and the Litigation Business, Getting to Settlement through Mediation’ 2004 *Public Affairs Ireland* at 4.

³ Philip Naughton QC ‘Enforcement of Multi-Tiered Dispute Resolution Clauses’ October 2001 IBA Section on Business Law *Arbitration and ADR* 10.

⁴ Chief Justice Warren Burger ‘Our Vicious Legal Spiral’ (1977) 22 *Judges Journal* 49.

The mediation rationale

When people in business conclude an agreement, such as a sale, lease, agency, joint venture, partnership or any kind of contract, they take upon themselves a number of legal rights and obligations. As time passes and circumstances change, their enthusiasm or ability to perform their obligations may diminish, so that one of the contracting parties cannot comply with the contract as initially drafted.⁵

Litigation usually results, which in turn causes communication between the parties to shut down, the vacuum being filled by lawyers' letters, pleadings and other legal notices which slowly moves the parties towards a distant trial date, characterising what has been described as the 'quintessence of any State-sponsored adversarial process of adjudicative dispute resolution.'⁶

Lovenheim points out that the legal system is not designed to solve people's problems, it has the loftier and more abstract goal of finding the truth. He suggests that truth finding and problem solving are not always the same thing, and that when parties have a dispute, rather than finding the truth, they are likely to want is to have their problem solved, quickly, fairly and inexpensively so that they can get on with their lives.⁷

Parties in dispute should not have to tolerate an experience that may resemble, to paraphrase author Jerold S Auerbach, 'a sudden regression to childhood', where they do not understand the procedures or the language, where the lawyer assumes the role of a parent and the parties become the dependent children, and where 'the judge looms as a menacing authority figure, empowered to divest you of property or liberty.'⁸

Logic suggests that dealing with disputes through litigation is not always the most advantageous way to do business. It has been pointed out that the purpose of entering into a business relationship is to create shared wealth, so that when a dispute arises, it should not be necessary to move from a consensus-seeking relationship straight into an adversarial relationship, and that disputing parties should be encouraged to focus their minds on the most appropriate way to further their business interests.⁹

⁵ Mark Antrobus and Roland Sutherland 'Some ADR Techniques in Commercial Disputes: Prospects for Better Business' in Paul Pretorius (ed) *Dispute Resolution* at 164.

⁶ Antrobus and Sutherland (note 5) at 164.

⁷ Peter Lovenheim *Mediate, Don't Litigate* at 4.

⁸ Jerold S Auerbach *Justice Without Law?* at viii.

⁹ Antrobus and Sutherland (note 5) at 164.

Whatever the reason for the dispute, unplanned legally unforeseeable circumstances may have persuaded one party that it cannot financially afford to comply with the contract. It has been suggested that in such circumstances there is a reasonable probability that an attempt to discuss the problems frankly with all concerned parties, including their origins, and to devise a workable solution acceptable to all, can put an end to a dispute before the radical process of litigation must be embarked upon.¹⁰

As Antrobus and Sutherland point out, such considerations lead inevitably to the implication that an honest effort to do that second most difficult of things after thinking, namely, talking to each other, should happen unless impossible. If it does, what can follow is good faith negotiation through which agreement may be achieved. However, commercial parties will know from experience that such a scenario occurs rarely, but what they may not fully appreciate is that the failure of direct communication and good faith negotiation is not, on its own, a sufficient reason to resort to litigation.¹¹

The opportunity may still exist for the application of consensual skills rather than the use of the lawyers' adversarial skills, and parties should be encouraged to reflect on whether the impasse can be resolved without resorting to litigation and by pursuing business interests rather than legal rights. If the commercial mediation option is chosen legal rights are not abandoned unless and until a new agreement is reached and the fear that suggesting assisted settlement is indicative of weakness is often unfounded.¹²

The essence of the process and procedures called commercial mediation is the idea that each party should put its interests above its rights and/or obligations in law and in good faith reach out to the other party to do the same. When one has tried, and direct negotiations break down, the dispute may be ripe for mediation. As mediation is founded upon interests and not upon rights, parties should be encouraged to recognise that the mediation of a business dispute has a lot more in common with the objective of the contract entered into than litigation can ever have.¹³ Litigation always carries with it a price that business litigants must fund, both directly through legal costs, and indirectly in terms of management time. As Cloke and Strachan observed in respect of the US

¹⁰ Antrobus and Sutherland (note 5) at 165.

¹¹ Antrobus and Sutherland (note 5) at 165.

¹² See Antrobus and Sutherland (note 5) at 165.

¹³ Antrobus and Sutherland (note 5) at 165.

experience twenty years ago: ‘To proceed from complaint to lawsuit without attempting settlement through the auspices of a trained mediator no longer makes sense.’¹⁴

Commercial parties in dispute find that mediation works in the appropriate circumstances as it is forward-looking rather than backward-looking. While the law looks to the past to determine who was right and who was wrong, mediation looks to the future to find a solution with which both parties can live. In law, the court uses its power to dictate a solution, while in mediation parties empower themselves to find their own solution.¹⁵

Historical background

The concept of mediation as a form of dispute resolution goes back thousands of years, notably in certain Asian countries.¹⁶ Mediation played an important role in Chinese history, particularly since the period of the Han Dynasty, when litigation was seen as trivialising and commercialising values such as human dignity, conscience, reputation, pain and morality.¹⁷

Chinese society recognised that a dispute affected more than the primary disputing parties, but the lives of numerous other people, and that conciliation and consensus were the goals to be achieved. Mediation was the most frequently used mechanism for resolving disputes, and it derived much of its effectiveness from the fact that the disputants were members of interlocking networks of families, clans, villages and tribes that also participated in the dispute resolution process, with the principal aim of restoring social harmony.¹⁸

The Greeks provide the earliest substantial body of evidence on arbitration, with the best evidence coming from Athens. In the ancient Greek world, including Ptolemaic Egypt, arbitration was the norm and in arbitration the mediation element was primary. Regardless of the formality of the procedure, mediation was attempted first and a

¹⁴ Kenneth Cloke and Angus Strachan *Mediation and Prepaid Legal Plans* (1987) 18 *Mediation Quarterly* 94.

¹⁵ See Lovenheim (note 7) at 14.

¹⁶ Mediation is believed to have traceable origins that go back to the Chou Dynasty (BC1100-256), more specifically to the writings of Confucius (BC551-479). See www.who2.com/confucius.html (last visited 19 June 2008). See generally, Donald C Clarke ‘Dispute Resolution in China’ in Tahirih V Lee (ed) *Contract, Guanxi, and Dispute Resolution in China* at 369.

¹⁷ J T Mowatt ‘Mediation and Chinese Legal Theory’ (1989) 106 *SALJ* at 349.

¹⁸ Mowatt (note 17) at 349.

mediated settlement was preferable, so that where possible, an adjudication may be incorporated into an agreement. Conversely, a settlement might be converted into an award, for easier enforcement. The processes of mediation and arbitration often intermingled, but they were conceptually distinct, as shown in the precision of terminology and the formal requirement of swearing an oath before moving to adjudication.¹⁹

Ancient Rome provides a surprising dearth of direct evidence of mediation, possibly because public arbitration was fast and inexpensive, and private ad hoc arbitration didn't cost anything. It was the duty of every decent citizen, *bonus homo*, to participate. Yet it seems that mediation featured centrally. The philosopher, Favorinus, said in the second century AD:²⁰

It is often asked whether it is fit and proper for a judex after the case has been heard, if there seems to be a chance to settle, to postpone his adjudicatory function for a little while and play the part of a mutual friend and a kind of peacemaker.

Similarly, as Jerold Auerbach has observed, merchants and business people have for centuries 'been among the outspoken proponents of nonlegal dispute settlement.' They have strived 'to elude lawyers and courts and to retain control over their disagreements.' It was the business community who pushed for laws to allow out of court arbitration, and the experience in the USA is that they are among those most eagerly embracing mediation.²¹

Nor is mediation a novel process in South Africa. It was used as the primary method of dispute resolution in some traditional pre-industrial societies, and more recently it has been employed with success to resolve industrial conflicts and a range of disputes in other fields.²² Indeed the perception exists that mediation as a method of dispute resolution has more in common with traditional African methods of dispute resolution than the usual adversarial style of arbitration practice associated with colonial arbitration legislation of English origin.²³ While the resolution of community-based

¹⁹ Derek Roebuck *Ancient Greek Arbitration* at 158. See also Derek Roebuck 'The Myth of Modern Mediation' (2007) 73 *Arbitration* 106.

²⁰ Aulus Gellius *Attic Nights* 14.2.13-14.2.16; Derek Roebuck and Bruno de Loynes de Fumichon *Roman Arbitration* at 69. For an overview of the historical background to mediation from the ancient world to modern times, see Derek Roebuck 'The Myth of Modern Mediation' (2007) 73 *Arbitration* 105-116.

²¹ Jerold S Auerbach (note 8) at 5.

²² Charles Nupen 'Mediation' in Paul Pretorius (ed) *Dispute Resolution* at 50.

²³ South African Law Commission Project 94 *Report on Domestic Arbitration* (2001) at 9.

disputes has traditionally been seen as part of *ubuntu*, many believe that this concept is developing in the corporate realm in the form of commercial mediation.²⁴

The South African economy

South Africa's economy has been in the upward phase of the business cycle since September 1999, the longest period of expansion in its recorded history. During the upswing, from September 1999 to June 2005, the annual economic growth rate averaged 3.5 per cent a year. By contrast, in the decade prior to 1994, economic growth averaged less than 1 per cent a year. In 2006, the economy grew by 5%, representing the highest rate of economic growth in 25 years.²⁵

The rand weakened after 1994 and was affected by three crises, but its fortunes changed in 2002, when the dollar declined and commodity prices increased. The strong rand largely accounted for South Africa's low inflation levels and lower interest rates. Many manufacturers benefited through increased productivity, as it was cheaper to import raw materials and machinery. Car manufacturing, for instance, boomed, and the tourist industry, which was not adversely affected by the 11 September attacks, continues to grow rapidly. While exports were originally adversely affected, the rand declined by 14.4% in the 12 months leading up to March 2007, which led to a substantial increase in the competitiveness of South African exports in international markets. According to the South African Reserve Bank, there is no sign of this period of expansion coming to an end.²⁶

An expanding economy such as South Africa's invariably encourages enterprise. According to the Department of Trade and Industry, the number of small businesses grew by 150% between 1995 and 2006, while overall; there are an estimated 3 million small-to medium-sized businesses in South Africa.²⁷ Experience in other countries shows that where an economy develops in such a fashion, a substantial number of

²⁴ Amanda Bougardt and Mervyn King 'The Only Place "Litigation" Should Precede "Mediation" is in the Dictionary' 1 February 2007 *Without Prejudice* at 18.

²⁵ www.info.gov.za/aboutsa/economy.htm (last visited 19 June 2008).

²⁶ www.info.gov.za/aboutsa/economy.htm (last visited 19 June 2008).

²⁷ See www.info.gov.za/aboutsa/economy.htm (last visited 19 June 2008) for a more extensive discussion of South Africa's economic development.

disputes are likely to arise, primarily between small to medium sized enterprises.²⁸ Mediation can play a key role in the resolution of such disputes.

The global economy

It has been suggested that it would be difficult to overstate the scale of global economic change in the last century, and in particular the ‘global village’ effect it has created.²⁹ With the volume of world trade increasing steadily, the world is certainly becoming smaller, and national boundaries are becoming more permeable and are gradually losing their economic significance. Modern technologies and the continuing shift towards market economies and free trade throughout the world are creating an increasingly globalised world economy, and the regional integration of markets in trading blocks is changing the parameters of business activities.³⁰

The growing internationalisation of competition and the increasing costs of research and development, has lead to global companies forming ‘strategic alliances’ to develop sophisticated new technologies or to manufacture and distribute their products, with even smaller companies and individual entrepreneurs dealing with customers, suppliers, competitors and potential partners from numerous countries.³¹

Business peoples engage in daily trade on a truly global scale, and businesses thousands of miles apart communicate daily, in seconds, with people they have never met.³² Over the last 15 years, with the demise of apartheid, South Africa has been emerging to renew its role in these developments.

It has been pointed out that the rapid pace of the globalisation of markets has not been matched by an appropriate responsiveness from the individuals and organisations involved, and as conflict is inherent in both competition and co-operation, the potential for transnational business disputes inevitably arises.³³

²⁸ Ercus Stewart and Anthony Moore ‘Mediation in Ireland, An Improving Environment’ May 2005 *Commercial Law Practitioner* at 118.

²⁹ See Bill Marsh ‘The Development of Mediation in Central and Eastern Europe’ in Christopher Newmark and Anthony Monaghan (eds) *Mediators on Meditation: Leading Mediator Perspectives on the Practice of Commercial Mediation* at 385.

³⁰ See Christian Buhring-Uhle, Lars Kirchhoff and Gabriele Scherer *Arbitration and Mediation in International Business* at 5.

³¹ See Buhring-Uhle, Kirchhoff and Scherer (note 30) at 6.

³² Marsh (note 29) at 385.

³³ Buhring-Uhle, Kirchhoff and Scherer (note 30) at 6.

It seems logical that national systems for resolving disputes, such as courts, should reflect the needs and demands of the communities they serve, so that they are seen simply as a service to enable society to function, rather than being an end in themselves.³⁴ With the advance of the global economy, the limitations and inadequacy of state-based legal systems have become more obvious as they are tied to:³⁵

- a specific legal system, with its own concepts and paradigms, often incomprehensible to and inconsistent with those from other systems;
- a specific geographic area; and
- a legally prescriptive and specific set of outcomes.

The motivation to find an alternative system has arisen from the fact that none of these limitations are responsive to the needs of disputing commercial parties from different systems.³⁶

While arbitration proved that it can be geographically flexible, it remains tied to a particular legal framework and to particular outcomes. Online facilities have enhanced this flexibility. The World Intellectual Property Organisation (WIPO) in Geneva, for example, operates an online arbitration system for the resolution of domain name disputes, where disputes can be referred and resolved in the different parties' languages without the need for them to leave their offices or even their countries. Mediation's ability to operate independently of legal and geographical constraints makes it perfectly placed to serve the needs of the global economy.³⁷

Increased communication between countries inevitably leads to the spread of ideas and practices, as was originally the case with potatoes and tobacco; it is now true of changes to legal systems. It is widely acknowledged that the experience of mediation in the US was the main source of inspiration for the development of mediation in the UK.³⁸ Similarly, widespread use of mediation has been a source of inspiration for reforms in other parts of Africa such as Nigeria.³⁹

³⁴ See Marsh (note 29) at 385.

³⁵ Marsh (note 29) at 386.

³⁶ Marsh (note 29) at 386.

³⁷ See Marsh (note 29) at 386.

³⁸ See Marsh (note 29) at 386.

³⁹ See Ifeoma Dukes 'Recent Developments in Mediation, Nigeria' IBA Legal Practice Division *Mediation Committee Newsletter* April 2005 at 27.

The legal system

As noted above, civil litigation involves placing a dispute before a judge or jury in order to examine a past event and determine how much money one party should pay the other party for what is usually a private conduct or wrong. Creo points out that in most jurisdictions civil cases are primarily contract or tort/delict cases, while only a small proportion of civil cases involve public policy, constitutional rights or other issues affecting the public.⁴⁰ Most civil cases involve money, and even when a claim seeks more than this, it seems that there is often a strong systemic pressure to re-frame the dispute into a purely economic one. While clients may be seeking restorative and retributive justice, it seems that lawyers usually inform their clients that all they can do for them is file a lawsuit seeking financial compensation, believing that it is preferable to be candid from the beginning about the limitations of the legal system and the lawyer's role in it.⁴¹

While courts in jurisdictions such as England were historically divided into law and equity divisions, today this division exists mostly in name only, as equitable courts can administer justice and order remedies beyond compensation for losses.⁴² Commentators have remarked that as society becomes more complex, courts have diminished, if not eliminated, equity's separate function in the justice system, for example, current evidentiary rules give little effect to equity in these jurisdictions as rules limiting evidence of subsequent remedial repair seem to avoid prejudice, encourage repairs and confirm that juries cannot order disputants to modify their behaviour.⁴³ Further actions such as apologies or changes in policies or practices do not seem to be ordered in many court cases, and even where courts still have the technical power, it seems that they rarely exercise it in claims where monetary relief is seen as available and adequate so that when injunctive relief is available, courts frequently focus on the compensatory aspects of a possible verdict.⁴⁴

As noted above, arbitration was originally created as a true alternative to the judicial system, with Aristotle viewing it as a source of equity where arbitrators

⁴⁰ Robert A Creo 'Business and Practice Issues of US Mediators' in Christopher Newmark and Anthony Monaghan (eds) *Mediators on Meditation: Leading Mediator Perspectives on the Practice of Commercial Mediation* at 310.

⁴¹ See Creo (note 40) at 311.

⁴² See Creo (note 40) at 311.

⁴³ See Creo (note 40) at 311.

⁴⁴ Creo (note 40) at 311.

employed a broad discretion in order to fashion remedies, although this perception of the process is not the contemporary viewpoint in the legal community.⁴⁵ It seems that over the past few decades arbitration has been viewed more as a choice of forum rather than as an alternative process, having become ‘legalised’, with arbitrators being asked to act as trial judges in applying statute and common law to claims.⁴⁶ The prominent ADR organisations in the USA, such as the American Arbitration Association (AAA), CPR Institute for Dispute Resolution, Judicial Arbitration Mediation Services (JAMS), and the National Arbitration Forum, promote arbitration in this way, and many observers believe this is one of the principal reasons why the number of civil trials in the USA has dropped to less than 2 per cent of cases filed from an historical average of slightly below 5 per cent.⁴⁷ The impact of mediation and other judicial, legislative, and corporate initiatives has no doubt also contributed to this trend, while the diminution of courts of equity and equitable remedies in arbitration are also contributing factors to mediation serving as an alternative process, with a variety of remedies available that are not available at law or from a jury system.⁴⁸

South African lawyers essentially apply a common law process to laws drawn from the old Dutch civil law. The system is a kind of uncodified civil law, which co-exists with traditional community dispute management such as the *makgotla*. While the legal profession in South Africa has been hesitant to embrace the mediation of civil legal disputes, the fall of the apartheid system has opened the entire legal spectrum to ADR and put mediation very clearly on the South African map.⁴⁹

While the author is drawing largely from the experiences in common-law jurisdictions, it has been suggested that mediation, as a universal process, has the ability to transcend legal norms and systemic difficulties, and as such leaves the civil/common law distinction largely redundant, for the purposes of a mixed legal jurisdiction such as South Africa.⁵⁰ The heavy reliance upon common-law jurisdictions in this thesis stems largely from the fact that mediation is more developed in these jurisdictions. As some of the suggestions discussed in this thesis are taken from common-law sources, they would need slight modification in order to be applicable in South Africa. For example, as

⁴⁵ Creo (note 40) at 311.

⁴⁶ Creo (note 40) at 311.

⁴⁷ See Creo (note 40) at 311. See also chapter 10 at 268 for a discussion of this issue.

⁴⁸ Creo (note 40) at 311.

⁴⁹ Alexander (ed) *Global Trends in Mediation* at 8. See also Mohamed Paleker ‘The Changing Face of Mediation in South Africa’ in Alexander (ed) *Global Trends in Mediation* at 301.

⁵⁰ See Alexander (note 49) at 4.

mentioned above, in common-law jurisdictions courts were traditionally divided into law and equity divisions. Consequently, relief such as specific performance is seen as an equitable remedy. South African courts draw no such distinction between law and equity.

As acknowledged by the Law Commission, the justice system in South Africa is under constant scrutiny and criticism from various interest groups, including business, continually looking for more efficient, more effective, less cumbersome, less expensive and often less conflicting ways of resolving disputes.⁵¹ This is the case in most advanced countries, even where there are very sophisticated judicial systems.⁵²

Similar to the experience elsewhere, the most common general complaint about the current system of justice in South Africa is that the cost of litigation is prohibitive.⁵³ The Law Commission recognised that this prevents meaningful access to courts and even those with access are often victims of delay, which means added expense and for many people justice delayed is justice denied. Delay combined with the cost of litigation has put justice beyond the reach of many and the incomprehensibility and adversarial nature of the process together with a resulting lack of control, where parties can only participate in an indirect manner, has led to a sense of frustration and disempowerment.⁵⁴ Courts offering only trials are also seen as being limited in their response to legal disputes, and similar to the experience elsewhere, the Law Commission concluded that litigation often creates winners and losers and even winners may feel like losers given the limited nature of the legal remedies that are imposed from a restrictive range of win or lose options.⁵⁵

Increasing harmonisation

Consistent with and as a consequence of increasing globalisation, there has been a move towards harmonisation of laws, practices, and societies. In the legal context, the harmonisation of dispute resolution systems is an essential part of the process.⁵⁶

⁵¹ See South African Law Commission Issue Paper 8 Project 94 *Alternative Dispute Resolution* (1997) at 5.

⁵² AM Omar 'AFSA: The need for Alternative Dispute Resolution' address delivered at the opening of Arbitration House as extracted in (1996) 9 *Consultus* at 126.

⁵³ South African Law Commission (note 51) at 5.

⁵⁴ South African Law Commission (note 51) at 5.

⁵⁵ South African Law Commission (note 51) at 5.

⁵⁶ Marsh (note 29) at 386.

Globally, the trend can be seen through the United Nations (UN), where the United Nations Commission on International Trade Law (UNCITRAL) has developed a number of ‘model laws’ which offer models to states that want to enact legislation in a particular field.⁵⁷ These texts are negotiated at length by the UNCITRAL member states and contain provisions and concepts that are sufficiently commonplace to be understood and reflected in the legal systems of the participating states. The UNCITRAL negotiations for a model law on international commercial conciliation (the same process that is referred to in this thesis as ‘mediation’) took three to four weeks per year, over a period of three years, as representatives of common-law, civil-law, Far Eastern, Arab and other legal systems ultimately produced a harmonised view of mediation, which illustrates how far mediation has advanced as part of civil justice systems throughout the world.⁵⁸

Model Law on International Commercial Conciliation⁵⁹

On 28 June 2002, UNCITRAL, the core legal body of the United Nations system in the field of international trade law, adopted the Model Law on International Commercial Conciliation, and formally declared to the commercial world the importance of mediation as a mechanism to resolve international commercial disputes and also attempted to harmonise its use throughout the world.⁶⁰

This is not the first time that mediation has been considered by UNCITRAL, as the Conciliation Rules prepared by the Commission at its thirteenth session in 1980 were frequently referred to by private and state parties in numerous and varied disputes and jurisdictions. In its Resolution 35/52 on 4 December 1980, the UN General Assembly recommended that the Rules be used ‘in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to [mediation]’.⁶¹ The Rules have also proved influential in the preparation of other rules, such as the London Court of International

⁵⁷ Marsh (note 29) at 386.

⁵⁸ Marsh (note 29) at 386-387.

⁵⁹ The Model Law refers to conciliation as this is the description used internationally to describe mediation.

⁶⁰ Babak Barin ‘UNCITRAL Model Law on International Commercial Conciliation, How Can Canada Make a Contribution to the Uniform Enforcement of Settlement Agreements Around the World?’ IBA Legal Practice Division *Mediation Committee Newsletter* August 2005 at 69.

⁶¹ See Barin (note 60) at 69-70.

Arbitration (LCIA) Mediation Rules, the World Intellectual Property Organisation (WIPO) Mediation Rules, the International Chamber of Commerce (ICC) ADR Rules, and more recently in the drafting of the Model Law on International Commercial Conciliation.⁶² The South African Law Commission has also recommended that the UNCITRAL Conciliation Rules should be included in the draft bill on International Arbitration.⁶³

While South Africa has no national or provincial framework that provides certainty or reliability to mediation participants, some will argue that formalising the process through legislation will do more harm than good, as the reason that mediation has proved successful is due to the fact that it is not structured or regulated.⁶⁴ It is in this context that the Model Law on International Commercial Conciliation, which represents the consensus of 90 member nations, could play an influential role. The 14 Articles of the Model Law provide the basic rules for conducting mediation and deal with fundamental issues such as confidentiality, disclosure, admissibility of evidence in other proceedings and enforceability of settlement agreements.⁶⁵

While the Model Law could serve as a basic template for mediation legislation for South Africa, it is not without defects and would require revision in key areas before it would be in an acceptable form to be adopted by the South African legislature.⁶⁶ However, it is not within the scope of this thesis to detail the rationale for the revision and ultimate adoption of all of the 14 Articles dealing with the relevant areas. Consequently, only the relevant provisions of the Model Law on International Commercial Conciliation for the purposes of this thesis will be discussed under the relevant headings below.

⁶² Barin (note 60) at 70.

⁶³ The Law Commission recommended that the Rules be included as Schedule 5 of the draft bill. The proposal was that the Rules would apply to mediation in the context of an arbitration agreement and were to operate on a 'contract-out' basis. See South African Law Commission Project 94 *Arbitration: An International Arbitration Act for South Africa* (1998) at 45.

⁶⁴ Barin (note 60) at 70.

⁶⁵ Consistent with the Model Law on Arbitration, the Model Law on Commercial Conciliation defines the terms 'international' and 'commercial' in a similar way as the Model Law on Arbitration. See Barin (note 60) at 70.

⁶⁶ For example, under Article 4 of the Model Law pre-existing agreements to mediate can be rendered ineffective where an invitation to mediate is rejected by one of the parties to the dispute. See Pieter Sanders *UNCITRAL's Model Law on International Commercial Conciliation* (2007) 23 *Arbitration International* 105 at 107-112.

The thesis

Our journey will take us through Europe, the USA, Canada and Australia in order to assess relevant developments in commercial mediation from the South African perspective. Our focus is restricted to private voluntary commercial mediation. A central element and a chief advantage of the process is that it is private. As mentioned, our focus is restricted to commercial mediation, which involves mediating disputes between commercial parties. While we may look to other areas for the purposes of citing relevant case law, we will not be looking at mediation in other areas such as the family, community, labour or construction areas. Our focus is restricted to the commercial realm.

The voluntary aspect relates to situations where parties voluntarily agree to mediate their dispute, either before or after the dispute arises. Consequently, we will not be covering other non-voluntary forms such as court-ordered, court-annexed or mandatory mediation.⁶⁷ While these forms are currently being developed in many of the jurisdictions that we will be looking at, the author believes that it is important initially that private voluntary commercial mediation be established as a workable viable alternative in South Africa before such compulsory models are investigated and considered for adoption.

Marsh points out that commercial mediation has proved most successful in countries where it began entirely separately from the court process, and while focusing on cases being litigated in state courts, formal links with the court system were not necessary to make it effective. Promoters of the process came primarily from the private sector and proposals for legal reforms to enhance mediation came after, rather than before it had developed a significant practical track record. For example, in the UK both the ADR Group and the Centre for Effective Dispute Resolution (CEDR) were actively promoting and offering mediation services long before the first ADR Practice Direction was issued by the courts, and by the time the ‘Woolf reforms’ institutionalised mediation within the court system there were numerous private sector service providers.⁶⁸ Similarly, there is still little regulation of mediation practice in the UK, and

⁶⁷The author is not disputing the relevance or effectiveness of court annexed or mandatory forms of mediation in resolving disputes. See for example Boule *Mediation: Principles, Process, Practice* Chapter 11, and in particular 414-417 dealing with some of the available survey evidence. It is not however within the remit of this thesis to deal with such forms comprehensively.

⁶⁸ See Marsh (note 29) at 389.

with no single national minimum standard for mediator accreditation, no national regulator of practice, no official approved list of mediators or mediation providers to which courts can refer parties, the development of the process has been characterised as essentially having a ‘free-market’ approach.⁶⁹

Hence our focus is restricted to private voluntary commercial mediation, where the parties agree to mediate their commercial dispute, either before or after the dispute arises. The working definition of this process is discussed below.⁷⁰

As the number of jurisdictions comprised in Europe, North America and Australia is quite extensive, the comparative scope of the thesis involves focusing on specific aspects of the law in relevant jurisdictions within those countries, in order to assess the most appropriate approach for South Africa to adopt and develop in the areas discussed. There is an obvious need to focus on specific, relevant developments in a thesis of this nature. For example, the USA comprises fifty one jurisdictions, which includes each state’s jurisdiction and the federal jurisdiction. It would therefore be pointless to try to discuss and compare the developments in the law of mediation in every state. The approach instead is to focus on developments in the relevant jurisdictions that the author feels are most relevant to the South African context.

The challenge of the thesis is essentially to assess how this process could become a viable alternative to arbitration and the court system in South Africa. The aim is neither to extol the virtues nor exaggerate the failings of commercial mediation. As this is a legal thesis, the central challenge is to give an honest assessment of the impact of mediation on commercial life in parts of Europe, North America and Australia and as a result attempt to assess the legal and regulatory issues pertaining to the successful development of the process in this jurisdiction. The ‘legal’ aspect relates to issues such as enforcement, confidentiality and the possible use of a costs sanction, while the ‘regulatory’ aspect relates to the training and accreditation of mediators, the training of lawyers within the process, as well as the use of standards and codes of conduct in order to establish a guide to appropriate conduct against which mediator behaviour should be gauged. An overview of the themes discussed in the thesis is given below.

It has been suggested that mediation is a process which is both new in terms of its emergence in the legal arena and old in terms of its timeless universality.⁷¹ For this

⁶⁹ Marsh (note 29) at 389.

⁷⁰ See chapter 3 at 69.

reason there is a need at the outset to distinguish modern commercial mediation from alternative forms of dispute resolution. Modern commercial mediation refers to a movement that began in the 1970s in the USA, in the 1980s in Australia and the UK, in the 1990s in much of civil-law Europe and more recently in South Africa. We first look to the ADR context in order to assess where commercial mediation fits into the myriad of options available to disputing parties. We look to the legal framework, the limits of adjudication and the possibilities of ADR. Having reviewed the options available we investigate the criteria to be used to measure the effectiveness of a dispute resolution process. It is not being suggested that mediation is the suitable process to resolve every commercial dispute. The issue is one of process selection and design. Consequently, it is critical to complete a comprehensive assessment of the nature of the commercial dispute in question, and a review of the appropriateness of each of the forms of alternative available to resolve that dispute, before an option is chosen.

The process of mediation is then discussed with reference to some of the principal authors on negotiation, including the phases and stages that form it and the ultimate path to agreement. Defining mediation, as we will discover, can be a complex endeavour. We look to the difficulties and approaches in attempting to define this elusive, versatile process. Having established our working definition for the thesis, we look to the types of solutions than can result from engaging in the process which cannot be achieved from judicial adjudication.

The Law Commission investigation and legislative efforts at introducing mediation in South Africa are reviewed. We will discover that the stalled investigation and the lack of understanding of the process, as evident from the legislation promulgated, point to a regrettable apathy on the part of government to embrace the process. Recent developments in the area are also reviewed.

Enforcement represents a fundamental area of mediation, as there is little point in having a mediation clause or reaching a settlement if either agreement cannot be given effect. We look first at the enforceability of mediation clauses and related issues such as the survival of a clause on the termination of an agreement, certainty, completeness, attempts to oust the jurisdiction of the courts and other policy considerations. Drafting, compliance, and remedies for breaching mediation clauses are discussed before we look to the issues arising from settlement agreements.

⁷¹ Alexander (note 49) at 2.

Proceeding to look at the legal status of mediated settlement agreements, we review the grounds for evading them such as fraud, duress and coercion. In light of the case law in other jurisdictions, we see that there are certain practical steps that South African commercial mediation practitioners can adopt as a guide in an attempt to avoid problems with enforcement. With particular reference to the New York Convention and the Model Law, we look at ways of making the settlement agreement a judgment or award.

Confidentiality is often described as the cornerstone of mediation, the central element that encourages parties to have an open and honest exchange of views in order to attempt to reach a settlement. Having established the role and forms of confidentiality, we look at ways of protecting it, such as common-law privileges, mediation rules, contract, equity⁷² and statute. In relation to the latter we look to broad and narrow approaches to protecting confidentiality in mediation, in order to devise the optimum path for the South African legislature to follow.

For disputing parties costs are a major issue. This is often cited as one of the chief reasons that parties are looking to mediation as a means of resolving their disputes in a cost-effective manner. However, unless both parties are willing to engage in the process, mediation will not achieve that objective. Where a party is unwilling to engage in the process, experience from other jurisdictions suggests that assistance may be required from the relevant court or tribunal, which needs to have the powers and authority to use mediation as a costs-containment device in order to bring often reluctant and unwilling parties together. We investigate the approach that the English courts have taken in light of the revised Civil Procedure Rules, in particular the test adopted in order to assess a reasonable refusal to mediate. A central question in determining costs is how far the court should look inside the process in order to assess conduct. The consequential impact of such an investigation on confidentiality is reviewed by assessing the different approaches taken and rules adopted in different jurisdictions. We also look at the potential impact of the Civil Procedure Rules in this jurisdiction despite the absence of an equivalent statute and investigate whether a legal basis currently exists in South Africa for a potential costs sanction against a party unwilling to mediate.

⁷² As noted above, South African law does not make the law/equity distinction; consequently, if such equitable remedies are to be adopted in South Africa, they would require slight modification.

We proceed to deal with the key professional player in this process, the mediator. We look at the qualities a mediator should possess, the standards should be followed and the accountability that should be maintained. Mediator training is critical if a high standard of practice is to be maintained and we also focus on accreditation. Standards in the form of a code of conduct tend to portray a standard of care that a mediator owes disputing parties, and the key elements are discussed. For those who act as mediators, liability is a critical issue and potential exposure is reviewed in terms of contract, delict and other forms including potential exposure arising from fiduciary obligations. The possibility of immunity is also discussed.

Commercial parties in dispute will generally attend a mediation with their legal teams. The traditional core values of practitioners, such as rules of evidence, are often in conflict with the more interest-based approach of the mediation process. We look at the different roles a lawyer can play in the process. Liability is also a pivotal issue, both in terms of exposure stemming from a failure to advise a client of the mediation option and potential negligence for either failing to settle or settling on what are viewed as bad terms. The danger of confusing the two distinct professions of advisor and mediator is discussed before looking at the nature of a lawyer's work when engaged in the process and how experience from some practitioners illustrates the sense of satisfaction they receive from participating in the process.

The final topic that is discussed is the possible limits and potential negative impact of mediation. We look at the limits of the process and analyse the arguments against mediation, such as the impact of the process on the trial rate and the consequences for judicial precedent and practitioners.

Our conclusion reflects upon the conclusions drawn from the relevant topics in order to assess what is required in order to move the development of the process forward.

Empirical research

At different stages throughout the thesis, the author will refer to empirical research gleaned from interviews conducted in Cape Town and Johannesburg between 24 May and 20 June 2007. The purpose of the interviews was to try to assess the experience of those who currently act as commercial mediators in South Africa. Ten interviews

comprise the empirical research. While this may seem like a small group, it must be remembered that commercial mediation is in its infancy in South Africa. It is not being suggested that this represents a scientific survey. However, the author believes that it is representative of the experience of those who currently work in the field.

The participants

In total ten individuals were interviewed, comprising five advocates and five attorneys. A brief biography of each participant follows.

John Myburgh SC is a former Judge President of the Labour Appeal Court and Judge President of the Labour Court. He has extensive commercial law, arbitration and mediation experience and is currently chairman of Tokiso, which recently launched a commercial mediation panel.⁷³

Mervyn King SC is a former Judge of the Transvaal Provincial Division and is Chairman of the King Committee on Corporate Governance in South Africa. He has extensive commercial law, arbitration and mediation experience and is currently First Vice President of the Institute of Directors Southern Africa.

Paul Pretorius SC was a mediator in commercial disputes under the auspices of the Alternate Dispute Resolution Association of South Africa (ADRASA) and currently is with the Arbitration Foundation of South Africa (AFSA). He is editor of the South African text book *Dispute Resolution* and has presented seminars and lectures on commercial mediation.

Mark Antrobus SC has extensive commercial mediation experience and was on the mediation and arbitration panel at the Independent Mediation Service of South Africa (IMSSA). He was co-author of a chapter on commercial mediation in *Dispute Resolution*.

Roland Sutherland SC has extensive commercial mediation experience and was on the mediation and arbitration panel at the IMSSA. He was co-author (with Mark Antrobus) of a chapter on commercial mediation in *Dispute Resolution*.

John Brand is an experienced commercial mediator and trainer and is a director of Bowman Gilfillan Inc in Johannesburg. He is also a director of Conflict Dynamics

⁷³ www.tokiso.com/view.php?sid=1623 and see chapter 4 at 84.

which is instrumental in organising international commercial mediation training and accreditation in South Africa.

Charles Nupen is an experienced commercial mediator and trainer. He is a former executive director of IMSSA and the Commission for Conciliation Mediation and Arbitration (CCMA). He is the chairman of Stratalign, a company offering organisational and human resource development products and services.

John O’Leary is a director of Walkers Attorneys in Cape Town and has acted as a commercial mediator and mediation trainer. He is also a member of the standing committee of the Cape Law Society for Alternative Dispute Resolution.

Barney Jordaan is extraordinary professor at the Graduate School of Business of Stellenbosch University and visiting professor at the Graduate School of Business of the University of Cape Town, where he teaches on the MBA, management development and industrial relations programmes. He is an experienced commercial mediator.

Nicholas Roodt is a director in Bell Dewar and Hall Attorneys in Johannesburg. He has acted as a commercial mediator on a number of occasions as part of his commercial litigation practice.

Methodology

Following an overview of the topics covered in the thesis and an explanation of the definition of commercial mediation for the purposes of the thesis,⁷⁴ the author proceeded to pose questions and engage in discussion on the following topics with each of the interviewees:

- types of commercial disputes mediated;
- level of experience with the process;
- size and number of businesses that have engaged in the process;
- rate of settlement;
- usefulness of the process where settlement not reached;
- reasons why clients opted to mediate their disputes;
- issues regarding enforcement;
- issues regarding confidentiality;

⁷⁴ See chapter 3 at 69.

- whether the option to mediate was before or after the dispute arose;
- whether the process was used in isolation or as part of a stepped process;
- the presence and influence of legal advisors;
- length of mediation process;
- whether the focus of the mediation was facilitative or evaluative;
- the prevalence of mediation clauses in commercial agreements;
- promotion of the option to mediate by the legal community; and
- the mediator's responsibility regarding possible undue influence by one of the parties and to the fairness of a settlement.

Summary of key findings

From the interviews conducted, mediation was attempted to resolve 118 commercial disputes. Of these, mediation proved successful in resolving 99 disputes, which gives a success rate of 84 per cent. In the cases where mediation did not result in a comprehensive settlement, there was unanimity in the responses from those interviewed that mediation was a worthwhile process as it assisted in identifying and clarifying the causes of the dispute, and also narrowed the issues significantly for the arbitration or litigation that followed. The reasons most cited for attempting mediation were cost and speed. Other reasons include privacy, finality, the preservation of ongoing business relations, self determination and efficient use of management time. The average mediation seems to last one day, while the mediation of larger, more complex commercial disputes can last several months.

Variance and consistency

Experience with the process varies considerably within the group interviewed. The least experienced mediated two disputes while the most experienced mediated 50. Similarly the types of corporate entities that have used the process fill the commercial spectrum from small partnerships to large publicly quoted corporate institutions. Yet there are consistent trends regarding issues such as enforcement, confidentiality, mediator style and the thoughts on the usefulness of the process even where the mediation did not result in a comprehensive settlement agreement.

CHAPTER TWO: THE ADR CONTEXT

Traditional forms of ADR processes have been in existence in rural parts of South Africa for some time. Unofficial dispute resolution has also been the norm in metropolitan areas since these areas were initially established, and the earliest unofficial people's courts, founded in 1901 in the township of Uitvlugt in the Cape Town area, were the civic associations that had dispute settlement functions.⁷⁵

Commercial arbitration is well established in South Africa. The Alternative Dispute Resolution Association of South Africa (ADRASA) and the Arbitration Foundation of South Africa (AFSA) have had reasonable success in institutionalising private commercial arbitration and, to a lesser extent, mediation. Similar initiatives also exist in the fields of engineering and construction.⁷⁶

The ethics of conscience or conviction and of responsibility or consequence

Conventional legal processes seem to be grounded in the ethic of conscience or conviction, on the belief, as previously mentioned that there is an absolute right or wrong in a given situation and that the right decision is attainable, and concern themselves more with individual motive and action rather than with social consequence.⁷⁷ Conversely, ADR processes, and mediation in particular, seem to be based on the ethic of responsibility or consequence and the ethic of moral ambiguity, and accept that one has to weigh the consequences of one's actions and take account of the 'real world' and the deficiencies in people on whom we rely for the end result.⁷⁸

It is in this context that it seems more relevant for decisions to be made with greater focus on their consequences than on the value of their 'purity', in recognition that decision making involves a choice between the lesser of two evils rather than establishing a 'perfect right'.⁷⁹

⁷⁵ G J van Niekerk 'People's Courts and People's Justice in South Africa- New Developments in Community Dispute Resolution' (1994) 1 *De Jure* 22. See also South African Law Commission (note 51) at 6.

⁷⁶ See South African Law Commission (note 51) at 7.

⁷⁷ See A T Trollip *Alternative Dispute Resolution in a Contemporary South African Context* at 3.

⁷⁸ Trollip (note 77) at 3.

⁷⁹ See Trollip (note 77) at 3-4.

A warmer way of disputing

It has been suggested that conflict is not something to be feared or avoided, and that if it is suppressed it will reappear in an alternate form, and that conflict offers an opportunity for understanding, interaction and moving ahead.⁸⁰ As the vast majority of all disputes are settled at the doors of the court it has been remarked for some time that it is regrettable to leave efforts for resolving them to this late and often uncomfortable stage.⁸¹

Contemporary context

It is generally acknowledged that the birth of modern alternative dispute resolution occurred in the USA at the 1976 Roscoe Pound Conference. Harvard Professor Frank Sander was a prominent advocate of the then revolutionary concept that disputes could be processed in ways other than adversarial litigation.⁸² The traditional rivalry between Harvard and Yale led to Yale Professor Owen Fiss writing in 1984, some years after Professor Sander first published 'Varieties of Dispute Processing',⁸³ that the justice system in the USA would suffer as a consequence of publicly supported settlement facilitation. According to Fiss:

[The court's] job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and Statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle.⁸⁴

This is illustrative of the contemporary logic that disputes were far too important for parties to be permitted to resolve them.

The legal framework

All dispute resolution, conventional or alternative, takes place within a legal framework.⁸⁵

ADR is generally accepted as the acronym for alternative dispute resolution, and includes all forms of dispute resolution other than litigation or court adjudication and

⁸⁰ Trollip (note 77) at 4.

⁸¹ Trollip (note 77) at 4.

⁸² Frank Sander 'Varieties of Dispute Processing, Address Before the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice' (1976) 70 *FRD* 79 at 111.

⁸³ Sander (note 82).

⁸⁴ Owen Fiss 'Against Settlement' (1984) 93 *Yale LJ* 1073.

⁸⁵ See Trollip (note 77) at 7.

offers the possibility of resolving disputes through a process that is most appropriate to the relevant dispute. It is for this reason that many ADR practitioners prefer to use the acronym to refer to the words ‘appropriate dispute resolution’, believing that the sovereign quality of the courts cannot be confronted by any alternative mechanism and that mediation is simply a step towards achieving a resolution which, if unsuccessful, is followed by litigation.⁸⁶

Similarly, a former Chief Justice of the Supreme Court of New South Wales believes that ADR should really stand for ‘additional dispute resolution’. Alternative processes such as mediation, he believes, should be seen as additional or complementary to litigation as they are not alternative procedures within the court system.⁸⁷ Commercial mediation, in his view, is a valuable social mechanism for the resolution of disputes, but it is not an exercise in the administration of justice as it is not subject to any judicial appellate or supervisory authority. While one expects the procedures to be operated fairly, he believes that the principles of natural justice or due process have no more relevance in a commercial mediation than they have to the mediation of any other commercial deal, as mediation does not involve the imposition of a decision that affects the parties’ rights or interests.⁸⁸ As a seasoned US mediator has pointed out, mediation is an extension of business negotiations, and should be seen as a commercial, not a judicial process.⁸⁹

This approach sits well with the contention that ADR processes, and mediation in particular, do not diminish the role of judges. As cases are settled against the backdrop of rights emerging from decided case law, success in mediation depends to some extent on the parties having the confidence to disclose their points of weakness to the mediator, whose role is complementary to what judges do, but cannot be done by judges. A party cannot safely disclose its vulnerabilities to a judge as the judge may ultimately decide the case, so that the mediation process fits comfortably within the framework of the court system.⁹⁰

⁸⁶ Trollip (note 77) at 7.

⁸⁷ Sir Laurence Street ‘Mediation and the Judicial Institution’ (1997) 71 *Australian Law Journal* 794 at 795–6.

⁸⁸ Street (note 87).

⁸⁹ John P Madden quoted by James T Prior ‘Mediation Cuts Costs of Construction Disputes’ June 2002 *New Jersey Business* at 102.

⁹⁰ Fergus Armstrong ‘Lost in Translation’ August/September 2004 *Law Society Gazette* 26 at 30.

Despite the discussion above regarding the ‘appropriate’ or ‘additional’ aspects of ADR, the term has in South Africa, as in other countries, represented the words ‘alternative dispute resolution’.⁹¹ The tendency to abandon the title ‘alternative dispute resolution’ in favour of the title ‘appropriate dispute resolution’ or ‘additional dispute resolution’ reflects a change of emphasis and development in this area, and acknowledges the fact that ADR is about more than the application of one or more alternatives to litigation, and involves the selection or design of a process that is best suited to the relevant dispute and to the disputing parties.⁹²

Dispute resolution therefore describes the area of practice and study concerning the selection, design and application of a process that best deals with a particular dispute or conflict and is most appropriate for the requirements of the disputing parties.⁹³ It would also seem that more than in any other country where dispute resolution is of interest, South African dispute resolution practitioners have been exposed for some time to intense levels of conflict and to intense pressure to change to and improve traditional forms of dispute resolution.⁹⁴

It seems that a critical assessment of adversarial litigation relative to other forms of ADR is central to the study of dispute resolution, with the objective of providing a broader range of creative and effective processes and mechanisms to disputing parties, supplementing rather than supplanting court adjudication.⁹⁵

The limits of adjudication and the possibilities of ADR

Economic markets determine how resources are allocated and how goods are produced and priced in an intricate manner, like a spider’s web of relationships, a pull on one strand redistributes tensions throughout the web with different effects and tensions.⁹⁶

⁹¹ Paul Pretorius (ed) *Dispute Resolution* at 1.

⁹² Pretorius (note 91) at 1.

⁹³ Pretorius (note 91) at 1.

⁹⁴ Pretorius (note 91) at ix.

⁹⁵ See Pretorius (note 91) at 2. It has also been suggested that the ADR concept includes conflict *avoidance*, conflict *management* and conflict *resolution*, as three closely related sequential approaches in the field of commercial interaction. See Sir Laurence Street ‘Commentary on Some Aspects of the Advent and Practice of Mediation in Australia’ in Christopher Newmark and Anthony Monaghan (eds) *Mediators on Meditation: Leading Mediator Perspectives on the Practice of Commercial Mediation* at 361.

⁹⁶ Trollip (note 77) at 10.

It has been suggested that there is ample evidence throughout Africa of the dangers of adjudicated economic markets, such as the slow pace of adjudicatory processes to keep up with the rapidly changing economic environments, and the inability of adjudication to provide for the complex consequences that flow from changes in prices or wages.⁹⁷ It follows that adjudication is equipped to distinguish black and white and is inadequate in recognising shades of grey and the importance of polycentric elements.⁹⁸

Experience would suggest that ordinary courts and even arbitration have a difficulty in addressing polycentric disputes, and it has been suggested that an arbitrator would be tempted to adopt a mediatory role in order to test out proposed solutions on disputing parties for their reactions.⁹⁹ As Fuller points out:¹⁰⁰

Irregular and improper as such conversations may appear when judged by the usual standards of adjudication, it should be noted that the motive for them may be the arbitrator's desire to preserve the reality of the parties' participation in the decision, to preserve, in other words, the very core of adjudication.

A central element of ADR processes is client involvement and that is why such processes offer so much to business in conflict.¹⁰¹

ADR and conventional litigation

It is not in doubt that courts are required to resolve certain disputes, but equally the court system seems to be organised on the assumption that most cases will settle, often at the doors of the court.¹⁰² Parties engaging in litigation will find familiar procedures specified by rules, while parties engaging in ADR processes face the additional responsibility of agreeing on the rules that should apply to the process, so that the path of least resistance is often to litigate.¹⁰³

Increasing concern with 'the pathology of litigation' is due to the fact that litigation has become expensive, often inefficient and has a propensity to develop a life of its own, inconsistent with the real objectives of those involved and not directed by the

⁹⁷ Trollip (note 77) at 10.

⁹⁸ See Trollip (note 77) at 10.

⁹⁹ Trollip (note 77) at 11.

¹⁰⁰ Lon L Fuller 'The Forms and Limits of Adjudication' (1972) 92 *Harvard Law Review* 353 at 396 as cited by Trollip (note 77) at 11.

¹⁰¹ See Trollip (note 77) at 11.

¹⁰² See Trollip (note 77) at 11.

¹⁰³ Trollip (note 77) at 11.

disputing parties so that the outcome is much more unpredictable than many lawyers will admit.¹⁰⁴ As many disputes seem to hinge on the dynamics of personal relationships rather than on what the law is, ADR processes such as mediation endeavour to focus the minds of disputing parties on resolving the dispute rather than on preparing for trial.¹⁰⁵

The interdependence of people's goals can also influence the type of dispute resolution process employed. When the goals of disputing parties are interconnected so that only one party can achieve the goal, it is a competitive situation, also called a 'zero-sum', or 'distributive', situation, in which 'individuals are so linked together that there is a negative correlation between their goal attainments.'¹⁰⁶ To the extent that one party achieves their goal, the others cannot. Conversely, when the goals of all parties are linked so that one party achieving their goal helps other parties to achieve their goals, it is a 'mutual-gains', or 'non-zero-sum' or 'integrative' situation, where there is a positive correlation between the goal attainments of all parties. To the extent that one party achieves their goal, the goals of the other parties may not necessarily be unattainable, but may in fact be significantly enhanced.¹⁰⁷ As ADR processes such as mediation avoid zero sum games, it has been suggested that where there is a genuine zero sum game, then this is the hallmark of a dispute ideally suited to adjudication in court, and such a case once identified should be put on the fast track for trial.¹⁰⁸

Methods of dispute resolution

As the main objective of dispute resolution is the selection or design and application of the most appropriate or effective process relative to a given dispute and disputing parties, it is important to have a way to compare various dispute resolution methods. It has been suggested that at one extreme, conflict may be avoided and at the other it may be ended by violent coercion, while the range of dispute resolution mechanisms and processes between these extremes is extensive.¹⁰⁹ There are effectively three major

¹⁰⁴ See Trollip (note 77) at 12.

¹⁰⁵ Trollip (note 77) at 12.

¹⁰⁶ M. Deutsch 'Cooperation and trust: Some theoretical notes' in M.R. Jones (Ed.), *Nebraska symposium on motivation* (1962) Lincoln, NE: University of Nebraska Press 275-318 as cited by R.J. Lewicki, B. Barry and D. Saunders *Essentials of Negotiation* 4ed (2007) New York; London: McGraw Hill at 26 note 3.

¹⁰⁷ See Lewicki, Barry and Saunders (note 106) at 9-10.

¹⁰⁸ Trollip (note 77) at 12.

¹⁰⁹ See Pretorius (note 91) at 3.

categories of dispute resolution,¹¹⁰ and in order to set mediation in context a brief overview of each follows:

1. Processes involving private decision making by parties themselves, such as negotiation and mediation.
2. Processes involving private adjudication by third parties such as arbitration.
3. Processes involving adjudication by a public authority such as formal litigation before the courts.

Negotiation, mediation, arbitration and litigation can be regarded as the main methods of dispute resolution, as all other methods of dispute resolution are seen as variations of these processes. In assessing commercial mediation's place in the spectrum of alternatives available, it is necessary to establish the type and form of alternatives available, and we can begin by using the first set of categories mentioned above in establishing a more comprehensive list of dispute resolution processes.¹¹¹

Dispute resolution methods involving private decision-making by the parties¹¹²

a. Informal discussion and problem solving

Disputing parties engage in discussion and problem solving voluntarily on an informal basis in order to resolve the dispute.

b. Negotiation

Negotiation is a bargaining relationship between parties and is a more structured and planned process than informal discussion and problem solving. The parties voluntarily join in a temporary relationship in order to educate one another about their respective needs and interests. It has been suggested that all negotiations fundamentally have the same characteristics, whether they are, for example, peace negotiations or business

¹¹⁰ An alternative approach distinguishes dispute resolution mechanisms by deciding who is more powerful, who is right, by reference to the interests of the parties or by avoiding the dispute altogether. See W L Ury, J M Brett and S B Goldberg *Getting Disputes Resolved, Designing Systems to Cut the Costs of Conflict* at 3-19. See also Pretorius (note 91) at 3.

¹¹¹ See Pretorius (note 91) at 3-4.

¹¹² See Pretorius (note 91) at 3-4.

negotiations, and that there are several characteristics common to all negotiations.¹¹³

These characteristics include:

- There are two or more individuals, groups, or organisations (the parties).
- There is a conflict of needs and desires between all or some of them.
- The process is largely voluntary, and the parties choose to negotiate as they think they can get a better deal by negotiating than by simply accepting what the other side will offer.
- There is an expectation that the process will involve ‘give-and-take’, so that both sides will modify or change from their opening statements, requests, or demands in order to reach an agreement. This movement may result in a compromise or a more creative solution that meets the objectives of all involved.
- The process will not usually involve a fixed or established set of rules, and the parties will usually invent their own solution for resolving the conflict.
- The success of the process will involve the management of ‘tangibles’, such as the price or the terms of an agreement, and the resolution of ‘intangibles’, which describes the underlying psychological motivations, often rooted in personal values and emotions, that can directly or indirectly influence the parties in a negotiation, such as the need to be perceived in a particular way.

c. Mediation

Mediation is an extension of the structured negotiation process involving the intervention of a third party in order to assist disputing parties to resolve their dispute. The mediator’s role is only to assist, he or she does not render a decision and all decision-making powers regarding the dispute remain with the parties and the process is voluntary, both in its initiation and its continuation.

d. Conciliation

Conciliation is also a structured negotiation process involving a third party, but the third party will make a formal recommendation to the parties in order to settle the dispute.

¹¹³ See R.J. Lewicki, S. Weiss and D. Lewin ‘Models of conflict, negotiation and third-party intervention: A review and synthesis’ (1992) 13 *Journal of Organisational Behaviour* 209-52; J. Z. Rubin and B.R. Brown *The Social psychology of bargaining and negotiation* (1975) New York: Academic Press as cited by Lewicki, Barry and Saunders (note 106) at 26 note 2.

The use of the term conciliation has not been consistent. For example, the United Nations Model Law uses the word ‘conciliation’ to describe the process that is described as mediation in South Africa.¹¹⁴ Conversely, the construction industry in South Africa uses the term mediation to describe the process described above as conciliation.

e. Facilitation

Facilitation is where a third party assists two or more parties in their communications regarding a dispute with the usual goal of bringing them together in some form of meeting or process. The facilitator may also chair or manage (facilitate) the meeting undertaken by the parties and may move from being a facilitator to being a mediator.

The use of this term has not been consistent, and is derived chiefly from the current use of the term in community dispute resolution in South Africa.

f. The mini-trial

A mini-trial is a structured settlement process where each party presents a summary of their case before senior officials of the parties who are authorised to settle the case. An impartial third party may chair the process and will give an advisory opinion if requested. Subsequent to the case summaries being delivered, the officials attempt to negotiate a settlement, and this may or may not involve the assistance of the third party.

Dispute resolution methods involving adjudication by a third party¹¹⁵

a. Arbitration

Arbitration can be defined¹¹⁶ as an adjudicative process which takes place pursuant to an agreement between the parties to a dispute, whereby that dispute is referred for final determination to an independent and impartial arbitral tribunal appointed by or on behalf of the parties.¹¹⁷ Arbitration therefore has the following characteristics:

¹¹⁴ See also chapter 1 at 12.

¹¹⁵ See Pretorius (note 91) at 5.

¹¹⁶ This definition of arbitration is from David Butler ‘Arbitration’ in WA Joubert *The Law of South Africa* Vol 1 para 542.

¹¹⁷ *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd* 2002 4 SA 661 (SCA) 673H; D Butler and E Finsen *Arbitration in South Africa: Law and Practice* at 1; the dispute is therefore referred to a tribunal other than the ordinary courts; see Butler (note 116) at 548 for the role of the courts in the context of arbitration proceedings.

- it is a process for resolving disputes,¹¹⁸ which usually relate to the substantive rights of the parties;¹¹⁹
- the arbitration takes place pursuant to an agreement between the parties;¹²⁰
- the arbitral tribunal is appointed by the parties, or by a method to which they have consented;¹²¹
- the agreement must contemplate that the arbitral tribunal will proceed impartially and make its decision after fairly receiving and considering evidence and other submissions from the parties;¹²² and
- the arbitral tribunal's decision, referred to as an award, is final and not subject to appeal to the courts.¹²³

While the above constitutes a legal definition of binding arbitration, it may be non-binding where the decision is only advisory. It may also be voluntary, where the parties agree to resolve the issues through arbitration, or it may be compulsory, where the process, by law or by prior agreement, is the exclusive means of resolving the issues. It may be conducted on an inquisitorial or adversarial basis. There are numerous forms of arbitration that can be designed by the parties in their agreement to suit their needs.¹²⁴

¹¹⁸ *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd* 2002 4 SA 661 (SCA) 673G; *Telecall (Pty) Ltd v Logan* 2000 2 SA 782 (SCA) 786C-J; Butler and Finsen (note 117) at 1; see also Butler (note 116) at para 577.

¹¹⁹ *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd* 2002 4 SA 661 (SCA) 673F-G; Butler and Finsen (note 117) at 1. Although the disputes therefore usually relate to existing rights, see Butler and Finsen (note 117) at 31 regarding the reference to arbitration of interest disputes relating to the determination of future wages.

¹²⁰ *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd* 2002 4 SA 661 (SCA) 673F-H; Butler and Finsen (note 117) at 1-2.

¹²¹ *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd* 2002 4 SA 661 (SCA) 673G; Butler and Finsen (note 117) at 2.

¹²² *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd* 2002 4 SA 661 (SCA) 673G; Butler and Finsen (note 117) at 2. See Butler (note 116) at para 588 regarding a party's right to an oral hearing; See also *Chelsea West (Pty) Ltd v Roodebloem Investments (Pty) Ltd* 1994 1 SA 837 (C) 849B-C where it is pointed out, in the context of distinguishing arbitration from valuation, that many arbitrations are conducted without the requirement or necessity of hearing evidence or argument.

¹²³ *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd* 2002 4 SA 661 (SCA) 673F where it is stated that the decision is binding on the parties; Butler and Finsen (note 117) at 3; see Butler (note 116) at para 598 regarding the finality of the award and pars 600 and 602-603 regarding the court's limited powers to review an award.

¹²⁴ Pretorius (note 91) at 5. It has become common in South Africa to refer commercial disputes to arbitration with many arbitration agreements containing automatic rights of appeal to an appeal tribunal. It seems however that arbitration awards, even those of an appeal tribunal, are being taken on review to the High Court, with the consequence that the dispute enters the very court process that the parties were initially trying to avoid. Cases are also conducted on the basis of trial by ambush with arbitration becoming increasingly expensive and the final resolution of disputes being inordinately delayed. See John Myburgh 'Speech delivered at the launch of Tokiso Commercial' Johannesburg 18 March 2008.

b. Expert valuation

Expert valuation is a process by which an impartial third party decides the questions submitted by exercising judgment and skill. It is distinguished from arbitration in that the expert is not required to hear or receive submissions from either party. He is not required to make a choice between the two opposing contentions between the parties. All he has to do is exercise honest judgment based on the material put before him by the parties.¹²⁵

c. Fact-finding

A fact-finding proceeding involves the appointment of a person, usually an expert, to evaluate material presented and to report on the relevant facts. The fact-finder does not resolve policy issues or determine matters of law or equity. Following the fact-finder's findings, the parties may negotiate a settlement, conduct further proceedings or conduct further research.¹²⁶

Hybrid forms of dispute resolution

Hybrid forms of dispute resolution using elements of both mediation and arbitration, such as Med-Arb and Arb-Med, have evolved over time.¹²⁷ In Med-Arb the parties are assisted by the mediator to negotiate a settlement of their dispute. In the event that the parties decide that they are unable to settle, the outstanding issues are submitted to the third party who takes on the role of an arbitrator and adjudicates on the issues.

In Arb-Med the parties agree to arbitrate their dispute, and having prepared the award the arbitrator, immediately prior to issuing it, takes on the role of a mediator and assists the parties to settle their dispute. If the parties are unable to reach a settlement the arbitrator then issues the award to the parties.

Process selection and design

The initial preparatory step is to select the type of ADR that is most appropriate for the particular dispute, and the options vary in their applicability, level of participation and

¹²⁵ See *Perdikis v Jamieson* 2002 (6) SA 356 (W) 357. See also Butler and Finsen (note 117) at 44-50.

¹²⁶ Pretorius (note 91) at 5.

¹²⁷ See Pretorius (note 91) at 5.

formality.¹²⁸ As there are no absolute rules regarding the selection of an ADR option, the characteristics of the dispute, the parties' preferences, and the temperament and skills of the lawyers involved are all relevant considerations.¹²⁹

As not all commercial disputes will be suited to mediation, when selecting mediation as the dispute resolution process, it is critical that it be the correct form of alternative for the particular dispute. As already stated, the selection and design of dispute resolution processes requires both the knowledge of the processes and the knowledge and ability to assess and compare methods.

Ury, Brett and Goldberg detail four criteria for assessing the effectiveness of a dispute resolution process.¹³⁰ These are transaction costs, satisfaction with outcomes, effect on the relationship and recurrence.

1. Transaction costs

Transaction costs are the time, money, emotional energy, the resources consumed and destroyed, and the opportunities lost that disputing requires. For example, in commercial disputes the costs include legal fees as well as the cost in management time and the impact that litigating the dispute may have on the party's ability to continue operating normally.

2. Satisfaction with outcomes

A party's satisfaction with the outcome of a particular process depends on whether the outcome satisfies the interests that led that party to make or reject the claim in the first place, and on the perceived fairness of the outcome and the process. In assessing fairness numerous factors are relevant to a disputing party including the opportunities afforded to express themselves, the control over whether to accept or reject the outcome, the level of participation in shaping the outcome, and the perceived fairness of the third party's involvement.

3. Effect on the relationship

This is particularly important where the parties have ongoing business dealings, where the procedure adopted may even enhance the relationship. This is frequently cited as one of the advantages of mediating commercial disputes, as commercial parties are

¹²⁸ See Trollip (note 77) at 15.

¹²⁹ Trollip (note 77) at 15.

¹³⁰ Ury, Brett and Goldberg (note 110) at 21-40. See also Pretorius (note 91) at 8-10.

more likely to engage in business in the future where the dispute is resolved in private rather than in a public court.

4. Recurrence

In order for the outcome to a dispute to be effective it must endure. If there is a relapse to the original dispute, it may be perceived and be the case that the dispute resolution process has been ineffective in resolving the dispute.

Ury, Brett and Goldberg¹³¹ conclude that, in general, reconciling interests is less costly than determining who is right, which in turn is less costly than determining who is more powerful, and while this does not mean that focusing on interests is invariably better than focusing on rights and power, it tends to result in lower transaction costs, greater satisfaction with outcomes, less strain on the relationship and less recurrence of disputes.

While a knowledge, understanding and experience of dispute resolution options can assist in developing a method for selecting and designing dispute resolution processes, a rigid framework cannot be provided to assist in selecting or designing an appropriate dispute resolution mechanism.¹³² The particular circumstances of the dispute and the needs and interests of the parties should determine the nature of the dispute resolution process employed, and the parties should understand and accept the dispute resolution process used. For example, a dispute ripe for mediation may not be resolved unless the parties co-operate fully and understand the characteristics and requirements of the process.¹³³

Parties in dispute should also be conscious of what they want to achieve through engagement in the ADR process.¹³⁴ For example, while parties may want to attempt a negotiated settlement, finality may be important and the Med-Arb procedure may be appropriate. Alternatively parties may need a deeper understanding of the respective strengths and weaknesses of their own and the other party's case, and the Arb-Med procedure could provide this and allow the parties the opportunity to settle once they have heard the other party's case and had the opportunity to have their own case tested on presentation. The mini-trial which uses elements of both the adversarial adjudicative

¹³¹ Ury, Brett and Goldberg (note 110) at 21-40. See also Pretorius (note 91) at 8-10.

¹³² See Pretorius (note 91) at 9.

¹³³ Pretorius (note 91) at 10.

¹³⁴ See Pretorius (note 91) at 10.

procedure and the interest-based mediation or negotiation process has been particularly useful in the United States in settling large corporate claims.¹³⁵

It has been suggested that mediation may be appropriate in any case which can be settled, which means most commercial disputes. Consequently any case that is appropriate for arbitration may be appropriate for mediation.¹³⁶

The critical point to be gleaned from the above discussion is that each dispute should be resolved by using the appropriate alternative process or adjudication. It is not being suggested that mediation is suitable for every situation and an appropriate assessment of the type of dispute and the forms of alternative available should be completed before a particular option is chosen.

¹³⁵ Pretorius (note 91) at 10.

¹³⁶ Paul Pretorius 'Commercial Mediation in the Southern African Development Community' (April 2007) Paper presented to the Arbitration Workshop in Mauritius at 3-4.

CHAPTER THREE: THE PROCESS AND DEFINITION OF MEDIATION

There has been an emerging trend in countries such as the USA, Canada and Australia over the past two decades to use mediation to resolve numerous types of conflict.¹³⁷ With increasing numbers of mediation practitioners, there is still no consensus on numerous professional and practice issues, such as a uniformly accepted role of the mediator or even a definition of mediation, while mediator styles and approaches have proliferated as both the process and the practitioner have evolved and adapted to the marketplace. Many academics and legal policy experts believe that the ‘promise of mediation’ has not been fulfilled, while others believe that they have found their life’s calling to become a mediator. Such varying views flow in part from the legal context and the varied types of disputes being mediated.¹³⁸

The phases and stages of mediation

Numerous commentators on negotiation believe that negotiations proceed through distinct phases.¹³⁹ As mediation is assisted negotiation, such commentaries have obvious relevance to a discussion on the mediation process. Greenhalgh, for example, has elucidated a model of negotiation that is particularly relevant for integrative negotiation, and suggests seven key steps to an ideal negotiation process:¹⁴⁰

- *Preparation*: this involves deciding what is important such as defining goals and thinking ahead about how to work with the other party.
- *Relationship building*: getting to know the other party, understanding how the parties are similar and different, and building commitment towards achieving a mutually beneficial set of outcomes in order to work through the other stages effectively.

¹³⁷ See Creo (note 40) at 310.

¹³⁸ See Creo (note 40) at 310.

¹³⁹ A Douglas *Industrial peacemaking* (1962) New York: Columbia University Press; L Greenhalgh *Managing strategic relationships: The key to business success* (2001) New York: Free Press; I. Morley and G. Stephenson *The social psychology of bargaining* (1977) London: Allen and Unwin as cited by Lewicki, Barry and Saunders (note 106) at 110 note 9.

¹⁴⁰ Greenhalgh (note 139) as cited by Lewicki, Barry and Saunders (note 106) at 110 note 10.

- *Information gathering*: this involves learning about the issues, the other party and their needs, the feasibility of possible settlements, and about the consequences of not reaching an agreement.
- *Information using*: this is where the parties put together the case they want to make for their preferred outcomes and settlement, one that will maximise the party's own needs, effectively "selling" their preferred outcome to the other side.
- *Bidding*: this involves each party moving from their initial, ideal position to the actual outcome, from each party's "opening offer" towards the middle ground.
- *Closing the deal*: this involves building commitment to the agreement achieved in the previous phase, where the parties assure themselves that they have reached a deal they can be happy with, or at least accept.
- *Implementing the agreement*: this involves determining what each party's obligations are once the agreement is reached. In the event that the agreement is flawed, or the situation has changed and new questions exist then the deal may have to be re-opened or issues may need to be settled by the mediator or the courts.

Greenhalgh argues that as this model is largely prescriptive, it is the way that parties should negotiate. However, actual practice of negotiators suggests that they frequently deviate from this model and that differences emerge in practice according to national culture.¹⁴¹ For example, US negotiators tend to see the process more in win-lose, or distributive, terms, spending less time on relationship building or planning, and moving directly to bidding, closing, and implementation. Conversely, Asian negotiators focus a lot of time on relationship building and less time on the steps towards the end of the negotiation process.

Similar to negotiation, the phases and stages of the mediation process are not set in stone, and it is important that an overly prescriptive approach is not adopted, as there can be considerable overlap between different stages. For example, below the issue of

¹⁴¹ See Lewicki, Barry and Saunders (note 106) at 94.

trust is dealt with under the heading of ‘building bridges of understanding’, but in practice, efforts to develop and build trust should permeate the entire process and should not be thought of simply as a stage in it. While a fluid interpretation of the stages of mediation is preferable, for conceptual purposes, it has been suggested that there are three stages to the mediation process:¹⁴²

1. Opening channels of communication

When parties are in dispute, free-flowing communication becomes inhibited, if not non-existent, as commercial litigants are warned only to communicate through their lawyers so that direct rational dialogue between the parties is sterilised. A central and essential element of effective mediation is to open up channels of communication between the parties.¹⁴³

Mediators should assist parties in managing both the context and the process of their negotiations.¹⁴⁴ A key contextual factor in this process is the creation of a free flow of information so that each party can understand the real needs and objectives of the other side in the search for a solution that meets the goals and objectives of both parties. Effective information exchange assists in developing good integrative solutions,¹⁴⁵ and research shows that the failure to reach integrative agreements is often linked to the failure to exchange sufficient information to allow the parties to identify relevant options.¹⁴⁶ In order for the necessary channels of communication to develop so that relevant information can be exchanged, the mediator should encourage the parties to reveal their true objectives and to listen to each other carefully so that the conditions are created for a free and open discussion of all related issues and concerns.¹⁴⁷

As the parties have different values and preferences, the realisation by each party that the other’s priorities are not the same as their own, can stimulate them to exchange more information, understand the nature of the negotiation better, and achieve

¹⁴² Street (note 95) at 362-365.

¹⁴³ Street (note 95) at 362.

¹⁴⁴ See Lewicki, Barry and Saunders (note 106) at 59.

¹⁴⁵ J Butler ‘Trust, Expectations, Information Sharing, Climate of Trust and Negotiation Effectiveness and Efficiency’ (1999) 24 (2) *Group & Organisation Management* 217-38; D.G. Pruitt *Negotiation behaviour* (1981) New York: Academic Press; L. Thompson ‘Information exchange in negotiation’ (1991) 27 *Journal of Experimental Social Psychology* 161-79 as cited by Lewicki, Barry and Saunders (note 106) at 83 note 3.

¹⁴⁶ Butler (note 145) at 217-38; K. E. Kemp and W.P. Smith ‘Information exchange, toughness, and integrative bargaining: The roles of explicit cues and perspective-taking’ (1994) 5 *International Journal of Conflict Management* 5-21 as cited by Lewicki, Barry and Saunders (note 106) at 83 note 4.

¹⁴⁷ See Lewicki, Barry and Saunders (note 106) at 59-60.

better joint results.¹⁴⁸ Similarly, integrative agreements are facilitated when parties exchange information about their priorities for, rather than their positions on, particular issues,¹⁴⁹ and the effective communication of relevant information, as assisted by a mediator, is critical in order to ensure that the exchange of such relevant information occurs.

The communicative aspects of information flow and understanding, while critical to integrative negotiation, also requires that issues such as trust and honesty, discussed below, are managed.¹⁵⁰ To sustain a free flow of information and to understand each other's needs and objectives, parties may need a different outlook or frame of reference,¹⁵¹ possibly requiring, for example, that individual goals are redefined as being best achieved through collaborative efforts directed towards a collective goal. In addition, parties may have varying abilities to distinguish needs and interests from positions, and the mediator may need to assist less experienced parties to discover their underlying needs and interests in order that they be communicated clearly to the other side.¹⁵²

The success of integrative negotiation depends on the search for solutions that meet the needs and objectives of both sides, and the parties are likely to be firm about their primary interests and needs, but flexible about how these needs and interests are met.¹⁵³ Mediators must attempt to probe below the surface of each party's position in order to discover the underlying needs of each party.¹⁵⁴ Parties must also be willing to share information about themselves,¹⁵⁵ specifically, what they want and why they want it, in specific, concrete and clearly understood terms. Each party must understand the meaning of what is being said by each side, and while mutual understanding is the

¹⁴⁸ Kemp and Smith (note 146) at 5-21 as cited by Lewicki, Barry and Saunders (note 106) at 83 note 5.

¹⁴⁹ M. Olekalns, P.L. Smith and T. Walsh 'The process of negotiating: Strategy and timing as predictors of outcomes' (1996) 68 *Organisational Behaviour and Human Decision Processes* 68-77 as cited by Lewicki, Barry and Saunders (note 106) at 83 note 6.

¹⁵⁰ See also H.H. Kelley 'A classroom study of the dilemmas in interpersonal negotiation' in K. Archibald (ed.) *Strategic interaction and conflict: Original papers and discussion* (1966) Berkeley, CA: Institute of International Studies 49-73 as cited by Lewicki, Barry and Saunders (note 106) at 83 note 7.

¹⁵¹ See Lewicki, Barry and Saunders (note 106) chapter 5 for a discussion on framing.

¹⁵² See Lewicki, Barry and Saunders (note 106) at 60.

¹⁵³ R. Fisher, W Ury and B. Patton *Getting to yes: Negotiating agreement without giving in* 2ed (1991) New York: Penguin; D.G. Pruitt and J.Z. Rubin *Social conflict: Escalation, stalemate and settlement* (1986) New York: Random House as cited by Lewicki, Barry and Saunders (note 106) at 83 note 8.

¹⁵⁴ See Lewicki, Barry and Saunders (note 106) at 61.

¹⁵⁵ See M. Neale and M.H. Bazerman *Cognition and rationality in negotiation* (1991) New York: Free Press as cited by Lewicki, Barry and Saunders (note 106) at 84 note 57.

responsibility of each party, the mediator can assist the communication process by encouraging the parties to engage in active listening and by testing whether, and ensuring that each side has received the message that was intended.¹⁵⁶

While open channels of communication for relevant information exchange would be the ideal in every mediation, there are in practice, circumstances where feelings may be running so high that direct flows of communication are impossible, so that the channels may, initially at least, need to be indirect by being routed through the mediator.¹⁵⁷ Similarly, in mediations where there are strong negative feelings or where one or more parties are likely to dominate, mediators, with the consent of the parties, may need to create formal, structured procedures for communication, ensuring that such a procedure gives everyone a chance to speak.¹⁵⁸

2. *Building bridges of understanding*

The central focus of mediation is to achieve a dispassionate objective appraisal of the dispute, and this is where the skills of the mediator are critical in assisting each party to enlarge its understanding of the other party's point of view, so that it can accurately assess a possible outcome. Each party needs to be aware that, if they can understand where the other party is coming from, they can be far more effective in negotiating an outcome, and the mediator can assist each party to assess the sort of consensus that could be achieved.¹⁵⁹

A central element of building bridges of understanding is to create trust and efforts should be made to develop trust at each stage of the mediation process. Trust in a human context in mediation operates on two basic levels, trust between the parties and trust between the mediator and each party respectively.

Kelley refers to two dilemmas directly related to trust that all negotiating parties face, and that all mediators should be conscious of.¹⁶⁰ The first is the dilemma of honesty, and concerns how much of the truth a party should reveal to the other side. As discussed above, information exchange is critical to progress in a mediation as there

¹⁵⁶ Lewicki, Barry and Saunders (note 106) at 80-81.

¹⁵⁷ Street (note 95) at 362.

¹⁵⁸ Lewicki, Barry and Saunders (note 106) at 81.

¹⁵⁹ Street (note 95) at 363-365.

¹⁶⁰ Kelley (note 150) at 49-73 as cited by Lewicki, Barry and Saunders (note 106) at 26 note 11.

needs to be an element of openness on both sides in order to move from opening positions. The second dilemma is the dilemma of trust itself, and this relates to how much a party should believe of what another party is telling them. If there is not an element of trust between parties in a mediation, and between the parties and the mediator, it is likely to prove difficult to reach an agreement.

Lewicki, Barry and Saunders point out that the search for an optimal solution through giving information and making concessions is assisted by trust and a belief that there is honesty and fairness in the process, and that two elements in negotiations in particular, assist in creating trust.¹⁶¹ The first is based on perceptions of outcomes and can be influenced by managing how the proposed result is perceived by the recipient, and the other is based on perceptions of the process, and this can be enhanced by conveying signs that signal fairness and reciprocity in proposals and concessions.

Where one party makes numerous proposals that are rejected and the other party offers no proposal, it is understandable that there may be a feeling of dejection and that consequently, the mediation could end. If a party makes concessions, they trust the other party and the process much more if a concession is returned, and the belief that concessions will occur in negotiations appears to be almost universal.¹⁶² This pattern of give and take is not just a characteristic of negotiation, it seems to be essential to joint problem solving in most interdependent relationships.¹⁶³ Lewicki, Barry and Saunders point out that satisfaction with negotiations is as much determined by the process through which the agreement is reached as it is with the outcome obtained. They further remark that efforts to eliminate or reduce 'give and take'¹⁶⁴ will short-

¹⁶¹ Lewicki, Barry and Saunders (note 106) at 13-14.

¹⁶² Lewicki, Barry and Saunders asked negotiators from more than 50 countries if they expect give and take to occur during negotiations in their culture and they all confirmed that they did, see Lewicki, Barry and Saunders (note 106) at 14.

¹⁶³ See M. J. Kimmel, D.G. Pruitt, J.M Magenau, E. Konar-Goldband and P.J.D. Carnevale 'Effects of trust aspiration and gender on negotiation tactics' (1980) 38 *Journal of Personality and Social Psychology* 9-23; L.L. Putnam and T.S. Jones 'Reciprocity in negotiations: An analysis of bargaining interaction' (1982) 49 *Communication Monographs* 171-91; L.R. Weingart, L.L. Thompson, M.H. Bazerman and J.S Carroll 'Tactical behaviours and negotiation outcomes' (1990) 1 *International Journal of Conflict Management* 7-31 as cited by Lewicki, Barry and Saunders (note 106) at 26 note 13.

¹⁶⁴ For a further discussion of this point see H. Raiffa *The art and science of negotiation* (1982) Cambridge, MA: Belknap Press of Harvard University Press; B.M. Selekman, S.H. Fuller, T. Kennedy and J.M. Baisel *Problems in labor relations* (1964) New York: McGraw-Hill as cited by Lewicki, Barry and Saunders (note 106) at 26 note 14.

circuit the process, and could destroy both the basis for trust and any possibility of achieving a mutually satisfactory result.¹⁶⁵

Although there is no guarantee that trust will lead to collaboration, experience leaves little doubt that mistrust inhibits it.¹⁶⁶ Interdependent parties that do not trust each other will act tentatively or defensively, which is likely to elicit a hesitant, cautious, and distrustful response from other parties, and in turn undermine the process.¹⁶⁷ Trust, as part of the process of understanding, is a complex, uncertain process and depends in part on how the parties behave and on their personal characteristics.¹⁶⁸ Parties that trust each other are more likely to share information and to communicate accurately their needs, positions, and the facts of a situation.¹⁶⁹ Conversely, parties that do not trust each other are more likely to engage in positional bargaining, use threats, and remain tied to uncompromising positions.¹⁷⁰ As with defensiveness, mistrust is likely to be reciprocated and to lead to unproductive negotiations. To develop trust effectively, each party must believe that they and the other party choose to behave in a cooperative manner and believe that this behaviour is a signal of the other's honesty, openness, and a similar mutual commitment to a joint solution.¹⁷¹

There is little doubt that creating trust is an elusive process for a mediator and is only achieved as a by-product of other efforts, such as listening empathetically and with respect, clarifying issues and carefully checking on the changing positions of the parties in caucus.¹⁷² Salem¹⁷³ observes that mediators should work diligently to gain and maintain the parties' trust, by being perceived by the parties as an individual that understands and cares about them and their disputes. At the outset, the mediator should explain the process to the parties, so that, depending on their level of experience, they understand how it will work and are committed to it. Joint sessions and separate

¹⁶⁵ Lewicki, Barry and Saunders (note 106) at 14.

¹⁶⁶ Lewicki, Barry and Saunders (note 106) at 79.

¹⁶⁷ J. Gibb 'Defensive communication' (1961) 3 *Journal of Communication* 141-48 as cited by Lewicki, Barry and Saunders (note 106) at 84 note 54.

¹⁶⁸ Lewicki, Barry and Saunders (note 106) at 80.

¹⁶⁹ Butler (note 145) at 217-38; A.E. Tenbrunsel 'Trust as an obstacle in environmental-economic disputes' (1999) 42 *American Behavioural Scientist* 1350-67 as cited by Lewicki, Barry and Saunders (note 106) at 84 note 55.

¹⁷⁰ Kimmel, Pruitt, Magenau, Konar-Goldband and Carnevale (note 163) at 9-23 as cited by Lewicki, Barry and Saunders (note 106) at 84 note 56.

¹⁷¹ Lewicki, Barry and Saunders (note 106) at 80.

¹⁷² Trollip (note 77) at 51.

¹⁷³ Salem 'Unpublished Notes (1991)' quoted by Nupen (note 22) at 44.

caucuses should be discussed in the light of what the parties feel most comfortable with and what is likely to effectively advance the negotiations.¹⁷⁴

Inconsistent behaviour or a breach of confidentiality¹⁷⁵ will cause the process to collapse, as the mediator's primary role is to nurture effective commitment from the parties. When gathering information from parties who are sensitive and defensive following a protracted dispute, an empathetic mediator displaying understanding about the parties' problems and how they see the issues, can have a salutary effect and can help to win the confidence and trust of the parties, reinforcing the mediator's acceptability¹⁷⁶ and in turn assisting the parties in finding a solution.

3. *Informed negotiations*

When the channels of communication are flowing and the parties have exchanged views in order to establish bridges of understanding, they may proceed to address the negotiations, with the mediator as the catalyst, the 'hand at the elbow'.¹⁷⁷

As discussed above, the interdependence of people's goals can determine whether it is a competitive 'zero-sum', or 'distributive', situation where there can only be one winner, or 'mutual-gains', or 'non-zero-sum' or 'integrative' situation where all of the parties can achieve their goals and objectives.¹⁷⁸ Lewicki, Barry and Saunders point out that the structure of the interdependence can shape the strategies and tactics that parties use. In distributive situations the parties are motivated to win so that they will employ win-lose strategies and tactics. This approach to negotiation, called distributive bargaining, accepts that there can only be one winner in the particular

¹⁷⁴ Nupen (note 22) at 42-43.

¹⁷⁵ See Nupen (note 22) at 43. When a party meets with the mediator in separate caucus, it is normal practice that whatever is said to the mediator is confidential and the mediator will not release information gleaned in caucus to other parties unless specifically authorised to do so. This element of mediation confidentiality creates the conditions in which there can be a candid exchange of views between a party and the mediator and in which the mediator can receive information that a party may be reluctant to share with others. See also chapter 6 at 145 for a discussion on the different forms of confidentiality in mediation.

¹⁷⁶ Trollip (note 77) at 51. See also Nupen (note 22) at 44.

¹⁷⁷ Street (note 95) at 365.

¹⁷⁸ See chapter 2 at 27. The number of issues in a negotiation together with the relationship between the parties can also prove critical in the choice of strategy to employ, for example, single issue negotiations tend to dictate distributive negotiations as the only real negotiation issue is the price or 'distribution' of that issue, while multiple-issue negotiations are more likely to be integrative as parties strive for agreements that are mutually beneficial, see Lewicki, Barry and Saunders (note 106) at 96-97.

context and pursues a course of action to be that winner. The purpose of the negotiations is to ‘claim value’ by doing whatever is necessary to attain the prize.¹⁷⁹

In integrative situations, the parties employ win-win strategies and tactics and attempt to find solutions so that both parties achieve their goals. The purpose of the negotiation is to ‘create value’¹⁸⁰ in order to find a way for all parties to meet their objectives, by identifying more resources or finding unique ways to share and coordinate the use of existing resources.¹⁸¹ The goals of the parties in integrative negotiation are not mutually exclusive so that one party’s gain does not have to be at the other party’s expense, and both parties can achieve their objectives.¹⁸² While the situation in a mediation may initially appear to be ‘win-lose’, numerous authors have pointed out that discussion and mutual exploration can often suggest alternatives where both parties can gain.¹⁸³

Implications of claiming and creating value processes

As Lewicki, Barry and Saunders point out; in reality most negotiations are a combination of claiming and creating value processes. They point out three main implications from this that are significant for parties in a mediation and that mediators

¹⁷⁹ See D Lax and J Sebenius *The manager as negotiator: Bargaining for cooperation and competitive gain* (1986) New York: Free Press as cited by Lewicki, Barry and Saunders (note 106) at 26 note 15.

¹⁸⁰ Value may be created in numerous ways, for example, by exploiting differences as well as common interests that exist between the parties, by exploiting differences in interests, judgments about the future, risk tolerance and time preference. Negotiation is about exploring both common and different interests to create value and using these interests as the basis for a strong and lasting agreement, see Lax and Sebenius (note 179) as cited by Lewicki, Barry and Saunders (note 106) at 26 note 16.

¹⁸¹ Lewicki, Barry and Saunders (note 106) at 14. Lewicki, Barry and Saunders identify four key steps in the integrative negotiation process; identify and define the problem, understand the problem and bring interests and needs to the surface, generate alternative solutions to the problem, and evaluate those alternatives and select among them. The first three steps are important for ‘creating value’ while the last step involves ‘claiming value’. It is important that processes to create value precede processes to claim value as the former is only effective when it is engaged in collaboratively and when there is not a focus on who gets what, while the latter involves distributive bargaining processes that need to be introduced carefully into integrative negotiation or they could adversely affect the relationship and resolution progress, see Lewicki, Barry and Saunders (note 106) at 61-76.

¹⁸² R. E. Walton and R.B. McKersie *A behavioural theory of labor negotiations: An analysis of a social interaction system* (1965) New York: McGraw-Hill as cited by Lewicki, Barry and Saunders (note 106) at 82 note 1.

¹⁸³ See P.J.D. Carnevale and D.G. Pruitt ‘Negotiation and mediation’ in M. Rosenberg and L. Porter (Eds.), *Annual review of psychology* (1992) Vol. 43 531-82 Palo Alto, CA: Annual Reviews, Inc.; Filley *Interpersonal conflict resolution* (1975) Glenview, IL: Scott Foresman; Fisher, Ury and Patton (note 153); D.G. Pruitt *Negotiation behaviour* (1981) New York: Academic Press; D.G. Pruitt ‘Strategic choice in negotiation’ (1983) *27 American Behavioural Scientist* 167-94; D.G. Pruitt and P.J.D. Carnevale *Negotiation in social conflict* (1983) Pacific Grove, CA: Brooks-Cole; and Walton and McKersie (note 182) as cited by Lewicki, Barry and Saunders (note 106) at 83 note 2.

should be aware of.¹⁸⁴ The first is that the parties must be able to recognise situations that require more of one approach than the other. For example, distributive bargaining may prove most appropriate when time and resources are limited, when the other party is likely to be competitive, and when there is no likelihood of future interaction between the parties. The second implication is that the parties must be versatile in their comfort and use of both strategic approaches, so that they can be used with equal versatility. As there is no single best, preferred, or right way to negotiate, the choice of negotiation strategy requires adaptation to the particular situation.

The third implication is that the parties' perceptions of situations tend to be biased towards seeing problems as more distributive/competitive than they really are, and accurately perceiving the nature of the interdependence between the parties is critical for successful negotiation as otherwise they may leave unclaimed value at the end of their negotiations because they failed to recognise opportunities for creating value.¹⁸⁵ In essence, successful coordination of interdependence by the parties, as assisted by the mediator, is more likely to lead to a collaborative mutually beneficial result for the parties.

Interdependent parties can usually influence each others' outcomes and decisions.¹⁸⁶ This 'mutual adjustment' continues throughout the process as both parties act to influence each other.¹⁸⁷ As negotiations in a mediation transform over time, mutual adjustment is seen as one of the key causes of the changes that occur as parties are assisted in their negotiations.¹⁸⁸ A mediator must be able to anticipate the possible

¹⁸⁴ Lewicki, Barry and Saunders (note 106) at 15.

¹⁸⁵ Research has shown that people are prone to several systematic biases in the way they perceive and judge interdependent situations, which in turn suggests that many negotiations yield suboptimal outcomes, see Lewicki, Barry and Saunders (note 106) at 15.

¹⁸⁶ E. Goffman *Strategic interaction* (1969) Philadelphia, PA: University of Philadelphia Press; Pruitt and Rubin (note 153); B.H. Raven and J.Z. Rubin *Social psychology: People in groups* (1973) New York: John Wiley and Sons; I. Ritov 'Anchoring in simulated competitive market negotiation' (1996) 67 *Organisational Behaviour and Human Decision Processes* 16-25 as cited by Lewicki, Barry and Saunders (note 106) at 26 note 5.

¹⁸⁷ J.F. Alexander, P.L. Schul and E. Babakus 'Analysing interpersonal communications in industrial marketing negotiations' *Journal of the Academy of Marketing Science* (1991) 19, 129-39; W.A. Donohue and A.J. Roberto 'An empirical examination of three models of integrative and distributive bargaining' (1996) 7 *International Journal of Conflict Management* 209-99; N. Eyuboglu and A. Buja 'Dynamics of channel negotiations: Contention and reciprocity' (1993) 10 *Psychology & Marketing* 47-65; R.L. Pinkley and G.B. Northcraft 'Cognitive interpretations of conflict: Implications for dispute processes and outcomes' (1994) 37 *Academy of Management Journal* 193-205 as cited by Lewicki, Barry and Saunders (note 106) at 24 note 6.

¹⁸⁸ B. Gray 'The gender-based foundation of negotiation theory' in B.H. Sheppard, R.J. Lewicki and R.J. Bies (eds) *Research in negotiation in organisations* (1994) (Vol. 4, pp. 3-36) Greenwich, CT: JAI Press;

ways negotiations may move as the parties move, in a form of mutual adjustment, towards a possible agreement.

Interests

Numerous authors on negotiation, particularly, Roger Fisher, William Ury, and Bruce Patton in their book, *Getting to Yes*, have stressed that a critical step to achieving an integrative agreement is the ability of the parties to understand and satisfy each other's interests.¹⁸⁹ Interests are the underlying concerns, needs, desires, or fears that motivate a party in a mediation to take a particular position. While positions are effectively what parties want, needs and interests are why they want them.¹⁹⁰ Fisher, Ury, and Patton believe that while negotiators may have difficulty satisfying each other's specific positions, an understanding of the underlying interests may permit them to invent solutions that meet their interests.¹⁹¹

In distributive bargaining, negotiators trade positions back and forth, attempting to achieve a settlement as close to their targets as possible. However, in integrative negotiation, both negotiators need to pursue the other's thinking and logic to determine the factors that motivated them to arrive at their goals. The presumption is that if both parties understand the motivating factors for the other, they may recognise possible compatibilities in interests that permit them to invent new options that both will endorse.¹⁹² An understanding of interests is critical to effective integrative negotiation.

Lax and Sebenius suggest that several types of interests may be at stake in a negotiation and that each type may be intrinsic, where the parties value it in and of itself, or instrumental, where the parties value it because it helps them to attain other outcomes in the future.¹⁹³

Substantive interests relate to the focal issues under negotiation, such as economic and financial issues such as the price or rate to be paid, or the substance of a negotiation such as the division of resources, effectively the tangible issues discussed above. These

D. Kolb *The mediators* (1985) Cambridge, MA: MIT Press; D.M. Kolb and L.L. Putnam 'Through the looking glass: Negotiation theory refracted through the lens of gender' in S. Gleason (Ed.), *Frontiers in dispute resolution in labor relations and human resources* (1997) East Lansing, MI: Michigan State University Press 231-57 as cited by Lewicki, Barry and Saunders (note 106) at 26 note 7.

¹⁸⁹ Fisher, Ury and Patton (note 153) as cited by Lewicki, Barry and Saunders (note 106) at 83 note 11.

¹⁹⁰ Fisher, Ury and Patton (note 153). See also Nupen (note 22) at 45-46.

¹⁹¹ See also Lewicki, Barry and Saunders (note 106) at 64.

¹⁹² Lewicki, Barry and Saunders (note 106) at 65.

¹⁹³ Lax and Sebenius (note 179) as cited by Lewicki, Barry and Saunders (note 106) at 83 note 13.

interests may be intrinsic or instrumental or both, as parties may want something because it is intrinsically satisfying to them or they may want something because it helps them achieve a long-range goal.

Process interests relate to the way a dispute is settled. One party may pursue distributive bargaining because they enjoy the competitive element, while another party may enjoy negotiating because they believe they have not been consulted in the past and want to have some influence on how a key problem is resolved, so that the issues under discussion are less important than the opportunity they allow that party to voice their opinions.¹⁹⁴ Process interests can also be both intrinsic and instrumental. Having a voice may be intrinsically important to a group as it allows them to affirm their legitimacy and worth and highlights the key role they play in the organisation, and it can also be instrumentally important, in that if they are successful in gaining voice in this negotiation, they may be able to demonstrate that they should be invited back to negotiate other related issues in the future.

Relationship interests indicate that one or both parties value their relationship with each other and do not want to take actions that will damage it. Intrinsic relationship interests exist when the parties value the relationship both for its existence and for the pleasure or fulfilment that sustaining it creates. Instrumental relationship interests exist when the parties derive substantive benefits from the relationship and do not wish to endanger future benefits by damaging it.

Lax and Sebenius also point out that the parties may have ‘interests in principle’.¹⁹⁵ Certain principles, concerning what is fair, what is right, what is acceptable, what is ethical, or what has been done in the past and should be done in the future, may be deeply held by the parties and serve as the dominant guides to their action. These principles often involve intangible factors. Interests in principles can also be intrinsic, valued because of their inherent worth, or instrumental, valued because they can be applied to a variety of future situations and scenarios.

Once the interests of the respective parties have been established, it may be possible to develop a range of options that can satisfy the parties’ interests in different

¹⁹⁴ See chapter 5 of B.H. Sheppard, R.J. Lewicki and J.W. Minton *Organisational justice: The search for fairness in the workplace* (1992) New York: Lexington Books for a more complete discussion of the role of “voice” in organisations as cited by Lewicki, Barry and Saunders (note 106) at 83 note 14.

¹⁹⁵ Lax and Sebenius (note 179) as cited by Lewicki, Barry and Saunders (note 106) at 83 note 15.

ways. It has been suggested that during this process the parties should separate the people from the problem, and when dealing with the problem, they should focus on interests rather than positions.¹⁹⁶ They should explore each other's interests and where the parties are unable to reconcile underlying interests and recognise that they conflict, the parties should employ the use of objective criteria to determine how this conflict may be resolved.¹⁹⁷

Separating the people from the problem facilitates the parties in dealing directly and empathetically with each other, making a mutually acceptable agreement more likely. Fisher and Brown¹⁹⁸ develop this concept and suggest that negotiating parties should be unconditionally constructive with one another. They suggest the following six fundamental qualities; parties should balance reason with emotion, understand each other's interests, perceptions and notions of fairness, communicate openly, be reliable, persuade rather than threaten, and accept each other as negotiating partners.

The unconditionally constructive approach will prove central in developing possible options during the creative phase of integrative negotiation. As mentioned, once the parties understand each other's interests, a variety of alternative solutions can be developed, with the objective of creating a list of options or possible solutions to the dispute that can be evaluated until a final solution is reached.¹⁹⁹

Techniques to assist parties in generating alternative solutions

The techniques to assist parties in generating alternative solutions fall into two general categories.²⁰⁰ The first requires the parties to redefine, recast, or reframe the problem or problem set to create 'win-win' options out of what previously seemed to be a 'win-lose' situation. The second takes the problem as it is and creates a long list of options that the parties can choose from. In an integrative negotiation dealing with a complex problem, both types of techniques may be used and even intertwined.

¹⁹⁶ Mediators and parties using this interest-based approach to negotiations would have been influenced by the method of 'principled negotiation' developed by Fisher, Ury and Patton (note 153).

¹⁹⁷ Fisher, Ury and Patton (note 153) at 17-98.

¹⁹⁸ R Fisher and S Brown *Getting Together: Building a Relationship that Gets to Yes* at 24-172.

¹⁹⁹ See Lewicki, Barry and Saunders (note 106) at 67.

²⁰⁰ See Lewicki, Barry and Saunders (note 106) at 68.

Redefining the problem or problem set

The techniques in this category require the parties to define their underlying needs and to develop alternatives to meet them, with commentators proposing five main alternative methods.²⁰¹ Each method refocuses the issues under discussion and requires progressively more information about the other party's true needs, with solutions moving from simpler, distributive agreements to more complex and comprehensive, integrative ones, and there are numerous paths to finding joint gain.²⁰² It has been suggested that parties should begin with the easiest and least costly method and progress to the more costly approaches if the simpler ones prove unsuccessful.²⁰³

- *Expand the Pie*: This is a simple solution of adding resources to a situation where there is a shortage in such a way that both sides can achieve their objectives. The only information the parties require is knowledge of each other's interests. The approach assumes that simply enlarging the resources will solve the problem and to the extent that the negotiation increases the costs of a person or organisation not directly involved in the negotiation, the solution may be integrative for the negotiators but problematic for other stakeholders.²⁰⁴
- *Logroll*: This involves the parties finding more than one issue in conflict and having different priorities for those issues,²⁰⁵ they then agree to trade off among these issues so that one party achieves a highly preferred outcome on the first issue and the other party achieves a highly preferred outcome on the second issue. If each party gets their most preferred outcome on a high-priority issue, then each should receive more and the joint outcomes should

²⁰¹ For example, see Neale and Bazerman (note 155); Pruitt (note 145); D.G. Pruitt 'Strategic choice in negotiation' (1983) 27 *American Behavioural Scientist* 167-94; D.G. Pruitt and P.J.D. Carnevale *Negotiation in social conflict* (1983) Pacific Grove, CA: Brooks-Cole; and D.G. Pruitt and S.A. Lewis 'Development of integrative solutions in bilateral negotiation' (1975) 31 *Journal of Personality and Social Psychology* 621-33 as cited by Lewicki, Barry and Saunders (note 106) at 83 note 21.

²⁰² M. Olekalns, F. Lau and P. Smith 'The Dynamics of Trust in Negotiation' Paper presented at the International Association of Conflict Management, Park City, Utah, Melbourne Business School Working Paper (2002) as cited by Lewicki, Barry and Saunders (note 106) at 83 note 22.

²⁰³ See Lewicki, Barry and Saunders (note 106) at 68.

²⁰⁴ J.J. Gillespie and M.H. Bazerman 'Parasitic integration: Win-win agreements containing losers' (1997) 13 *Negotiation Journal* 271-82 as cited by Lewicki, Barry and Saunders (note 106) at 83 note 23.

²⁰⁵ M. Tajima and N.M. Fraser 'Logrolling procedure for multi-issue negotiation' (2001) 10 *Group Decision and Negotiation* 217-35 as cited by Lewicki, Barry and Saunders (note 106) at 83 note 24.

be higher.²⁰⁶ It is often done by trial and error and by experimenting with various packages of offers that will satisfy everyone involved.²⁰⁷

- *Use Nonspecific Compensation:* This involves one party being permitted to obtain their objectives by paying the other party off for accommodating them. The payoff may be unrelated to the substantive negotiation, but it is viewed by the recipient as sufficient for agreeing to the other party's preferences. The compensation is "nonspecific" as it is not directly related to the substantive issues being discussed. The party compensating must be aware of what is valuable to the other party and how much compensation is required.
- *Cut the Costs for Compliance:* This involves one party achieving their objectives and the other party's costs being minimised for agreeing to the solution. It is seen as more sophisticated than logrolling or non-specific compensation as it requires a more intimate knowledge of the other party's real needs and preferences.
- *Find a Bridge Solution:* When the parties invent new options that meet their respective needs they have created a bridge solution, which requires a fundamental reformulation of the problem so that the parties are disclosing sufficient information to discover their interests and needs and subsequently invent options to satisfy those needs.²⁰⁸ Bridging solutions do not always

²⁰⁶ S. Moran and I. Ritov 'Initial perceptions in negotiations: Evaluation and response to "logrolling" offers' (2002) 15 *Journal of Behavioural Decision Making* 101-24 as cited by Lewicki, Barry and Saunders (note 106) at 83 note 25.

²⁰⁷ See Lewicki, Barry and Saunders (note 106) at 69. Research indicates that negotiators reach better agreements as the number of issues being negotiated increases, see C. E. Naquin 'The agony of opportunity in negotiation: Number of negotiable issues, counterfactual thinking, and feelings of satisfaction' (2002) 91 *Organisational Behaviour and Human Decision Processes* 97-107. Negotiator satisfaction may be less when more issues are negotiated, however, for a discussion on negotiator cognition and satisfaction see Chapter 5 of Lewicki, Barry and Saunders (note 106). If it appears initially that only one issue is at stake, the parties may need to separate the single issue into two or more issues so that the logrolling may begin, see Lax and Sebenius (note 179); D.G. Pruitt *Negotiation behaviour* (1981) New York: Academic Press as cited by Lewicki, Barry and Saunders (note 106) at 83 note 27. Research by Mannix, Tinsley, and Bazerman also shows that when parties believe that future negotiations with the other party are unlikely, they are less likely to employ logrolling and consequently may reach a suboptimal agreement in the current negotiation, see E.A. Mannix, C.H. Tinsley and M. Bazerman 'Negotiating over time: Impediments to integrative solutions' (1995) 62 *Organisational Behaviour and Human Decision Processes* 241-51 as cited by Lewicki, Barry and Saunders (note 106) at 83 note 28.

²⁰⁸ J.K. Butler Jr. 'Two integrative win-win negotiating strategies' (1996) 27 *Simulation and Gaming* 387-92 as cited by Lewicki, Barry and Saunders (note 106) at 83 note 29.

remedy all concerns, but if parties commit themselves to a win-win negotiation, bridging solutions can prove highly satisfactory.

Generating Alternative Solutions to the Problem as Given

- *Brainstorming*: This involves small groups of people working to generate as many possible solutions to the problem as they can, and recording the solutions, without comment, as they are identified. Parties are urged to be spontaneous, even impractical, and not to censor anyone's ideas or discuss or evaluate any solution when it is proposed so they do not stop the free flow of new ideas. The success of the process depends on the amount of intellectual stimulation that occurs as different ideas are generated. It is also suggested that participants should avoid judging or evaluating solutions as this will stifle creativity. Parties should also be encouraged to depersonalise the problem and to treat all possible solutions as equally viable, regardless of who produces them.²⁰⁹ As research shows that when parties work at the process for a long time, the best ideas are most likely to surface during the latter part of the activity, it is important that the parties are exhaustive in the process.²¹⁰ It has also been suggested that the parties could ask outsiders who know nothing about the history of the negotiation or the issues for possible options and possibilities that have not been considered.²¹¹
- *Surveys*: This has the advantage over brainstorming in that it can involve the ideas of those that are not present during the negotiation but has the disadvantage that contributors through this process do not have the advantage of hearing the views of those involved in the negotiation.
- *Electronic Brainstorming*: This involves employing the services of a professional facilitator who types the responses from a series of questions

²⁰⁹ Filley (note 183); Fisher, Ury and Patton (note 153); Walton and McKersie (note 182) as cited by Lewicki, Barry and Saunders (note 106) at 84 note 31.

²¹⁰ As Shea notes, 'Generating a large number of ideas apparently increases the probability of developing superior ideas. Ideas, when expressed, tend to trigger other ideas. And since ideas can be built one upon the other, those that develop later in a session are often superior to those without refinement or elaboration. What difference does it make if a lot of impractical ideas are recorded? They can be evaluated and dismissed rapidly in the next step of the win-win process. The important thing is to ensure that few, if any, usable ideas are lost,' see G.F. Shea *Creative negotiating* (1983) Boston, MA: CBI Publishing Co., at 57 as cited by Lewicki, Barry and Saunders (note 106) at 84 note 32.

²¹¹ For a discussion on the rules to be observed in brainstorming, see Lewicki, Barry and Saunders (note 106) at 71-72.

put to participants into a computer anonymously that displays them to the group in aggregate. It is seen as particularly useful in situations that involve multiple parties or during preparations for a negotiation where there are disparate views within the team.

Although identifying options may lead to a solution, it has been suggested that solutions usually flow from hard work and by pursuing three related processes: information exchange, focusing on interests rather than positions, and firm flexibility.²¹² Information exchange facilitates the parties in maximising the amount of information available, focusing on interests allows parties to move beyond opening positions and demands to determine what the parties really want and what needs must be satisfied, while firm flexibility allows parties to be firm regarding their interests while remaining flexible on the means to achieve them. Having established the set of possible solutions, the parties, assisted by the mediator, can engage in decision-making and come to an agreement on the best options until they ultimately reach an agreement.²¹³

Critique of the integrative approach

While such an approach to negotiation contemplates parties devising agreements through a process of identifying underlying interests and exploring options in an atmosphere of mutual respect in order to achieve a ‘win-win’ result,²¹⁴ such an approach to negotiation has elicited criticism.²¹⁵

It has been criticised for making parties in negotiations vulnerable to exploitation and for being ‘naïve’,²¹⁶ even misleading,²¹⁷ by neglecting the inherent limits of problem-solving as a model of negotiation,²¹⁸ over-emphasising the potential

²¹² Fisher, Ury and Patton (note 153); D.G. Pruitt ‘Strategic choice in negotiation’ (1983) 27 *American Behavioural Scientist* 167-94 as cited by Lewicki, Barry and Saunders (note 106) at 84 note 34.

²¹³ Some authors have suggested a detailed set of guidelines to assist negotiators in evaluating options, see Filley (note 183); D.G. Pruitt and P.J.D Carnevale *Negotiation in social conflict* (1983) Pacific Grove, CA: Brooks-Cole; Shea (note 210) at 57; and Walton and McKersie (note 182) as cited by Lewicki, Barry and Saunders (note 106) at 84 note 35.

²¹⁴ See also Roger Fisher and Scott Brown *Getting Together: Building a Relationship as We Negotiate*; William Ury *Getting Past No: Negotiating with Difficult People*; Robert Mnookin, Scott Peppet and Andrew Tulumello *Beyond Winning: Negotiating To Create Value in Deals and Disputes*; Douglas Stone, Bruce Patton and Sheila Heen *Difficult Conversations*.

²¹⁵ Buhring-Uhle, Kirchhoff and Scherer (note 30) at 154.

²¹⁶ James White ‘The Pros and Cons of “Getting to Yes”’ (1984) 34 *J Legal Educ* at 115.

²¹⁷ White (note 216) at 117; Lax and Sebenius (note 179) at 156.

²¹⁸ Carrie Menkel-Meadow ‘Toward Another View of Legal Negotiation: The Structure of Problem-Solving’ (1984) 31 *UCLA Law Review* 754 at 829-840.

of integrative negotiation and ignoring that ‘the most demanding aspect of nearly every negotiation is the distributional one’.²¹⁹ The appeal to objective criteria has also drawn criticism which some critics believe is employed in negotiations more as a bargaining tactic than as an honest basis for a mutually acceptable agreement.²²⁰

While some of these criticisms may seem justified, it has been suggested that others are based on misperceptions.²²¹ It has also been suggested that the underlying commitment to co-operative problem-solving and the attempt to combat the widespread conventional wisdom about how to ‘win’ in negotiations through over-reaching and deceptive behaviour may have resulted in a perceived over-emphasis of the co-operative element in negotiations.²²²

It has been suggested that a ‘win-win’ in a mediation is not so much about both sides winning, but that the ‘win-win’ involves the distinction between the terms of the settlement, which is likely to involve some compromise, and the fact of the settlement, which is effectively the ‘win-win’ factor for both parties as they realise that the dispute has been resolved and is relegated to the past.²²³ The mediator is essentially attempting to assist the parties to formulate a resolution that they can live with rather than litigating, arbitrating or allowing the dispute to fester.²²⁴

The strategy is effectively to facilitate parties in a mediation to further their self interest by developing choices that are better than the ‘no agreement’ alternatives. It has been suggested that the inherent danger is that individuals who are already predisposed through their personality towards co-operative strategies might internalise only the positive, problem-solving element of such an approach to negotiation and could get caught in a ‘co-operative pathology of appeasement.’²²⁵

For integrative negotiations to succeed, the parties must be willing to collaborate rather than to compete and be committed to reaching a goal that benefits all, rather than pursuing only their own agenda. They must effectively be willing to make their own

²¹⁹ White (note 216) at 115-116.

²²⁰ White (note 216) at 117.

²²¹ Buhring-Uhle, Kirchhoff and Scherer (note 30) at 155.

²²² Buhring-Uhle, Kirchhoff and Scherer (note 30) at 155. The competitive element present in negotiations has received more careful attention in more recent publications, see Ury (note 214) and the added passages in revised editions of *Getting to Yes*.

²²³ Street (note 95) at 367.

²²⁴ See generally Fisher, Ury and Patton (note 153) at 101-154.

²²⁵ Buhring-Uhle, Kirchhoff and Scherer (note 30) at 155.

needs explicit, to identify similarities, and to recognise and accept differences.²²⁶ This does not mean that for successful integrative negotiations to occur, each party should be just as interested in the objectives and problems of the other party as they are in their own. Assuming responsibility for each other's needs and outcomes as well as for their own is more likely to be dysfunctional than successful as parties that are deeply committed to each other and each other's welfare often do not achieve the best solution.²²⁷ However close the parties may feel to each other, it is unlikely that they will completely understand each other's needs, objectives, and concerns, and they can consequently fall into the trap of not meeting each other's objectives while believing that they are.²²⁸ Negotiating parties maximise their outcomes when they assume a healthy, active self-interest in achieving their own goals while also recognising that they are in a collaborative, problem-solving relationship.²²⁹ When parties and the mediator are mindful of this fact, the prospect of an integrative solution is more likely to result from engaging in the process and the criticisms discussed above are largely redundant.

Towards a definition

Boulle and Rycroft point out that mediation is neither easy to define nor describe.²³⁰ They give reasons such as the flexibility and open interpretation of terms such as 'voluntary' and 'neutrality' which are often used in the definition of mediation, but remain unclear. They add that the term is used in different senses by different users,

²²⁶ Lewicki, Barry and Saunders (note 106) at 78.

²²⁷ W.R. Fry, I. J. Firestone and D. Williams 'Bargaining process in mixed-singles dyads: Loving and losing' paper presented at the annual meeting of the Eastern Psychological Association, Philadelphia, PA (April, 1979); H.H. Kelley and D.P. Schenitzki 'Bargaining' in C.G. McClintock (ed) *Experimental social psychology* New York: Holt, Rinehart and Winston 298-337 as cited by Lewicki, Barry and Saunders (note 106) at 84 note 49.

²²⁸ Rubin and Brown (note 113) as cited by Lewicki, Barry and Saunders (note 106) at 84 note 50.

²²⁹ Kelley and Schenitzki (note 227) at 298-337 as cited by Lewicki, Barry and Saunders (note 106) at 84 note 51. Maximising outcomes can also be negatively correlated with a party's ability to punish the other party. As De Dreu, Giebels, and van de Vliert point out, even cooperatively motivated negotiators have less trust, exchange less information about preferences and priorities, and achieve agreements of lower joint value when they can punish the other party than when they do not have this ability, see C.K.W. de Dreu, E. Giebels and E. van de Vliert 'Social motives and trust in integrative negotiation: The disruptive effects of punitive capability' (1998) 83 *Journal of Applied Psychology* 408-22 as cited by Lewicki, Barry and Saunders (note 106) at 84 note 52.

²³⁰ Boulle and Rycroft cite the following authors as authorities on some of the difficulties with definitions: G Kurien 'Critique of Myths of Mediation' (1995) 6 *ADRJ* 43; S Silbey 'Mediation Mythology' (1993) 9 *Negotiation Journal* 349 and John Wade 'Mediation, The Terminological Debate' (1994) 5 *ADRJ* 204. See Laurence Boulle and Alan Rycroft *Mediation: Principles, Process, Practice* at 3.

often for different purposes and in different contexts by mediators with varying backgrounds, skills sets and diversity in practice.²³¹

They contend that definitional problems arise because of comparisons between private mediation and institutionalised (court annexed/compulsory) mediation. In their view descriptions have arisen from a perception that private mediations have ample resources, few time limitations, and are usually conducted by well-qualified mediators while institutionalised mediation often have none of these features and could be described as poor, short and nasty.²³²

A decade ago Boule and Rycroft believed that mediation in South Africa was still in the ‘defining phase’ of its development. This certainly remains true of commercial mediation. Working definitions are emerging from the actual practice of mediation, from those who promote it and the attitudes and beliefs of mediation educators and trainers, and are being influenced by the various areas in which mediation is growing such as the commercial and family realms both with and without the use of professional advisers.²³³ While there is sometimes talk of the ‘orthodox mediation process’ or the ‘standard model of mediation’ or ‘classical mediation’, with other versions being regarded as variations from the norm, Boule and Rycroft argue that, while there are limits to what can be classified as mediation, it is premature to glean a narrow definition from such phrases.²³⁴

Approaches to defining mediation

Generally speaking there are two approaches to defining the practice of mediation. The first is the *conceptualist approach* which defines the process in ideal terms, emphasising certain values, principles and objectives and such definitions have a high normative content. Consequently they may not reflect what actually happens in mediation practice.²³⁵ Folberg and Taylor’s conceptualist definition of mediation is often quoted in the Australian literature and states:

[T]he process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop

²³¹ Laurence Boule and Alan Rycroft *Mediation: Principles, Process, Practice* at 3.

²³² T Hobbes *Leviathan* at 65 as cited by Boule and Rycroft (note 231) at 4.

²³³ Boule and Rycroft (note 231) at 4.

²³⁴ Boule and Rycroft (note 231) at 4.

²³⁵ Boule and Rycroft (note 231) at 4.

options, consider alternatives, and reach a consensual settlement that will accommodate their needs.²³⁶

Despite its popularity, it has been correctly pointed out that this definition has many questionable elements and internal tensions.²³⁷ It would seem that mediation can often involve bargaining towards a compromise rather than the systematic isolation of issues in a dispute in order to effectively resolve it, and can sometimes have more to do with the efficient disposal of files in large organisations than accommodating ‘needs’.²³⁸

It has been correctly pointed out that other conceptualist definitions asserting that mediation ‘is empowering for the parties’, that it ‘reflects an alternative philosophy of conflict management’, or that it strives to ‘improve relationships between the parties’ are misleading as these goals are not achieved in mediations per se.²³⁹

The second approach to defining mediation focuses on what actually happens in practice and is referred to as the *descriptive approach*. Boulle and Rycroft point out that descriptive definitions have a low normative content and accept that within the diversity of mediation practice the values, principles and objectives of the conceptualists are often overlooked.²⁴⁰ One descriptive definition describes mediation as ‘a process of dispute resolution in which the disputants meet with the mediator to talk over and then attempt to settle their differences.’²⁴¹ It has been sensibly pointed out that this definition is largely uninformative and has very little prescriptive content.²⁴²

The strength of the conceptualist approach would seem to lie in the fact that it highlights for users and practitioners the higher goals and values of mediation which differentiate it from other decision-making processes, while its main short-coming is that it tends to pass off as *descriptive* those elements of mediation which are

²³⁶ J Folberg and A Taylor *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation* at 7, as cited by Boulle and Rycroft (note 231) at 4. Boulle and Rycroft also cite the following as references for other well-used definitions: C Moore *The Mediation Process: Practical Strategies for Resolving Conflict* at 15; H Astor and C Chinkin *Dispute Resolution in Australia* at 135-6.

²³⁷ See Boulle and Rycroft (note 231) at 4 who cite F Astill ‘On Alternative Significances of Definition in Dispute Resolution’ (October 1993) Paper presented at the Australasian Law Teachers’ Conference, Canterbury, New Zealand.

²³⁸ Boulle and Rycroft (note 231) at 4.

²³⁹ Boulle and Rycroft (note 231) at 5.

²⁴⁰ Boulle and Rycroft (note 231) at 5.

²⁴¹ M Roberts ‘Systems or Selves? Some Ethical Issues in Family Mediation’ (1992) 10 *Mediation Quarterly* 11 as cited by Boulle and Rycroft (note 143) at 5.

²⁴² Boulle and Rycroft (note 231) at 7.

prescriptive, which makes it an ideological rather than an empirical approach to defining mediation.²⁴³

Based on actual practice, the descriptive approach finds its main strength in reflecting reality while its main shortcoming is that it proves quite superficial and unhelpful given the diversity of mediation practice.²⁴⁴

The assistance of a definition

Most European Parliaments have yet to provide a general definition of mediation,²⁴⁵ while in some countries such as Austria,²⁴⁶ Denmark and Finland there is a legal definition of mediation, in other countries such as Belgium, Spain, Sweden, Greece, Portugal, the Netherlands and Italy,²⁴⁷ there is no general legal definition.²⁴⁸

In France, the New Code of Civil Procedure (NCCP) distinguishes conciliation²⁴⁹ from mediation.²⁵⁰ While conciliation is a process by which the

²⁴³ Boulle and Rycroft (note 231) at 5.

²⁴⁴ Boulle and Rycroft (note 231) at 5.

²⁴⁵ The reform of the civil procedure in Germany, effective from 2000, does not mention the term mediation. As expressed by N Alexander, W Gottwald and T Trenczek 'Mediation in Germany: The Long and Winding Road' in Alexander (note 49) at 189, the lack of direction concerning the process is likely to have a negative effect on the quality of the process and the standard of performance.

²⁴⁶ Austria provides two different definitions of mediation. As pointed out by Matl 'Mediation in Austria' in Alexander (note 49) at 61, like in most other countries, Austria does not provide one single definition of mediation, which, it is suggested probably means that the process is not yet well established and codified.

²⁴⁷ The Italian legislator does not use the term mediation (*'mediazione'*) as a structured activity to find a settlement to a dispute, and the Italian Civil Code only uses the term 'mediator' (Article 1754) to describe 'the one who puts in relation two or more parties for the conclusion of a business transaction, without being bound by any of them by relations of collaboration, dependence or representation'. The company law reform enacted by the Italian legislature with Legislative Decree no 5/2003 to encourage mediation in commercial disputes, implemented by Decree of 23 July 2004, no 222, offers a definition of conciliation as 'the service offered by one or more entities, different from judges or an arbitrator, under conditions of impartiality and having the aim to settle a dispute already arisen or that may arise between parties, through methods that promote an autonomous settlement' (Article 1, lett d, Decree 222/04). The definition of 'conciliator' is very vague, focusing only on the fact that the mediator cannot issue a binding decision (Article 1, lett e, Decree 222/04). See also G de Palo and L Cominelli 'Crisis of Courts and the Mediation Debate: The Italian Case' in Alexander (note 49) at 213.

²⁴⁸ See Giuseppe De Palo and Sara Carmeli 'Mediation in Continental Europe: a Meandering Path toward Efficient Regulation' in Christopher Newmark and Anthony Monaghan (eds) *Mediators on Meditation: Leading Mediator Perspectives on the Practice of Commercial Mediation* at 342.

²⁴⁹ Articles 127-131. See also Giuseppe De Palo and Sara Carmeli 'Mediation in Continental Europe: a Meandering Path toward Efficient Regulation' in Christopher Newmark and Anthony Monaghan (eds) *Mediators on Meditation: Leading Mediator Perspectives on the Practice of Commercial Mediation* at 343.

²⁵⁰ Article 131-1-131-15. See also Giuseppe De Palo and Sara Carmeli 'Mediation in Continental Europe: a Meandering Path toward Efficient Regulation' in Christopher Newmark and Anthony Monaghan (eds) *Mediators on Meditation: Leading Mediator Perspectives on the Practice of Commercial Mediation* at 343.

settlement of the dispute is decided directly by the parties or by the help of the judge whose mission is to conciliate parties,²⁵¹ mediation is deemed a voluntary process that always involves a third party, physical person or ‘association’ which must listen to parties, compare their interests and allow them to find a solution to their dispute.

Similarly, there is no exhaustive definition of either of these two methods given by the French legislature. In Spain, conciliation is the process by which a dispute is resolved by the parties themselves, while in mediation parties accept a solution given by the mediator, who is normally the judge before whom the proceeding has been introduced.²⁵² Outside of the differences that exist across EU member states on mainland Europe, and unlike the English model where mediation is based on the idea that parties can achieve a better result by involving a neutral/impartial third party, the working definitions of mediation have as a common feature the idea of reciprocal concessions made by parties to reach an amicable solution.²⁵³

It has been pointed out that the fact that even legal scholars only give tentative definitions for mediation, illustrates the lack of normative definition, and demonstrates the elusive nature of the mediation process for definitional purposes.²⁵⁴

Many ‘official’ definitions of mediation exist in Australian statutes, rules of court and codes of conduct for mediators, and this is viewed as a significant development, as earlier laws used the term without clearly defining or describing the process.²⁵⁵ It seems that in practice, there are very different forms of mediation process being used in different jurisdictions and subject areas (for example, the process of

²⁵¹ Article 21. See also Giuseppe De Palo and Sara Carmeli ‘Mediation in Continental Europe: a Meandering Path toward Efficient Regulation’ in Christopher Newmark and Anthony Monaghan (eds) *Mediators on Meditation: Leading Mediator Perspectives on the Practice of Commercial Mediation* at 343.

²⁵² It is difficult to distinguish between this kind of mediation and arbitration. See also Giuseppe De Palo and Sara Carmeli ‘Mediation in Continental Europe: a Meandering Path toward Efficient Regulation’ in Christopher Newmark and Anthony Monaghan (eds) *Mediators on Meditation: Leading Mediator Perspectives on the Practice of Commercial Mediation* at 343.

²⁵³ V Manfredi ‘Quel est l’état de la médiation dans l’Union européenne?’ in Actes du Colloque soutenu par la Commission Européenne *La médiation dans les conflits internationaux*. See also Giuseppe De Palo and Sara Carmeli ‘Mediation in Continental Europe: a Meandering Path toward Efficient Regulation’ in Christopher Newmark and Anthony Monaghan (eds) *Mediators on Meditation: Leading Mediator Perspectives on the Practice of Commercial Mediation* at 343.

²⁵⁴ See R Nazzini ‘Modelli conciliativi interni al processo (analisi comparativa e testi strutturali)’ [2002] *Riv Dir proc* at 847. See also Giuseppe De Palo and Sara Carmeli ‘Mediation in Continental Europe: a Meandering Path toward Efficient Regulation’ in Christopher Newmark and Anthony Monaghan (eds) *Mediators on Meditation: Leading Mediator Perspectives on the Practice of Commercial Mediation* at 343.

²⁵⁵ See the Federal Court Rules 0 2 r 4: “‘Mediation’ means mediation conducted under a mediation order’, which is not very descriptive, as cited by Boulle and Rycroft (note 231) at 5.

mediation is conducted quite differently in states such as Victoria and New South Wales) and the lack of clear legislative definition may mean that in different states and areas of jurisdiction, there is a tendency to adopt the process characteristics that are most used in practice in that state or jurisdiction.²⁵⁶

While the official definitions are quite varied, reflecting both conceptual and descriptive approaches, the practical question has been asked as to what assistance such a discussion gives in finding a suitable definition.²⁵⁷ Reliance is sometimes put on the Folberg and Taylor definition referred to above.²⁵⁸ Some are more general,²⁵⁹ and some are specific on debatable aspects of the process, such as the degree of intervention that the mediator is allowed.²⁶⁰ Some refer to a mediation framework and provide for an official to give directions on how it will operate,²⁶¹ and others reflect the requirements of those who promote the process in order to manage cases efficiently within the litigation process.²⁶²

Mediation models

As a result of the difficulties in defining and describing mediation, Boule refers to four separate mediation approaches or models in an effort to conceptualise different tendencies in practice.²⁶³ The four approaches are settlement, facilitative, therapeutic

²⁵⁶ Tania Sourdin ‘Mediation in Australia: The Decline of Litigation?’ in Alexander (note 49) at 37.

²⁵⁷ Boule and Rycroft (note 231) at 5.

²⁵⁸ Boule and Rycroft cite an example of such a conceptualist definition which is provided in the New South Wales Guidelines for Solicitor Mediators: ‘Mediation is a voluntary process in which a mediator independent of the disputants facilitates the negotiation by the disputants of their own solution to their dispute by assisting them systematically to isolate the issues in dispute, to develop options for their resolution and to reach an agreement which accommodates the interests and needs of all the disputants,’ Boule and Rycroft (note 231) at 5. The definition appears at 2.1 of the guidelines, which are available at www.lawsociety.com.au/uploads/filelibrary/1048744833121_0.8990171634879579.pdf (last visited 17 July 2008).

²⁵⁹ Boule and Rycroft cite as an example the Supreme Court of Victoria O 50.07 (3): ‘[T]he mediator shall endeavour to assist the parties to reach a settlement of the proceeding ... referred to him [sic],’ Boule and Rycroft (note 231) at 6.

²⁶⁰ Boule and Rycroft cite as example, the Supreme Court of South Australia O 56A.02:

‘Mediation includes ... any process ... whereby a neutral presiding officer assists parties in dispute ... by making positive recommendations ... and options and/or suggesting possible bases for possible resolution of the dispute,’ Boule and Rycroft (note 231) at 6.

²⁶¹ Boule and Rycroft cite as an example the Federal Court Rules O 72 r 7(1): ‘A mediation conference must be conducted ... in accordance with any directions given by the Court or a Judge ...’ Boule and Rycroft (note 231) at 6.

²⁶² Boule and Rycroft cite as an example, the County Court of Victoria, Building Cases Rules r 6.09(2), which refers to the mediation taking place ‘expeditiously’ in order to reach a ‘speedy resolution’, Boule and Rycroft (note 231) at 6.

²⁶³ Boule *Mediation: Principles, Process, Practice* at 43-47.

and evaluative.²⁶⁴ In each ‘model’ the objective is different. In settlement mediation, the objective is to reach a compromise. In facilitative mediation it is to promote a negotiation in terms of underlying needs and interests rather than legal rights or obligations. In a ‘therapeutic’ or transformative model underlying causes of behaviour may be considered. In evaluative mediation, legal rights and entitlements and the anticipated range of court outcomes serve as a guide in reaching a settlement.

Boulle notes that they are not discrete forms of mediation practice but ways of conceptualising the different tendencies in practice, as a mediation may commence in one mode and then adopt characteristics of another e.g. it may become evaluative after a facilitative opening. There are also other theories of mediation that do not fit neatly into the four paradigm models.²⁶⁵

Settlement Mediation

This is also known as compromise mediation and the aim of the process is to encourage incremental bargaining towards a ‘central’ point of compromise between the original positional demands of the parties. The dispute is defined in terms of positions, based on the parties’ respective perceptions of the problem. Mediators tend to be high status such as barrister or manager and are charged with determining the parties’ ‘bottom lines’. Through relatively persuasive interventions they move the parties in stages from positions to a point of compromise. Experience in the process, skills and techniques of mediation is not necessary and limited procedural interventions are required of the mediator, while positional bargaining is employed by the parties. The strengths of this model are that the process is understood by the parties, it is culturally accepted, it is not difficult to do and little preparation is required. The disadvantages are that it overlooks the needs and interests of the parties and can be manipulated through initial ambit claims and it can be difficult to cross the final gap. It is often used in commercial, personal injury, insurance and industrial disputes.²⁶⁶

²⁶⁴ See S Roberts, ‘Three Models of Family Mediation’ in R Dingwall and J Eekelaar (eds), *Divorce Mediation and the Legal Process* (1988) 144 who refers to minimal intervention, directive intervention and therapeutic intervention models of family mediation, corresponding respectively to *facilitative*, *settlement* and *evaluative*, and *transformative* mediation, as cited by Boulle (note 263) at 43.

²⁶⁵ An example used by Boulle is the ‘narrative’ theory of mediation which focuses on the complex cultural stories through which conflict is constructed by the parties, see J Winslade and G Monk, *Narrative Mediation: A New Approach to Conflict Resolution* (2000) as cited by Boulle (note 263) at 47.

²⁶⁶ See Boulle (note 263) at 44-45.

Facilitative Mediation

Also known as interest-based, problem solving or rational-analytic mediation, the main objective is to avoid positions and negotiate in terms of the underlying needs and interests of the parties (substantive, procedural and psychological) instead of their strict legal entitlements. Mediators are experienced in the process and techniques, with the main role of conducting the process, maintaining constructive dialogue between the parties, enhancing negotiation efforts, and encouraging settlement, while knowledge of the subject matter of the dispute is unnecessary. Mediators tend to have a low intervention role while the parties are encouraged to fashion creative outcomes around mutual interests. The benefits are that it makes most efficient use of negotiation opportunities and is controlled by the parties. The disadvantages are that they may not reach an outcome, it can be lengthy, and it requires uncommon skills from the parties. This model is often used in community, family, work-place, organisational, environmental, and partnership disputes.²⁶⁷

Transformative Mediation

Also known as therapeutic or reconciliation mediation, the main objective is to deal with the underlying causes of the parties' problem in order to improve their relationship through recognition and empowerment in the hope of resolving the dispute, which is defined in terms of behavioural, emotional and relationship factors. Mediators generally have expertise in counselling, psychology or social work, with an understanding of emotional and cognitive dimensions of conflict and use professional therapeutic techniques, before or during mediation, to treat relationship issues through empowerment and recognition, even at the expense of not achieving a settlement. The mediator's most significant function is to conduct and maintain the process and have no active role in the parties' decision-making, which enables mediators to retain their neutrality. Decision-making is postponed until relationship issues are dealt with, while there is less emphasis on outcomes. The strength of this approach is that it can lead to a 'resolution' of the relationship rather than just 'settlement' of the dispute and is responsive to the needs of the parties. However, it can be prolonged and terminated without any agreement and can confuse counselling and mediation roles. It is used in

²⁶⁷ See Boule (note 263) at 44-45.

matrimonial, parent/adolescent, family networks, workplace and continuing relationship disputes.²⁶⁸

Evaluative Mediation

Also known as advisory, managerial or normative mediation, the main objective is to reach a settlement according to the legal (or other) rights and entitlements of the parties and within the anticipated range of court, tribunal or industry outcomes. The dispute is defined in terms of legal rights and duties, industry standards or community norms. Mediators tend to have expertise in substantive areas of the dispute, with the main role of providing information, advice and persuasion, professional expertise regarding the content of negotiations, and prediction on possible outcomes while no necessary qualifications in mediation techniques are required. It involves high intervention by the mediator, less party control over the outcome and is quasi-arbitral in style. The strengths of the process are that the mediator's substantive expertise is used, while the outcome is within the range of likely court verdicts. However, it blurs the distinction between mediation and arbitration, does not teach parties skills for the future, and involves additional responsibilities for the mediator. It is generally used in commercial, personal injury, trade practices, matrimonial property, and anti-discrimination disputes.²⁶⁹

These models are not always recognised by mediators, although many would concede that they have familiarity with the concepts of facilitative and evaluative mediation.²⁷⁰ Roberts and Palmer remark that mediators function in one of two ways, by providing a link through which negotiations take place, or by actively seeking to eliminate differences between the parties.²⁷¹ As Boule remarks and as we discover below, while there are more subtle differences than these, it is the facilitative/evaluative distinction that seems to arise most frequently in mediation debates. While facilitative mediation attempts to uphold mediator neutrality, the distinction between process and content, minimalist intervention style and the consensuality of outcomes, it seems that

²⁶⁸ See JP Folger and R Baruch Bush, 'Transformative Mediation and Third Party Intervention: Ten Hallmarks of Transformative Approach to Practice' (1995) *Mediation Quarterly* 263; M Dewdney, 'Transformative Mediation: Implications for Practitioners' (2001) 12ADRJ 20; K Cloke, *Mediating Dangerously: The Frontiers of Conflict Resolution* (2001); L Riskin, 'Mindfulness in the Law and ADR' (2002) 7 *Harvard Negotiation Law Review* 1 as cited by Boule (note 263) at 47.

²⁶⁹ See Boule (note 263) at 44-45.

²⁷⁰ See Tania Sourdin, *Alternative Dispute Resolution* at 24 as cited by Boule (note 263) at 46.

²⁷¹ See M Palmer and S Roberts, *Dispute Process – ADR and the Primary Forms of Decision-Making* (1998) 103 as cited by Boule (note 263) at 46.

there has been a tendency in practice to use settlement and evaluative forms of mediation.²⁷² As the facilitative/evaluative distinction is the most relevant to commercial mediation, it is discussed below.

An empowering process

As every dispute is different, and every mediator is different, every mediation is to some extent different from every other mediation.²⁷³ Even where the disputes are relatively similar, there is still variation in mediator practices as different mediators approach their jobs differently.²⁷⁴ Len Riskin describes some of the variations in mediator approaches by suggesting that some mediators define problems in narrow terms, for example, by concentrating on how much money is owed, while others define the problem in broader terms by assessing, for example what is going on between two former business partners in dispute.²⁷⁵ Michael Moffitt suggests that some mediators conduct themselves transparently by sharing their observations, their purposes and their decisions with the disputants, while others maintain less transparency by conducting the mediation without revealing the mediator's inner thinking.²⁷⁶ As noted above, a very prominent example of differences in mediator's approaches has to do with the distinction between 'facilitative' and 'evaluative' practices.²⁷⁷

The empowering nature of the process regarding the mediator's involvement has also led to the 'facilitative' and 'evaluative' categorisations. These two approaches are the most relevant to commercial mediation and they have also been described as process

²⁷² See R Baruch Bush, 'Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation and What it Means for the ADR Field' (2002) 3 *Pepperdine Dispute Resolution Law Journal* 111 as cited by Boule (note 263) at 46.

²⁷³ K K Kovach 'Mediation' in Michael L Moffitt and Robert C Bordone (eds) *The Handbook of Dispute Resolution: A Publication of the Programme on Negotiation at Harvard Law School* at 306.

²⁷⁴ Kovach (note 273) at 310.

²⁷⁵ See L Riskin 'Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed' (1996) 1 *Harvard Negotiation Law Review* at 7-51. See also K K Kovach and L Love 'Mapping Mediation: The Risks of Riskin's Grid' (1998) 3 *Harvard Negotiation Law Review* at 71-110.

²⁷⁶ See M L Moffitt 'Casting Light on the Black Box of Mediation: Should Mediators Make Their Conduct More Transparent?' (1997) 13 *Ohio State Journal on Dispute Resolution* at 1-49.

²⁷⁷ For a survey of the issues raised in this debate see J Stulberg 'Facilitative versus Evaluative Mediator Orientations: Piercing the 'Grid' Lock' (1997) 24 *Florida State University Law Review* 985-1005; L P Love 'The Top Ten Reasons Why Mediators Should Not Evaluate' (1997) 24 *Florida State University Law Review* at 937-948; Michael L Moffitt and Robert C Bordone (eds) *The Handbook of Dispute Resolution: A Publication of the Programme on Negotiation at Harvard Law School* chapter 13.

oriented (facilitative) or substance oriented (evaluative) mediation.²⁷⁸ As previously discussed, in the process oriented approach the parties, rather than the mediator, provide the solution to their dispute and the mediator is the facilitator of the process rather than an authority figure providing substantive advice or pressure to settle.²⁷⁹

Substance oriented mediation, as noted above, is at the other end of the spectrum and the mediator is often an authority figure who evaluates the case based upon his or her experience, and offers recommendations on how the case should be resolved. Some practitioners consider that the basic philosophy of mediation requires recognition that the process is to be empowering and that therefore substance oriented mediation cannot be defined as mediation. They argue that the only 'true' form of mediation is 'facilitative' mediation.²⁸⁰ A facilitative mediator would help disputing parties to search for a resolution that reflected their underlying interests and maximised joint gains and would not suggest what the resolution should be. A facilitative mediator might suggest, for example, that the parties should put aside notions of legal rights and remedies and re-conceptualise their dispute as a problem that would be best to solve and then move on.²⁸¹

Len Riskin introduced the concept of a grid that plotted mediators based on whether they were facilitative or evaluative, and whether they stayed within a narrow definition of the problem or framed the mediation more broadly.²⁸² Riskin²⁸³ points out that the evaluative mediator assumes that the participants want and need the mediator to provide some direction as to the appropriate grounds for settlement, based on law, industry practice or technology. As previously noted, the mediator is qualified to give such direction because of his/her experience, training and objectivity. The facilitative mediator assumes the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than either their lawyers or the mediator, and may consequently develop better solutions than any that the mediator may create. For these reasons the facilitative mediator assumes that his principal mission is to

²⁷⁸ R Amadei and S. Lehrburger 'The world of Mediation: A Spectrum of Styles' (1996) 51 *Dispute Resolution Journal* 62.

²⁷⁹ See Sourdin (note 256) at 38.

²⁸⁰ For an overview of this debate, see Riskin (note 275) at 7; L Riskin 'Mediation Quandaries' (1997) 24 *Fla St U L Rev* 1007; Stulberg (note 175) at 985.

²⁸¹ Deborah R Hensler 'Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Reshaping Our Legal System' (2003) 108 *Penn State Law Review* at 188.

²⁸² Riskin (note 275) at 7.

²⁸³ L Riskin 'Mediator Orientations, Strategies and Techniques' (1994) 12(9) *Alternatives* 111 at 113.

enhance and clarify communications between the parties in order to help them decide what to do. The facilitative mediator believes that it is inappropriate for the mediator to give his opinion, for at least two reasons. First, such opinions might impair the appearance of impartiality and thereby interfere with the mediator's ability to function. Second, the mediator might not know enough about the details of the case or the relevant law, practices or technology to give an informed opinion.

The evaluative/facilitative distinction became a subject of hot debate,²⁸⁴ while the broad/narrow question framing was rarely discussed. Some argued that evaluative mediation is an incongruity,²⁸⁵ while others argued that some level of evaluation is inevitable.²⁸⁶ Others grew wary of the debate altogether.²⁸⁷

Lela Love and Kimberlee Kovach believe that evaluative mediation is something of an oxymoron, and that an unhappy consequence of 'Riskin's Grid' is that it appears to have encouraged mediators to play a more active and judgmental role. They suggest that there should be clarity of purpose in mediation, and no confusion of roles.²⁸⁸

Lela Love²⁸⁹ develops this theme by explaining at some length why mediators should resist the temptation to evaluate. Love argues that the debate over whether mediators should 'evaluate' revolves around confusion over the nature of the evaluation that should take place in mediation. An evaluative mediator does not, in her view, deliver the kind of evaluation that the parties really need. Love briefly defined an 'evaluative' mediator as one who 'gives advice, makes assessments, states opinions, including opinions on the likely court outcome, proposes a fair or workable resolution to an issue or the dispute, or presses the parties to accept a particular resolution.'²⁹⁰ The evaluative mediator, in evaluating, assessing and deciding for the parties, is therefore similar to other types of 'evaluators' such as judges, arbitrators and other third party decision makers.²⁹¹ The role of the mediator is fundamentally different, and requires the

²⁸⁴ See generally Len Riskin 'Symposium' 2000 *Journal of Dispute Resolution* 245.

²⁸⁵ K K Kovach and L P Love 'Evaluative Mediation is an Oxymoron' (1996) 14 *Alternatives to High Cost Litigation* 31; also see Love (note 277) at 941.

²⁸⁶ J H Stark 'The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, From An Evaluative Lawyer Mediator' (1997) 38 *S Tex Law Review* 769.

²⁸⁷ Richard Birke and Louise Ellen Teitz 'US Mediation in the Twenty-first Century: The Path that brought America to Uniform Laws and Mediation Cyberspace' in Alexander (note 49) at 380.

²⁸⁸ Kovach and Love (note 275) at 71-75.

²⁸⁹ Love (note 277) at 937-948.

²⁹⁰ Love (note 277) at 938.

²⁹¹ Love (note 277) at 939-940.

crucial task of facilitating evaluation, assessment and decision making by the parties themselves. Mediators, she concludes, cannot effectively facilitate when they are evaluating.²⁹²

Statistics about style are not kept, nor would they be easy to collect, and the information would have to come from self reporting or lawyers and clients, who have no incentive to take the time to provide information,²⁹³ and it has also been suggested that it is likely that lawyers may advise clients not to give more information about the conflict than necessary to anyone.²⁹⁴

For the more facilitative mediators, Riskin's article gave them a meaningful distinction between what they did and what was commonly thought of as mediation, that is, evaluative mediation. This resulted in more mediation trainings in facilitative styles, and in practice, less time spent in caucus with each party and more in joint session with all parties.²⁹⁵

A legislated model

The evaluative approach would also seem to be inconsistent with the defined key characteristic of mediation. Charlton has noted that:

[Mediation] derived from the recognition that participants were quite capable of negotiating for themselves and reaching their own decision. The parties' ability in this regard was acknowledged and respected. As any solution was not imposed, but arose out of empowerment of the parties, it was more likely to be acceptable to both sides and adhered to.²⁹⁶

The definition contained in the recent EU Directive on Certain Aspects of Mediation in Civil and Commercial Matters was very much drafted in this spirit, the relevant part of which reads:

'Mediation' means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to

²⁹² Love (note 277) at 939.

²⁹³ In the interviews of practising commercial mediators conducted by the author in Cape Town and Johannesburg between 21 May and 20 June 2007, there was unanimity in the responses from those interviewed on this point. All of those interviewed described their approach as facilitative.

²⁹⁴ Birke and Teitz (note 287) at 380.

²⁹⁵ Birke and Teitz (note 287) at 381. Aside from the definitional differences, there are also liability issues for mediators who provide their views on a possible outcome. Such mediators are more likely to be sued if a dispute is resolved after advice, which may be incorrect, has been provided to a party or parties. See chapter 8 at 237 for a discussion on the potential legal liability of mediators.

²⁹⁶ R Charlton *Dispute Resolution Guidebook* at 8.

reach an agreement on the settlement of their dispute with the assistance of a mediator.²⁹⁷

Similarly Article 1(3) of the UNCITRAL Model Law on International Commercial Conciliation defines the process as follows:

‘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 relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.²⁹⁸

The New Jersey standards approved by its Supreme Court, gives another example of where ‘facilitative’ mediation is required:

Definition of Mediation: Mediation is a process in which an impartial third party neutral [mediator] facilitates communication between disputing parties for the purpose of assisting them in reaching a mutually acceptable agreement. Mediators promote understanding, focus the parties on their interests, and assist the parties in developing options to make informed decisions that will promote settlement of the dispute. Mediators do not have authority to make decisions for the parties, or to impose a settlement.²⁹⁹

There is also a requirement that the mediator ‘always conduct mediation sessions in an impartial manner’. The rule continues:

[A] mediator shall therefore avoid any conduct that gives the appearance of favouring or disfavours any party. [Mediators] shall guard against prejudice or lack of impartiality because of any party’s personal characteristics, background, or behaviour during the mediation.³⁰⁰

It has been pointed out that a literal interpretation and application of this rule would preclude mediators from offering any evaluative comments or opinions, and from commenting on numerous matters, such as the credibility of participants as witnesses in the event that the case proceeds to trial. Similar provisions exist in a number of other jurisdictions but in some places a contrary view is dominant.³⁰¹

²⁹⁷ Article 3(a) Directive 2008/52/EC ‘Directive on Certain Aspects of Mediation in Civil and Commercial Matters’ of 21 May 2008. The Directive is effective throughout the EU (except Denmark).

²⁹⁸ See also Sanders (note 66) at 114-122 for a discussion on proposed revisions to this definition in the Model Law. See below the author’s preferred definition for the purposes of this thesis, which should act as a guide in the event that the Model Law on International Commercial Conciliation acts as a template for the introduction of a statute on mediation in South Africa.

²⁹⁹ See Creo (note 40) at 315.

³⁰⁰ Creo (note 40) at 315.

³⁰¹ Creo (note 40) at 315-316. The California Dispute Resolution Council, a private non-governmental organisation of neutrals, developed Standards of Practice for California Mediators, which have been

A mixed process

Some commercial mediators believe that a purely facilitative approach to mediation does not exist in practice, and that the result of a successful mediation emanates from employing a clearly identified ‘mixed process’, rather than the assumption of different roles by the mediator.³⁰² Experience from practice suggests that mediators evaluate on numerous levels and react to opportunities arising in the process, and the strategies and facilitative techniques employed are determined by the mediator’s assessment of the participants and the substance of the dispute. While the public approach and process tactics may be facilitative, the choice of approach in the process involves evaluation by the mediator.³⁰³

Trollip favours the concept of midwifery to the creative solution, believing that while the midwife will not herself produce the child, she will nevertheless take every care at its birth.³⁰⁴ A mediator can ‘throw out’ a tentative line of thought or approach without suggesting an exact or detailed solution, and can, where appropriate, draw to the parties’ attention the impact that the way in which a particular proposal is framed is likely to have on others and on the possibility of acceptance of the relevant proposal.³⁰⁵

Mediation is ultimately about exploring the possibilities of settlement, and such efforts may prove abortive, which may be no measure of the mediator as the process belongs to the parties and only they determine its outcome.³⁰⁶ Even where mediation does not result in an immediate settlement, it can affect the dynamics of the existing relationship, narrow the issues³⁰⁷ and given more time, can ultimately lead to the resolution of the dispute.³⁰⁸

Observance of strict definitions presents the dilemma of whether it is more ethical or appropriate for a mediator to lead the parties through the process and expect,

described as recognising the flexibility and diversity of mediation practice. Available at www.sbcadre.org/neutrals/ethicsmed.htm (last visited 22 July 2008). For a discussion on the standards see www.mediate.com/articles/cdrcstds.cfm (last visited 22 July 2008).

³⁰² Simon Roberts and Michael Palmer *Dispute Processes, ADR and the Primary Forms of Decision-Making* at 186.

³⁰³ Creo (note 40) at 316.

³⁰⁴ Trollip (note 77) at 56-57.

³⁰⁵ Trollip (note 77) at 57.

³⁰⁶ Trollip (note 77) at 57.

³⁰⁷ In the interviews of practising commercial mediators conducted by the author in Cape Town and Johannesburg from 21 May to 20 June 2007, there was unanimity in the responses from those interviewed on this point. Where mediation did not result in a comprehensive settlement it assisted in identifying, clarifying and narrowing the issues considerably for the arbitration or litigation that followed.

³⁰⁸ Trollip (note 77) at 57.

or hope, that the parties will reach an agreement, than charter a path in a narrative format.³⁰⁹ It has been suggested that the selection of a line of query involves ‘reality’ from the experience of the mediator, as the mediator as ‘trickster’ or ‘mystic’ is not superior to the mediator who is a transparent broker.³¹⁰ As a transparent and direct approach is healthier for both the parties and the process, it seems to make practical sense to practise function over form during the bargaining stage of mediation. As the process is intended to be a true alternative method of communication, restricting mediators and participants is believed to be self-defeating, and regulations that intrude into the mediation process do not respect the self-determination of the parties.³¹¹

A sensible approach would involve the mediator discussing with the parties his or her role, what he or she is going to do, and why, so that the mediator can serve as the proverbial ‘agent of reality’ by meeting the expectations of the parties and acting consistently with the core values of the process. This approach, it is believed, would not clash with the core values of the legal profession or the courts.³¹²

It has been sensibly pointed out that the different official definitions of mediation discussed above reveal many inconsistencies, obscurity issues and boundary problems presented by the process and that despite the definitional difficulties, mediation operates in the shadow of the law and those involved in the process are all, to a certain extent, subject to legislative definitions and their judicial interpretation.³¹³

The definitional necessity

It has been pointed out that definitions are significant in several practical and political ways.³¹⁴ In practical terms, governments provide funding for ‘mediation’ programmes, some ‘mediators’ are immune from liability for negligence, and codes of conduct and ethical standards are developed for ‘mediators’. As mediation needs to be explained and justified in some circumstances, there would also seem to be good marketing reasons for defining and limiting the concept. Definitional clarity also benefits all who are involved in the process. Its political significance is seen in the way that different

³⁰⁹ Creo (note 40) at 316.

³¹⁰ Creo (note 40) at 316.

³¹¹ See Creo (note 40) at 316-317.

³¹² Creo (note 40) at 317.

³¹³ Boulle and Rycroft (note 231) at 6.

³¹⁴ Boulle and Rycroft (note 231) at 5.

professions and organisations tend to define mediation relative to the self-interest of their members. Boulle and Rycroft give as an example that a ‘social work’ definition might imply that it is necessary for mediators to have counselling skills, while a ‘legal’ definition could imply that knowledge of the law is essential, so that the political significance of mediation being claimed by competing groups of potential service providers is reflected in the particular definition of mediation that prevails.³¹⁵

One practitioner has noted that ‘by definition, mediation will defy complete codification. Its inherent flexibility and strengths will continue to grow and applications will be discovered in new areas.’³¹⁶ It has also been suggested that mediation cannot be defined, as any attempt to *define* mediation is to *confine* it, given the inherent flexibility of the process. The approach taken in a mediation should be determined by the mediator to suit the nature of the dispute and the personalities of the disputing parties.³¹⁷

While mediation cannot and it seems should not be defined, it can be meaningfully described, and three criteria have been identified that characterise a process as a mediation:³¹⁸

1. The parties call in an independent person (mediator) who will, in conjunction with, and with the agreement of, the parties structure a process appropriate for the nature of the dispute, the stage it has reached and the personalities of the key players; the mediator will meet privately with each party and discuss any aspect of it in utter confidence and will only reveal such confidential information to another party if expressly authorised to do so.
2. The mediator has no authority to impose a decision on the parties.
3. The course of the process and, in particular, the outcome are voluntary, pervaded throughout by the consensus oriented philosophy.

Despite the logic behind the contention that any effort to define mediation is to confine it, it is imperative, for the purposes of this thesis to establish a working definition of commercial mediation. Consistent with the above description of the process, the revised definition of mediation given by CEDR is as follows:

³¹⁵ Boulle and Rycroft (note 231) at 6-7.

³¹⁶ S Press ‘International Trends in Dispute Resolution: A US Perspective’ (2000) 3(2) *The ADR Bulletin* 23.

³¹⁷ See Street (note 95) at 361.

³¹⁸ Street (note 95) at 362.

Mediation is a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and of the terms of resolution.

One of the main objectives in the new definition is to give more emphasis to the fact that parties are in ultimate control of both the decision to settle and the terms of resolution. Regardless of how strong the influences may be to get disputing parties to attend a mediation, once they are present it is important that they have a sense of ownership and responsibility.³¹⁹

For the purposes of this thesis, the above represents the definition of commercial mediation. Unless specified to the contrary, where mediation is mentioned, it is the process as described above that the author is referring to.

Mediated solutions

Having looked at the process and established the working definition of mediation, it is useful to look at the types of solutions that can result from engaging in the process when compared with traditional judicial adjudication.³²⁰ At the conclusion of a trial, one party obtains an order and if necessary a writ to compel compliance by the other party with the terms of the order. The winner will have successfully established legal rights and will have them enforced. However, as previously discussed, what can be obtained from a judge is a limited range of solutions, as the judge decides on what happened in the past. In mediation, the only limitations on possible solutions that can be achieved are the limits of the parties' imagination and resourcefulness. An imaginative, novel solution, that is interest-based, can often provide a better business result than a legal remedy obtained from a court. What can happen as a result of mediation is that the parties create an opportunity to empower themselves to resolve the dispute by not confining themselves to debating it simply in terms of their contractual rights and obligations. The parties can essentially determine the future.³²¹

³¹⁹ Eileen Carroll 'The Future belongs to Mediation and its Clients' in Christopher Newmark and Anthony Monaghan (eds) *Mediators on Meditation: Leading Mediator Perspectives on the Practice of Commercial Mediation* at 404.

³²⁰ See Antrobus and Sutherland (note 5) at 169-170.

³²¹ See Antrobus and Sutherland (note 5) at 169-170.

Antrobus and Sutherland provide a useful example to illustrate this point.³²² They present the situation of a manufacturer contracting with a technical expert in order to establish and maintain a new type of manufacturing plant. In order to secure the expertise and establish the plant the manufacturer signs a fixed-term five-year contract with the technical expert and the latter undertakes to be bound by a restraint of trade clause effective throughout South Africa, for two years from the termination of the contract. Three years into the arrangement, and when the manufacturing plant is well established and operating well, and no longer requires the expertise of the technical expert, the manufacturer finds that due to an economic downturn it is no longer viable to retain the technical expert whose expertise is now superfluous. The manufacturer cancels the contract and in response the technical expert sues for the remaining two years' remuneration under the contract, which the manufacturer cannot afford to pay.

The technical expert could enforce his rights and claim the payments, but his real interest lies in establishing a processing plant in the related but distinctly different field not in competition with the manufacturer. The manufacturer's real interest lies in preventing the technical expert from establishing a plant in competition with it both inside South Africa and abroad. A mediated solution could produce an agreement whereby the restraint of trade arrangement is redrafted to permit the technical expert to work on his new project, while the restraint as to his working in the same field as the manufacturer would be renewed for South Africa and extended to certain countries abroad. The manufacturer's foreign holding company could even pay the expert an amount in foreign currency abroad in exchange for this restraint of trade. A trial judge could never make such an imaginative order and an adjudicated solution would never meet the parties' true interests in this way.³²³

It has also been suggested that solutions of this nature are less likely to require legal enforcement, as compliance is less grudgingly forthcoming,³²⁴ while the risk of appeals and reviews is also eliminated.³²⁵ A judge-made solution creates a public precedent, and even when the decision is made in a party's favour, it can raise questions

³²² Antrobus and Sutherland (note 5) at 170.

³²³ Antrobus and Sutherland (note 5) at 170.

³²⁴ This is consistent with the US experience; see Antrobus and Sutherland (note 5) at 170.

³²⁵ Antrobus and Sutherland (note 5) at 170.

that expose other aspects of their business interests to criticism or attack, and this risk can be sufficiently strong to make avoidance of court prudent.³²⁶

³²⁶ Antrobus and Sutherland (note 5) at 170.

CHAPTER FOUR: THE SOUTH AFRICAN APPROACH TO DEVELOPING MEDIATION

While it is interesting to speculate on the reasons why mediation emerges in a particular place, the major cause for its emergence in the USA and, subsequently, elsewhere was always believed to be a dissatisfaction with the litigation process, with its costs, delays, aggressive tone, and the inherent uncertainties in the process that have made commercial decision making so difficult.³²⁷

Proponents of mediation have argued that it involved not only a move *away* from the more negative aspects of litigation, but also a move *towards* a more constructive approach, so that the motivation did not emanate only from the failings of the old, but also a perception of the value of the new, with both ‘carrot’ and ‘stick’ applying.³²⁸ In this spirit, it is useful to take stock of developments to date in South Africa.

The Law Commission investigation

The South African Law Commission began an investigation into arbitration in 1995. As a first step it published a draft International Arbitration Act for information and comment in December 1996. It also engaged in a revision of the Arbitration Act 42 of 1965 by asking interested parties by means of a Working Paper to submit comments on the 1965 Act.³²⁹

On 8 July 1996 the Minister for Justice requested the Law Commission to expand its investigation into arbitration so that it included all elements of ADR, in order to develop a framework within which ADR could be discussed in an organised fashion. The urgency of the project was emphasised by the Minister, as formalised methods of ADR could relieve the overburdened court system. The Commission considered and approved the inclusion of such an investigation in its programme and a project

³²⁷ Marsh (note 29) at 385.

³²⁸ Marsh (note 29) at 385.

³²⁹ South African Law Commission (note 51) at 1.

committee for this purpose was appointed by the Minister for Justice with effect from 16 September 1996, with work commencing on 26 October 1996.³³⁰

Community involvement was seen as critical to the investigation, and the Commission consequently decided to compile an issue paper to initiate, facilitate and encourage focused consideration and response by all interested parties. It was believed that, in light of the response and consequent work of the Project Committee, a discussion paper, and should it be deemed necessary going forward, draft legislation, would be prepared and published for general information and comment.³³¹

This was followed in July 1998 by the *Report on an International Arbitration Act for South Africa* and in May 2001 by the *Report on Domestic Arbitration*. Both reports included draft legislation with commentaries dealing with their respective areas. Unfortunately, due to apathy on the part of government, progress on ADR has stalled since then.

The industry's response

Seventeen respondents submitted comments regarding ADR and the civil law, eight of which exclusively related to this aspect of the investigation.³³² Respondents generally stressed the important role they believed ADR played in civil practice.³³³

The crucial questions to be answered from the Commission's perspective were whether the state has a role to play in the regulation of ADR activities, and whether there is any need for statutory intervention in this field.³³⁴

Some respondents specifically requested to be excluded from any possible legislation that might be enacted as they believed that ADR already played an important role in the resolution of disputes in their industry and that it should not be tinkered with.³³⁵

³³⁰ South African Law Commission (note 51) at 1.

³³¹ South African Law Commission (note 51) at 1-2.

³³² For a list of the relevant names see Annexure B to South African Law Commission Committee Paper 556 Project 94 *Alternative Dispute Resolution: Evaluation of Comments received on Issue Paper 8, Planning of Investigation* 18 October 1997.

³³³ See submissions from SAICE, MIB Technical Services, SAACE, Prof Faris, Mr Goodman, the Society of Advocates in Natal, OD Hart, director, Venn Nemeth and Hart and SACOB in South African Law Commission (note 332) at 2-3.

³³⁴ South African Law Commission (note 332) at 2.

³³⁵ See the comments of SAICE and SAACE in South African Law Commission (note 332) at 2.

The consensual nature of the ADR processes was repeatedly emphasised as was the belief that the state's role regarding such processes should be one of support rather than control.³³⁶ Such support could take the form of showing approval of ADR institutions, supplying funds and in suitable circumstances providing legislative support.³³⁷ The purpose of the legislation should not be to institutionalise formally ADR in civil practice, but instead to give support for the reference of disputes to ADR organisations such as AFSA.³³⁸ The legislation, it was suggested, should be enabling rather than prescriptive.³³⁹

One academic contributor³⁴⁰ believed that regardless of whether ADR is institutionalised or not, its eventual regulation by the state is inevitable. As the ADR movement gains impetus, it becomes necessary, in his view, to regulate by legislation contentious matters such as mediator privilege or to determine issues such as standards of training and ethics for practitioners in order to protect those who avail of ADR services.

Mediation in the courts

The South African litigation system is governed by formalistic procedures and since the 1980s,³⁴¹ has endured constant criticism for making access to justice too slow and too expensive.³⁴² Commentators have remarked that the government's response has traditionally been to argue that the courts should be restructured.³⁴³ However, many³⁴⁴ argue that while restructuring the courts is one option, a preferable solution would be the incorporation of mediation into the litigation system as it would lead to a substantial saving in court time and administration, and spare the judiciary expertise for more serious cases.³⁴⁵

³³⁶ South African Law Commission (note 332) at 2.

³³⁷ See Society of Advocates of Natal, SAICE, AHI and the Association of Law Societies of RSA amongst others in South African Law Commission (note 332) at 2-3.

³³⁸ See Society of Advocates of Natal in South African Law Commission (note 332) at 2-3.

³³⁹ See AHI in South African Law Commission (note 332) at 2-3.

³⁴⁰ See Professor Faris, UNISA, in South African Law Commission (note 332) at 3.

³⁴¹ See Hoexter Commission *Commission of Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court* (1983). See also Paleker (note 49) at 304.

³⁴² South African Law Commission (note 51) at 5.

³⁴³ Paleker (note 49) at 304.

³⁴⁴ J A Faris 'Exploring the Alternatives in "Alternative Dispute Resolution"' (1994) 27(2) *De Jure* 331 at 339; J G Mowatt 'Some Thoughts on Mediation' (1988) 105 *SALJ* 727. See also Paleker (note 49) at 304.

³⁴⁵ Faris (note 344) at 339; Mowatt (note 344). See also Paleker (note 49) at 304.

While it is not within the scope of this thesis to engage in a detailed analysis of court-annexed forms of mediation, it is useful to look at the approach taken by the legislature in this area as indicative of its commitment to, and understanding of, the mediation process. There have been two endeavours to introduce mediation into the litigation system. The first came in the form of the Short Process Court and Mediation in Certain Civil Cases Act 103 of 1991, and the second in the form of High Court Rule 37. Both of these initiatives have been criticised for not recognising the true nature of mediation.³⁴⁶

Mediation in the magistrates' courts

As lower courts, the magistrates' courts are the courts of first access to the public. Their powers are elucidated in the Magistrates' Courts Act³⁴⁷ read with the Magistrates' Courts Rules,³⁴⁸ under which they can hear contractual, delictual and property disputes,³⁴⁹ as well as different types of applications where the act or rules so provide.³⁵⁰ The Short Process Court and Mediation in Certain Civil Cases Act 103 of 1991 (the 'SPCA') came into effect on the 17 July 1992 and attempts to introduce mediation into the ordinary magistrates' courts³⁵¹ and a new form of court that the Act created called the Short Process Court.

Definition and referral

While mediation is not expressly defined in the SPCA, section 3(1) provides that 'at any time prior to or after the issuing of a summons for the institution of a civil action (be it in the ordinary Magistrates' Court, or the Short Process Court), the parties or their legal

³⁴⁶ For a more detailed discussion of these provisions, see Paleker (note 49) at 301-311.

³⁴⁷ Magistrates' Courts Act 32 of 1944 as amended.

³⁴⁸ Government Notice R1108 RG 980 of 21 June 1968 as amended. For an up-to-date version of the Magistrates' Courts Act and Rules with commentary, see H J Erasmus and D E Van Loggerenberg *Jones and Buckle: the Civil Practice of the Magistrates' Courts in South Africa*.

³⁴⁹ Magistrates' Courts Act 32 of 1944, as amended, section 29 read with section 46.

³⁵⁰ See T J M Paterson *Eckard's Principles of Civil Procedure in the Magistrates' Courts* at 41-43.

³⁵¹ This excludes the specialist divisions of the magistrates' court such as the Small Claims Court, governed by the Small Claims Court Act 61 of 1984, the Maintenance Court, which is governed by the Maintenance Act 98 of 1998 and the Children's Court which is governed by the Children's Act 33 of 1960, see Paleker (note 49) at 305.

representatives may refer the dispute to mediation'. The referral requires the consent of both parties and is consequently voluntary.³⁵²

The parties have a right to refer a matter to mediation before a summons is issued, but where proceedings have commenced by issuing a summons, the parties' right to mediation is affected as the court 'must be satisfied that mediation proceedings will not delay the trial unreasonably and will not prejudice the parties'.³⁵³ It has been pointed out that this provision is practically meaningless, as in the normal course of litigation the parties can reach a settlement at any time prior to a judgment on any of the disputed issues without the approval of the presiding judge, and the court is simply requested to make the settlement an order of the court. The only real practical effect that the limitation contained in section 3(1) has is to prevent the parties from having an absolute right to refer a matter to mediation.³⁵⁴

The mediator

As a mediator is assigned to the parties under the SPCA, they are not allowed to choose their own, and this has been criticised as the parties should be free to choose their own mediator,³⁵⁵ and this is particularly important in situations where, for example, parties may want to choose a mediator with special qualifications.³⁵⁶

The Minister for Justice is responsible for appointing mediators to the magisterial districts from a list of attorneys and advocates furnished by the General Council of the Bar and the Association of Law Societies³⁵⁷, and it has been pointed out that this pool for selecting mediators should be broadened to include specialists in other disciplines such as engineers and doctors.³⁵⁸

There is little doubt that lawyers who act as mediators need to be 're educated to bring about a change in mindset when mediating'.³⁵⁹ Unfortunately the SPCA does not deal with the training of mediators or with lawyers advising parties in mediations

³⁵² See Paleker (note 49) at 306.

³⁵³ Section 3.

³⁵⁴ See Paleker (note 49) at 306.

³⁵⁵ See C Cohen 'Mediation: Terminology is Important' (1993) 3 *De Rebus* 221 at 222.

³⁵⁶ See Paleker (note 49) at 306.

³⁵⁷ Section 2(1).

³⁵⁸ Paleker (note 49) at 306.

³⁵⁹ Cohen (note 355) at 222. See also Paleker (note 49) at 306-307. This issue is discussed further in chapter 8 at 220.

despite the need for lawyers acting as mediators or advisors in the process to be sufficiently trained.³⁶⁰

Mediation venue

When the parties agree to mediation, the clerk of the court arranges a date and time for the parties to appear before a mediator for an ‘interview and investigation’,³⁶¹ and the proceedings must take place in ‘chambers’.³⁶² It has been pointed out that the reference to chambers implies that the interview and investigation are to take place in the court building, which may not be the most suitable surroundings for mediation, and the parties should, in any event be free to choose their own mediation venue.³⁶³

The mediation process

The SPCA provides that ‘the mediator entrusted with mediation proceedings may make such enquiries and institute such investigation as he may deem necessary’,³⁶⁴ and it has been remarked that it would be difficult to guarantee that a mediator would not take an adjudicative role when exercising these powers.³⁶⁵ This issue is also apparent when considering the oath of office that a mediator is expected to take before engaging in the process, which states that he or she ‘will administer justice over all persons alike without fear, favour or prejudice and, as the circumstances of a particular case may require, in accordance with the law and customs of the Republic of South Africa applying to the case concerned.’³⁶⁶ The reference to ‘administer justice’ undoubtedly confuses mediation with adjudication.³⁶⁷

The purpose of the mediation proceedings is stated in section 3, to achieve ‘settlement out of court’. Where settlement is reached, the mediator issues a written order, which is subsequently recorded.³⁶⁸ Once an order is recorded it becomes binding

³⁶⁰ Paleker (note 49) at 307. The role of a lawyer in mediation is discussed in chapter 9 at 255.

³⁶¹ Section 3(1)(b)(ii).

³⁶² Section 3(1)(b)(ii).

³⁶³ See Paleker (note 49) at 307.

³⁶⁴ Section 3(d).

³⁶⁵ Paleker (note 49) at 307.

³⁶⁶ Section 2(2).

³⁶⁷ See Paleker (note 49) at 307.

³⁶⁸ Section 3(2)(b).

on the parties.³⁶⁹ Where settlement cannot be reached on all issues, settlement may be reached on specific issues.

The SPCA empowers the Minister for Justice to create rules to regulate the ‘practice and procedure in respect of an interview with and investigation by a mediator.’³⁷⁰ In 1992, the Rules for Short Process Courts and Mediation Proceedings were promulgated³⁷¹ and lay down what has been described as ‘tedious administrative directives’³⁷² that fail to deal with the content of the mediation process or issues such as the ethical or formal duties of the mediator, or to how the parties are to conduct themselves.³⁷³

It is clear that the legislature, in its attempt to provide for mediation in the magistrates’ courts, has failed to recognise the true nature of mediation,³⁷⁴ as the SPCA does not assist to facilitate mediation and ‘the mechanisms are more concerned with process than with finding a solution.’³⁷⁵ Commentators have also remarked that the process mentioned in the SPCA should be described as a ‘pre-adjudicative procedure’³⁷⁶ rather than mediation and that ‘Whatever else [the SPCA] may be, it is simply not mediation.’³⁷⁷

High Court Rule 37 (‘Rule 37’)

The High Court³⁷⁸ is the most important higher court in South Africa and has extensive jurisdiction, with the practice and procedure of the court being regulated by statute,³⁷⁹ it also enjoys inherent jurisdiction under the common law³⁸⁰ and the Constitution.³⁸¹

³⁶⁹ Section 3(3).

³⁷⁰ Section 13(1)(a).

³⁷¹ Government Notice No R2196 GG 14188 of 31 July 1992.

³⁷² See Rules 4, 5, 6, 7.

³⁷³ See Paleker (note 49) at 308.

³⁷⁴ See also Cohen (note 355) at 222; J G Mowatt ‘The High Price of Cheap Adjudication’ (1992) 109 *SALJ* 77 at 85. See also Paleker (note 49) at 308.

³⁷⁵ Paterson (note 350) at 13-14. See also Paleker (note 49) at 308.

³⁷⁶ Cohen (note 355) at 222. See also Paleker (note 49) at 308.

³⁷⁷ Cohen (note 355) at 222. See also Paleker (note 49) at 308.

³⁷⁸ Chapter 8 of the Constitution of the Republic of South Africa renamed the Supreme Court as the High Court, which did not change the powers, functions, or status of the Court.

³⁷⁹ The practice and procedure of the High Court is governed by the Supreme Court Act 59 of 1959, as amended, read with the Uniform Rules of Court (Regulation Gazette No. 437 GG 999 of 12 January 1965), as amended. For a full version of the Act and the Rules, see L T C Harms *Civil Procedure in the Supreme Court*, Vol. 1. See also Paleker (note 49) at 309.

³⁸⁰ Harms (note 379) at para A6. See also Paleker (note 49) at 309.

³⁸¹ Section 173 of the Constitution of the Republic of South Africa.

Similar to the magistrates' courts, litigation in the High Court has been criticised as being very slow and expensive.³⁸² The restructuring of the court by introducing a number of specialist courts³⁸³ operating at high court level has partially alleviated the problem of inefficiency, but has failed to deal with the costs issue³⁸⁴ so that there have been calls³⁸⁵ for mediation in the High Court. The only facility currently available accommodating mediation is ingrained in High Court Rule 37, which obliges parties to hold a pre-trial conference³⁸⁶ with the apparent objectives of curtailing the length of trials,³⁸⁷ narrowing the issues in dispute,³⁸⁸ curbing costs³⁸⁹ and facilitating agreements.³⁹⁰

As the rule obliges parties to hold a pre-trial conference, it cannot be waived by agreement and is consequently not voluntary.³⁹¹ The parties must agree a date, time and place for the conference, and if agreement cannot be reached, the Registrar of the High Court will direct them.³⁹² Strict time periods dictate issues such as when the conference must be held,³⁹³ when the minutes of the conference must be filed,³⁹⁴ when the parties must exchange lists detailing the admissions that the parties are required to make, enquiries that the parties will direct, and other issues relating to the preparation for the trial.³⁹⁵ It has been suggested that the strict time periods imposed on parties places an unnecessary pressure to comply with the rule's requirements rather than to achieve a settlement.³⁹⁶

³⁸² Hoexter Commission *Commission of Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court: Third and Final Report* (1997). See also Paleker (note 49) at 309.

³⁸³ For example, the Labour Court. See Paleker (note 49) at 309.

³⁸⁴ Road Accident Fund Submission on Arbitration to the Satchwell Commission of Enquiry *An Evaluation of the Road Accident Fund Arbitration Pilot Project* (November 1998). See also Paleker (note 49) at 309.

³⁸⁵ Road Accident Fund Submission on Arbitration to the Satchwell Commission of Enquiry (note 384). See also Paleker (note 49) at 309.

³⁸⁶ High Court Rule 37(2).

³⁸⁷ *Bosman v A A Mutual Insurance Association Limited* 1977 (2) SA 407 (C) at 408F. See also Paleker (note 49) at 310.

³⁸⁸ *Fitla-Matix (Pty) Ltd v Freudenberg and Others* 1998 (1) SA 606 (SCA) at 614C. See also Paleker (note 49) at 310.

³⁸⁹ *Lekota v Editor, 'Tribute' Magazine and Another* 1995 (2) SA 706 (W) at 707H. See also Paleker (note 49) at 310.

³⁹⁰ *Lekota v Editor, 'Tribute' Magazine and Another* 1995 (2) SA 706 (W) at 707H. See also Paleker (note 49) at 310.

³⁹¹ Harms (note 379) para M29. See also Paleker (note 49) at 310.

³⁹² High Court Rule 37(3)(b).

³⁹³ High Court Rule 37(3)(a).

³⁹⁴ High Court Rule 37(7).

³⁹⁵ High Court Rule 37(4).

³⁹⁶ *Lekota v Editor, 'Tribute' Magazine and Another* 1995 (2) SA 706 (W). At 708F, Flemming DJP held that 'the strict time periods (in rule 37) should be timeously held ...' See also Paleker (note 49) at 310.

After setting out the preliminary procedural steps with the relevant time periods for holding the conference, the rule proceeds to explain the kind of information that the minutes must contain,³⁹⁷ but fails to set out any governance of the conduct of the parties during the meeting. It has been pointed out that sub-rule 8 is the most obvious illustration of the fact that the rule does not really facilitate mediation, as under it, a judge, who may ultimately try the matter, can call the parties to a pre trial conference and preside over it if he or she believes it is advisable. As the process is more like informal adjudication than mediation, it falls far short of what is required ‘to break the shackles of formalism which is very much needed if mediation is to thrive.’³⁹⁸

It is unfortunate that the South African legislature failed in its attempt to introduce mediation into the court system. The above discussion on High Court Rule 37 and the SPCA illustrates the lack of understanding about the mediation process at government level when these enactments were drafted. This was a lost opportunity, particularly in view of the success of court annexed forms of mediation in other jurisdictions.³⁹⁹

Recent developments

While the resolution of community-based disputes has traditionally been seen as part of *ubuntu*, as previously mentioned, many believe that this concept is developing in the corporate realm in the form of commercial mediation.⁴⁰⁰ The new Companies Act, expected to be passed later this year, provides for a Companies Ombud, an independent organ of the state with a mandate to serve as a forum for voluntary ADR in any matter arising under the Act. The King III Report on Corporate Governance which is also expected later this year, will require company directors to consider ADR (including

³⁹⁷ See High Court Rule 37(6). See also Paleker (note 49) at 310-311.

³⁹⁸ Paleker (note 49) at 311.

³⁹⁹ As noted in chapter 1 at 14, the author is not disputing the relevance or effectiveness of court annexed or mandatory forms of mediation in resolving disputes. See for example Boule *Mediation: Principles, Process, Practice* Chapter 11, and in particular 414-417 dealing with some of the available survey evidence. It is not however within the remit of this thesis to deal with such forms comprehensively.

⁴⁰⁰ Amanda Bougardt and Mervyn King ‘The Only Place “Litigation” Should Precede “Mediation” is in the Dictionary’ 1 February 2007 *Without Prejudice* at 18. Mediation is also well established in the field of labour law, for example, Section 157(4)(a) of the Labour Relations Act 1995 provides that the Labour Court (a court of equal standing to the High Court established under the Act) may refuse to determine any dispute, other than an appeal or a review before the Court, if it is not satisfied that an attempt has been made to resolve the dispute through mediation. See also Chris Todd and John Brand ‘Commercial Mediation: A New Era for the Resolution of Commercial Disputes in South Africa,’ *African Initiative for Mediation Quarterly Newsletter* December 2007 at 7.

mediation) before resorting to litigation, based on the fiduciary duty of a director and the management of risk.⁴⁰¹

In addition to the advances in the commercial mediation sphere mentioned above, recent statutory provisions dealing with mediation in niche areas such as tax⁴⁰² and consumer law⁴⁰³ show the advance of the process into these areas. There have also been non-legislative initiatives.

Johannesburg advocacy group

A group of attorneys and advocates in Johannesburg recently decided to foster the implementation and use of commercial mediation. They identified a need for high quality skills training, accreditation, continual professional education and ongoing training, evaluation and accreditation in order to create a pool of competent commercial mediators.

As part of this initiative, Conflict Dynamics in association with CEDR recently trained and accredited three groups of South African commercial mediators.⁴⁰⁴ Conflict Dynamics is a South African training provider which specialises in the training of mediators.⁴⁰⁵

⁴⁰¹ John Myburgh 'Speech delivered at the launch of Tokiso Commercial' Johannesburg 18 March 2008.

⁴⁰² Rule 7 promulgated (1 April 2003) under Section 107 (A) of the Income Tax Act 58 of 1962 (as amended) provides that any taxpayer who is entitled to object to an assessment and is dissatisfied with the decision of the Commissioner under the Act may request that the matter be resolved by an ADR process in their notice of appeal. Similarly the Commissioner can request an ADR procedure if he/she thinks it would be appropriate in the circumstances. Provided there is agreement, an ADR procedure such as mediation may be used, subject to the requirements set out in the schedule to the rules.

⁴⁰³ Section 134 of the National Credit Act 34 of 2005, provides as an alternative to filing a complaint with the National Credit Regulator regarding a complaint concerning an alleged contravention of the Act, a person may refer the matter to mediation, provided the credit provider is not a financial institution (in which case it would go to the relevant Ombudsman) and does not object. Similarly, under section 77 of the Consumer Protection Bill 2007, a person may refer a dispute to be mediated by an Ombud under the Act.

⁴⁰⁴ See chapter 8 at 221 for a discussion on mediator training.

⁴⁰⁵ See www.conflictdynamics.co.za (last visited 8 August 2008). CEDR has accredited 54 commercial mediators in South Africa, correspondence between John Brand and the author, dated 2 July 2008.

Cape Town referral group

A group of small- to medium-size law firms in Cape Town⁴⁰⁶ are in the process of establishing an organisation to promote the use of mediation to resolve commercial disputes. The immediate aim of the group is to publish information on the benefits of mediation and also promote the member firms of the group as potential service providers.

Tokiso Commercial

Tokiso is a well established private sector provider of labour mediation services in South Africa. On 18 March 2008, Tokiso Commercial was launched in Johannesburg and is comprised of a panel of commercial mediators who have been accredited by CEDR. The organisation's main initiative is to promote commercial mediation and market its services. Similar launches occurred in Cape Town on 29 May and in Durban on 3 July last, and there are currently plans to arrange breakfast meetings with firms of attorneys and their clients, to make available through CEDR the training of lawyers who will appear in mediations and to speak to companies in the private and public sectors in order to encourage them to resolve their disputes through mediation. Tokiso Commercial is ideally placed to encourage the development and use of commercial mediation locally in South Africa and regionally in Africa.⁴⁰⁷

Centre for Mediation

The Institute of Directors ('IOD'), based in Johannesburg has also recently established a Centre for Mediation (the 'Centre') for the resolution of commercial disputes.⁴⁰⁸ Where negotiations fail, the IOD believes that every director owes a duty to their company to consider mediation as the next logical step towards any dispute resolution.⁴⁰⁹ The Centre will assist disputing parties to find an agreeable solution to their conflict through the provision of a range of professional mediators who have mediation experience

⁴⁰⁶ The group has four members: Walkers, Craig Schneider & Associates, Terence Matzdorss and De Rooy Brodziak. Interview with attorney John O'Leary, Cape Town, 20 June 2007, update interview 22 April 2008.

⁴⁰⁷ John Myburgh 'Speech delivered at the launch of Tokiso Commercial' Johannesburg 18 March 2008.

⁴⁰⁸ www.iodsa.co.za/centre_mediation.asp (last visited 22 July 2008).

⁴⁰⁹ www.iodsa.co.za/centre_mediation.asp#info (last visited 22 July 2008).

across a number of industries.⁴¹⁰ The Centre plans to train and accredit its own mediators who must abide by the Centre's Code of Conduct.⁴¹¹

The IOD promotes the use of IOD mediation clauses as a precondition to arbitration. The logic is that parties should first attempt mediation through the Mediation Centre and, if that fails, arbitration at the Arbitration Foundation of South Africa according to its rules.⁴¹² There has been traditional reluctance on the part of contract drafters to include mediation provisions in dispute resolution clauses in commercial contracts in South Africa.⁴¹³ As the representative body for directors, professionals and business leaders, the IOD is well placed to develop a culture of including such provisions in agreements and in turn the use of mediation to resolve commercial disputes.

Corporate Governance

It has been suggested that commercial mediation in South Africa has a dual function, as a mechanism to resolve disputes and as a management tool.⁴¹⁴ Corporate governance concerns not only how a board steers or directs a company and monitors management, but how managers manage. Consequently, a director has a duty of care to endeavour to ensure that there is a mechanism to manage disputes and if conflict arises to resolve it as effectively, expeditiously and efficiently as possible. Mediation, it is believed, can become this management tool.⁴¹⁵

As it is good corporate governance to have an upfront agreement to encourage collaborative problem solving in order to achieve agreed goals when a dispute arises, it has been suggested that the constitution of a corporation should also have a negotiation, mediation and arbitration clause in it. Experience in South Africa suggests that 80 per cent of disputes are settled before reaching the doors of the court, on the steps of the court, 80 per cent of the balance is settled and of those that go to trial, several are settled

⁴¹⁰ www.iodsa.co.za/centre_mediation.asp#info (last visited 22 July 2008).

⁴¹¹ Telephone interview with Michael Judin, Executive Committee Member, Institute of Directors, 20 June 2007, update interview 22 July 2008. See also www.iodsa.co.za/centre_mediation.asp#info (last visited 22 July 2008).

⁴¹² Interview with Mervyn King, Vice-President, IOD, Cape Town, 20 June 2007.

⁴¹³ Interviews conducted in Cape Town and Johannesburg with practising commercial mediators between 21 May and 20 June 2007.

⁴¹⁴ Mervyn King 'Speech delivered at a workshop on Mediation held by the Global Corporate Governance Forum, with the International Finance Corporation' Paris 12 February 2007.

⁴¹⁵ King (note 414).

after a few days of adversarial litigation. In light of this a limitation on access to the courts could be built in to the constitution of companies by spelling out why the parties to that constitution believe that the limitation is advantageous for its stakeholders. People contracting with the company could contract to align themselves with this limitation, which will, it is believed, be enforced by courts around the world.⁴¹⁶

The basis for this belief is that there was a time when South African courts refused to order contracted mediation because they could not see that their orders would be carried out by the parties, for example to negotiate in good faith. This is no longer the position.⁴¹⁷ If the procedures are agreed or there is a reference to the rules of an administrator of mediators, the process will be enforced by the court.⁴¹⁸ This is where Tokiso Commercial and the recently established mediation centre can play a key role.⁴¹⁹

Access to Justice

Access to justice is also a very material factor in driving the commercial mediation movement in South Africa. In June of this year, the Johannesburg High Court suggested mediation in a case involving a dispute between the South African Broadcasting Corporation and the suspension of its CEO.⁴²⁰ Similarly in August 2007, Deputy Chief Justice Moseneke urged the four hundred residents of two derelict inner-city buildings to mediate their eviction dispute with a municipality.⁴²¹ The parties reached a partial settlement that was ultimately endorsed by the court in its judgement.⁴²² The court also quoted, with approval, the remarks of the Constitutional Court in *Port Elizabeth Municipality v Various Occupiers*,⁴²³ another case involving an evictions order, that ‘wherever possible, respectful face to face engagement or

⁴¹⁶ King (note 414).

⁴¹⁷ See chapter 5 at 93 for a discussions on *Southernport Development (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA).

⁴¹⁸ See chapter 5 at 93 for a discussion about this issue, in particular the endorsement by the Supreme Court of Appeal of Kirby P’s reference to a readily ascertainable external standard in the Australian case *Coal Cliff Collieries (Pty) Ltd v Sijehama Pty Limited* (1991) 24 NSWLR 1.

⁴¹⁹ See Mervyn King ‘Speech delivered at the launch of the Mediation Centre’ 28 March 2007.

⁴²⁰ See www.thetimes.co.za/PrintArticle.aspx?ID=790256 (last visited 3 July 2008). The presiding judge even offered to act as mediator in the dispute, see www.businessday.co.za/PrintFriendly.aspx?ID=BD4A790370 (last visited 3 July 2008).

⁴²¹ See www.news24.com/News24/South_Africa/News/0,,2-7-1442_2172885,00.html

⁴²² See *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg, Rand Properties (Pty) Limited, Minister of Trade and Industry & President of the Republic of South Africa* Case CCT 24/07 (2008) ZACC 1, available at www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT24-07A (last visited 3 July 2008) particularly the remarks of Yacoob J. at paras 28, 29 and 30.

⁴²³ 2005 (1) SA 217 (CC).

mediation through a third party should replace arm's-length combat by intransigent opponents.⁴²⁴

The backlog in the Court roll in most jurisdictions of the High Court is by itself evidence of the need for the introduction of active case management in the rules of civil procedure. As can be seen from the discussion in chapter seven below, in England, judicial activism has played a critical role in the growth of commercial mediation. The leadership displayed by the judiciary in the cases discussed above represents the beginning of such activism in South Africa, and it is to be hoped that the judiciary will display a similar approach in appropriate circumstances when dealing with commercial disputes that come before it.

⁴²⁴ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) Sachs J. at para 39, as cited by Yacoob J. at para 12, *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg, Rand Properties (Pty) Limited, Minister of Trade and Industry & President of the Republic of South Africa* Case CCT 24/07 (2008) ZACC 1. In *Port Elizabeth Municipality*, the court said that 'one of the relevant circumstances in deciding whether an eviction order would be just and equitable would be whether mediation has been tried. In appropriate circumstances, the courts should themselves order that mediation be tried,' see Sachs J. at para 45.

CHAPTER FIVE: ENFORCEMENT

The ultimate aim of the process described in chapter two above is that it will result in an agreement. It has been pointed out that where a mediation produces a binding agreement, that agreement will usually supersede the parties' prior rights, and where the agreement is turned into a consent order in court, it can be enforced regardless of the parties' rights and duties before the mediation.⁴²⁵

Mediation can also affect legal rights and remedies indirectly, for example, mediation does not extend the limitation period for a party to take an action, so that parties should take the necessary precautions to protect their legal rights from being directly or indirectly affected.⁴²⁶

Mediation clauses

Internationally, mediation clauses appear in many commercial contracts and either require the use of the mediation process where there is a contractual dispute, or require the parties to consider mediation in resolving a potential dispute.⁴²⁷ Several reasons are given for using such clauses.⁴²⁸ They focus the minds of the parties on the reality that they may have to face future conflicts, they allow the parties to select and fashion their own dispute resolution system, e.g. med/arb, and to choose in advance a procedure for selecting the mediator when a dispute arises, they assist in avoiding a conflict over how to deal with a dispute and they go some way towards allaying fears that a party may have about 'showing weakness' by suggesting mediation when a dispute arises.⁴²⁹

It has been suggested that complex contracts, such as joint venture agreements should include mediation clauses, where the relationship will last over a long period of time in changing circumstances, and where the parties will be in an ongoing

⁴²⁵ Boulle and Rycroft (note 231) at 225.

⁴²⁶ Laurence Boulle and Miryana Nesic *Mediation: Principles, Process, Practice* at 467.

⁴²⁷ Boulle (note 263) at 418.

⁴²⁸ Boulle and Rycroft (note 143) at 226 cite the following references in their discussion: H Astor and C Chinkin (note 236) at 193-210; M Ahrens and G Witcombe *Australian Dispute Resolution Handbook* at 1; S Henderson *The Dispute Resolution Manual* at 118-19.

⁴²⁹ Boulle and Rycroft (note 143) at 226. In the interviews of practising commercial mediators conducted in Cape Town and Johannesburg between 21 May and 20 June 2007, all but three of those interviewed said that there were no agreements to mediate in place before the dispute arose. The three mediators that mediated under pre-existing mediation clauses said that the clauses usually appeared in the contracts in med-arb form.

relationship.⁴³⁰ Research from the US indicates that parties who participate in mediation under an agreement reach a settlement as frequently as those who agree to mediate when a dispute occurs.⁴³¹

Mediation service providers have produced standard mediation clauses for use in agreements which generally stipulate that contractual disputes will be referred to mediation, before commencing legal proceedings or going to arbitration.⁴³² Such clauses vary in complexity, some provide for the appointment of a mediator and are silent on how the process will work, while others detail features of the process or refer to a prescribed mediation procedure contained in a separate document, and may also provide for a sequence of dispute resolution methods e.g. negotiation, followed by mediation, followed by arbitration.⁴³³

While mediation clauses can refer all or specific disputes to mediation, Boule and Nesic point out that in order to determine the most appropriate escalation procedure, the nature of the contract should be considered in order to assess the types of disputes that may arise during the life of the contract, and to consider the most appropriate dispute resolution procedure for disputes of that kind and to incorporate such procedures into the clause.⁴³⁴ In addition to providing for the costs of the process and a jurisdiction clause, another issue to consider is the method for selecting or appointing the neutral, and whether an organisation will administer the process and, if so, which one.⁴³⁵

Boule remarks that dispute resolution clauses have evolved over time becoming more complex and responding to judicial direction and while it is uncommon for their validity to be legally assessed, court decisions have resulted in more careful and detailed drafting.⁴³⁶

⁴³⁰ See M Pryles 'Dispute Resolution Clauses in Contracts' (1990) 1 *ADRJ* 116-24 as cited by Boule and Rycroft (note 143) at 226.

⁴³¹ J Brett, Z Barsness and S Goldberg 'The Effectiveness of Mediation: an Independent Analysis of Cases Handled by Four Major Service Providers' (1996) 12 *Negotiation Journal* 259 as cited by Boule and Nesic (note 426) at 468.

⁴³² Boule (note 263) at 420.

⁴³³ Boule (note 263) at 420.

⁴³⁴ Boule and Nesic (note 426) at 469.

⁴³⁵ Boule and Nesic (note 426) at 469.

⁴³⁶ Boule (note 263) at 420. It has been suggested that even if mediation clauses were legally unenforceable, they could still serve useful purposes and there might be advantages in including them in agreements, as they focus attention on the possibility of a non-litigious remedy and go some way in countering the traditional perception that an offer to mediate is a sign of weakness, see Pryles (note 430) at 118; Astor and Chinkin (note 236) at 210 as cited by Boule and Rycroft (note 231) at 236.

Enforceability of mediation clauses

It has been sensibly remarked that when considering enforcement, it is important to remember that compliance is not an issue with many mediation clauses.⁴³⁷ When investigating the enforceability of mediation clauses where one party refuses to comply, it is likely that the courts will determine their enforceability under general contractual principles as there is no legislative basis for enforcing such clauses in South Africa.⁴³⁸ This is in contrast to the law on the enforceability of arbitrations clauses which is legislated for⁴³⁹ and has been interpreted by the courts and is well established.⁴⁴⁰

Boulle and Rycroft point out a number of reasons as to why the differences between arbitration and mediation limit the relevance of the law on arbitration clauses to that on mediation clauses.⁴⁴¹ The first difference is that arbitration is regulated by statute which provides for its enforceability. Second, mediation and other ADR processes are not as well defined or as well understood as arbitration. Third, compliance is relatively easy to assess with an arbitration clause, but difficult to assess with a mediation clause. Finally, mediation does not guarantee an outcome while arbitration does in the form of the arbitrator's binding award.

As a result of these differences, the courts originally displayed a traditional reluctance to enforce mediation clauses compared to arbitration clauses, and Boulle remarks that similar policy considerations influenced the courts' approach to both types of clauses, which involved balancing the parties' autonomy to agree on their own dispute resolution method with the rights of parties to have matters adjudicated in court.⁴⁴² As we will see from the discussion that follows, the attitude of the judiciary in this area has changed over time.

The following six issues are relevant to the enforceability of mediation clauses.⁴⁴³

⁴³⁷ Boulle and Nesic (note 426) at 469.

⁴³⁸ Boulle and Rycroft (note 231) at 227.

⁴³⁹ See section 31 of the Arbitration Act 42 of 1965 as cited by Boulle and Rycroft (note 143) at 227.

⁴⁴⁰ See the cases cited by Butler and Finsen (note 117) at 272-275 referred to by Boulle and Rycroft (note 143) at 227.

⁴⁴¹ See Boulle and Rycroft (note 231) at 227.

⁴⁴² Boulle (note 263) at 422.

⁴⁴³ See D Spencer 'Uncertainty and Incompleteness in Dispute Resolution Clauses' (1995) 2 *ADRJ* 23 as cited by Boulle and Rycroft (note 143) at 227.

Survival of a mediation clause on the termination of an agreement

While contracts can be terminated in numerous ways such as through repudiation, the issue that arises is whether, in such a circumstance, an otherwise valid mediation clause survives the termination of the contract.⁴⁴⁴ Although further contractual performance is not required from the parties following termination, it has been sensibly suggested that in this context general contractual principles indicate that the contract remains effective for the purposes of enforcement of the dispute resolution clause.⁴⁴⁵

Another issue that may arise is where one party wants to enforce a dispute resolution clause and the other party claims that the contract, including the dispute resolution clause, was void *ab initio*.⁴⁴⁶ With regard to arbitration it is well established in England that where a contract is void *ab initio*, the arbitration clause can be severed from the main contract.⁴⁴⁷ Despite allegations that the underlying contract is void, the parties are presumed to have wanted their disputes to be resolved by arbitration and the underlying principle is that the agreement to arbitrate is collateral to the main agreement and therefore stands on its own.⁴⁴⁸

Traditionally, the effectiveness of such a clause in South Africa seemed to be an open question.⁴⁴⁹ It was thought that there would be no objection in principle to South African courts following the English approach on the severability of an arbitration clause from a void agreement, except in the case of initial illegality, with the result that the arbitration clause would be deemed valid.⁴⁵⁰

⁴⁴⁴ See Boule and Rycroft (note 231) at 227-8.

⁴⁴⁵ Boule and Rycroft cite 'Ermine', 'The Arbitration Clause in Recognition Agreements: Can it be Terminated by the Repudiatory Conduct of One of the Parties to the Agreement?' (1992) 13 *ILJ* 19 for a discussion on the survival of the arbitration clause on the termination of a recognition agreement, see Boule and Rycroft (note 231) at 228.

⁴⁴⁶ See Boule and Rycroft (note 231) at 228.

⁴⁴⁷ See Boule and Nesic (note 426) at 470-471; *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] QB 701 CA; *Paul Smith Ltd v H & S International Holdings Inc* [1991] 2 Lloyd's Rep 127 (QB Com Ct) 130-1. The English Court of Appeal recently reaffirmed its decision in *Harbour Assurance* recognising the severability of an arbitration clause in *Fiona Trust & Holding Corporation v Yuri Privalov* [2007] EWCA Civ 20.

⁴⁴⁸ *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] QB 701 CA at 759, 763 and 769.

⁴⁴⁹ In *Allied Mineral Development Corporation (Pty) Ltd v Gemsbok Vlei Kwartsiet (Edms) Bpk* 1968 (1) SA 7 (C) 14E, a dispute as to the validity of the main agreement was, however, held to fall outside the wording of the arbitration clause, making it unnecessary to decide the point.

⁴⁵⁰ Butler and Finsen (note 117) at 57.

Unfortunately, in *Wayland v Everite Group Ltd*⁴⁵¹ the court rejected severability in this context. Although this decision has been criticised,⁴⁵² the decision has apparently now been accepted by the Supreme Court of Appeal in *North West Provincial Government v Tswaing Consulting CC*.⁴⁵³

It is to be hoped that the South African courts will change their course from recent decisions and follow the English approach on the severability of an arbitration clause from the main agreement. If this new course were pursued, the principle could be extended to other dispute resolution clauses such as mediation clauses, the argument being that they derive their authority from the agreement of the parties, can be severed from the main contract, and should be enforced by the courts despite an allegation that the main contract is void.⁴⁵⁴

Certainty

Contract provisions are void where it is difficult to assess the particular rights or obligations of the parties, and the law may decline to enforce them where they are vague on certain matters to be agreed in the future.⁴⁵⁵

Agreements to agree or negotiate

As there is uncertainty regarding the terms and whether an agreement will even be reached, either party could walk away from an ‘agreement to agree’. Where a mediation clause makes the occurrence of the mediation dependent on the future wishes of one party, it is effectively an ‘agreement to agree’ and will not provide sufficient certainty to be enforceable.⁴⁵⁶ This principle was extended by the English courts⁴⁵⁷ where they refused to enforce agreements to negotiate future matters on the basis that such

⁴⁵¹ 1993 (3) SA 946 (W) at 951 H-I.

⁴⁵² See Butler (note 116) at para 558 note 12.

⁴⁵³ 2007 (4) SA 452 (SCA), citing *Wayland v Everite Group Ltd* as authority, the court declared that ‘the arbitration agreement cannot stand’ as it was ‘embedded in a fraud-tainted agreement’ which was rescinded by one party, and ‘the clause cannot survive the rescission,’ see Cameron JA at para 13.

⁴⁵⁴ R D Giles ‘Severability of Dispute Resolution Clauses in Contracts’ (1995) 14 *The Arbitrator* at 38, Spencer (note 443) at 28 as cited by Boule and Rycroft (note 426) at 228.

⁴⁵⁵ See Boule and Nestic (note 426) at 471. See also *Pitout v North Cape Livestock Co-op Ltd* (1977) 4 SA 842 (A) 850.

⁴⁵⁶ *Minister for Main Roads for Tasmania v Leighton Contractors Pty Ltd* (1985) 1 BCL 381 as cited by Boule and Nestic (note 426) at 472.

⁴⁵⁷ *Courtney and Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd* [1975] 1 WLR 297; *Walford v Miles* (1992) 2 WLR 174 as cited by Boule and Nestic (note 426) at 471.

arrangements are effectively ‘agreements to agree’.⁴⁵⁸ This was viewed at the time as having potentially negative implications for the enforceability of mediation clauses.⁴⁵⁹

The issue arises as to whether mediation is equivalent to negotiation for the purposes of enforcement. As Boule and Rycroft have usefully pointed out, Australian courts have displayed more ‘analytical acumen and common sense’ on this issue.⁴⁶⁰ The judgment of Kirby P in *Coal Cliff Collieries Pty Ltd v Sijehama Pty Limited*,⁴⁶¹ reflects this approach, where the New South Wales Court of Appeal held that a contract to negotiate in good faith could be enforceable in some circumstances, although a minority judgment followed the English approach. The majority judgment acknowledged that one of the difficult issues is that where negotiations amount to nothing it can be difficult to assess whether there was a breach of an agreement to negotiate, although as Boule concludes, this philosophy has been pursued by the courts with regard to agreements to mediate.⁴⁶²

Kirby P identified three situations. The first is where there is a plain promise to negotiate which is intended to be a binding legal obligation. This would be clear where an identified third party has been given the power to settle ambiguities and uncertainties. However, if the court regards the failure to reach agreement on a particular term so that the agreement should be classed as illusory or unacceptably uncertain, it will not enforce the agreement. The second refers to a small number of cases where there is a readily ascertainable external standard, and the court may be able to add flesh to a provision which is otherwise unacceptably vague or uncertain or apparently illusory. The third situation is where the promise to negotiate in good faith occurs in the context of an arrangement that is too illusory or too vague and uncertain to be enforced.

The circumstances in which an agreement to negotiate is enforceable would seem to have been settled in South Africa by the Supreme Court of Appeal in

⁴⁵⁸ See Boule and Nestic (note 426) at 472 note 21, who cite Lord Ackner in *Walford v Miles* [1992] 2 AC 128 at 181, where he held that ‘the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of [negotiating] parties’. However, English courts have held that clauses that provide that the parties agree to use their best endeavours do not lack the required certainty for enforcement. See Boule and Nestic (note 426) at 472 note 21.

⁴⁵⁹ Boule and Rycroft (note 231) at 228.

⁴⁶⁰ Boule and Rycroft (note 231) at 229.

⁴⁶¹ (1991) 24 NSWLR 1.

⁴⁶² See *Computershare Ltd v Perpetual Registrars Ltd (No 2)* [2000] VSC 233 as cited by Boule (note 263) at 424.

Southernport Development (Pty) Ltd v Transnet Ltd,⁴⁶³ where the parties had agreed that in certain circumstances they would enter into an agreement to negotiate in good faith. Noting that the duty to negotiate in good faith is known in South African law in the field of labour relations, Ponnar AJA concisely reviewed the enforceability or unenforceability of agreements to negotiate in good faith in other countries, concluding that the principles enunciated by Kirby P in the Australian case of *Coal Cliff Collieries Pty Ltd v Sijehama Pty Limited*⁴⁶⁴ were in accordance with South African law.⁴⁶⁵

Agreements to mediate

Agreements to mediate are different from agreements to agree or agreements to negotiate. Boulle⁴⁶⁶ points out that there is a conceptual difference between agreements the validity of which depends on the parties agreeing on an essential term, such as the price to be paid, and an otherwise valid contract in which parties agree to resolve issues through a recognised process and the involvement of an outside intervener who facilitates the parties' negotiations when things go wrong. The jurisprudence from the courts in New South Wales builds on these distinctions.⁴⁶⁷

In *Hooper Bailie Associated Ltd v Natcon Group Pty Limited*⁴⁶⁸ the parties agreed that 'conciliation' would conclude before arbitration would proceed. The plaintiff claimed that the defendants had not complied with the conciliation requirement and sought a stay of the arbitration proceedings instituted by the defendants. The court granted the stay, finding that the agreement to conciliate was sufficiently certain about the conduct required of the parties. Giles J held that an agreement to conciliate, or mediate, was more than an agreement to negotiate in good faith. It was a commitment to participate in a process that may result in an agreed settlement which would make the need for further proceedings redundant. Giles J distinguished between reaching agreement and participating in a process which, despite the parties' initial reluctance, may result in an agreement: 'What is enforced is not cooperation and consent but participation in a process from which cooperation and consent might come.'⁴⁶⁹ Giles J

⁴⁶³ 2005 (2) SA 202 (SCA).

⁴⁶⁴ (1991) 24 NSWLR 1.

⁴⁶⁵ See also R H Christie *The Law of Contract in South Africa* at 38.

⁴⁶⁶ Boulle (note 263) at 425.

⁴⁶⁷ Boulle (note 263) at 425.

⁴⁶⁸ (1992) 28 NSWLR 194 as cited by Boulle and Rycroft (note 426) at 229.

⁴⁶⁹ (1992) 28 NSWLR 194 at 206 as cited by Boulle and Rycroft (note 231) at 229

refused to follow the English authorities as he believed that ‘the law in New South Wales in relation to contracts to negotiate is not so uncompromising.’⁴⁷⁰ After referring to relevant US cases he concluded that: ‘[a]n agreement to ... mediate is not to be likened ... to an agreement to agree ... nor is it an agreement to negotiate.’⁴⁷¹

It was suggested some time ago that this judgement showed a realistic appreciation of the nature of the mediation process and that it was in accordance with contemporary business practice as it is was not unusual for commercial agreements to contain mediation clauses.⁴⁷² Time has proved such remarks prophetic.

In the subsequent case, *Con Kallergis v Calshonie*,⁴⁷³ Hayne J believed that an agreement to negotiate would be enforceable if the process specified has an identifiable end rather than a contractual requirement to negotiate in order to achieve agreement, which would be unenforceable. Hence the focus of the clause should be on the process with the agreement to negotiate being a stage in that process.⁴⁷⁴

Hooper Baillie was also considered in *Aiton Australia Pty Ltd v Transfield Pty Ltd*⁴⁷⁵ where a stay of proceedings was sought on the basis of a mediation clause. While there was no legislative basis for enforcing dispute resolution clauses other than those which provided for arbitration, Einstein J believed that an agreement to conciliate or mediate was enforceable provided that it was expressed as a condition precedent to litigation (or arbitration). Consequently, the clause, similar to the arbitration clause considered in *Scott v Avery*⁴⁷⁶ did not attempt to oust the jurisdiction of the court. As discussed, another condition for enforceability is that the dispute resolution procedure is sufficiently certain and it was this requirement which was to prove critical to the enforceability of the mediation clause in the agreement. The plaintiff submitted that the mediation process set out in the agreement lacked sufficient certainty to be given legal effect because (i) there were no remuneration provisions dealing with the amount to be paid to the mediator and (ii) there were no provisions dealing with what was to happen in the event that one or both of the parties disagreed with the fee proposed by a mediator or what was to happen if the nominated mediator declined appointment. Einstein J.

⁴⁷⁰ (1992) 28 NSWLR 194 at 207 as cited by Boule and Nestic (note 426) at 473.

⁴⁷¹ (1992) 28 NSWLR 194 at 207 as cited by Boule and Nestic (note 426) at 473.

⁴⁷² Boule and Rycroft (note 231) at 229

⁴⁷³ (1998) 14 BCL 201 as cited by Boule and Nestic (note 426) at 473.

⁴⁷⁴ See Boule and Nestic (note 426) at 473.

⁴⁷⁵ [1999] NSWSC 996.

⁴⁷⁶ (1856) 10 ER 1121.

adopted the views of Giles J. in *Hooper Bailie* and in light of these points held that the mediation clause was unenforceable.⁴⁷⁷

Einstein J referred to a paper written by Boulle and Angyal who detailed the minimum requirements for an enforceable dispute resolution clause:⁴⁷⁸

- It must be in *Scott v Avery* form i.e. it should require that the mediation be completed before court proceedings commence.
- The clause must create a process that is certain i.e. stages in the process should not require agreement on some course of action before the process can proceed. If the parties cannot agree then the clause would amount to an agreement to agree and would be unenforceable due to uncertainty.
- The clause should include processes for dealing with administrative issues such as the selection of the mediator and the mediator's remuneration. In the event that agreement is not reached on these issues the clause should provide for a mechanism for a third party to make the selection.
- The mediation process should also be clear from the clause, alternatively it should incorporate the rules of a mediation organisation.

Einstein J. rejected the plaintiff's argument that the dispute resolution clause was unenforceable because it was merely an agreement to negotiate, rather than an agreement to conciliate and/or to mediate, and also that it contained a good faith requirement.⁴⁷⁹ Einstein J. observed:

As discussed below, the focus ought properly be on the process provided by the dispute resolution procedure. Provided that no stage of the dispute resolution mechanism is itself an 'agreement to agree' and therefore void for uncertainty, there is no reason why, in principle, an agreement to attempt to negotiate a dispute may not itself constitute a stage in the process.⁴⁸⁰

⁴⁷⁷ See the discussion by Michael Pryles, 'Multi-Tiered Dispute Resolution Clauses' 2001 *Journal of International Arbitration* 18(2) 159-176.

⁴⁷⁸ Australian Law Reform Commission, *Review of the Adversarial System of Litigation*, Issues Paper 25, June 1998, Chapter 6, Paragraph 6.20. See also Pryles (Note 477) at 168-169.

⁴⁷⁹ The contract imposed the requirement of 'good faith' on the parties and it was argued that this concept was too imprecise to give rise to an enforceable obligation. See Kent Dreadon 'Mediation, English Developments in an International Context' IBA Legal Practice Division *Mediation Committee Newsletter* April 2005 at 17. See also *Walford v Miles* [1992] 2 AC 128, discussed in chapter 7 at 206.

⁴⁸⁰ [1999] NSWSC 996, Einstein J. at para 59.

He held that the sole reason for the unenforceability of the mediation clause was the uncertainty as to the allocation of the mediator's costs. Einstein J. also disagreed with the observations of Giles J. in *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd*⁴⁸¹ who cast doubt on the enforceability of a good faith obligation.⁴⁸²

In any event, the English view that agreements to agree or to negotiate are unenforceable for lack of certainty was weakened by the House of Lords in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*.⁴⁸³ In this case a clause provided that disputes should be referred to a panel and if either party was not satisfied, it could have the panel's decision reviewed and revised by arbitration. The court held that such a clause can only operate if it is well defined and if reasonable time limits for the completion of each stage of dispute resolution are set, otherwise the parties may be involved in a process that is too lengthy and uncertain. The court exercised its discretionary power to stay proceedings to give effect to the clause which was 'nearly an immediately effective agreement to arbitrate, albeit not quite.'⁴⁸⁴

It has been suggested that careful drafting would make such a multi-step dispute resolution clause effective and enforceable.⁴⁸⁵ However, despite the prudence employed at contract drafting stage, the 'good faith negotiations' aspect of such a clause gave rise to difficulties in England, where the court took a very different approach to Einstein J. in *Aiton*. In *Halifax Financial Services Ltd v Intuitive Systems Ltd*,⁴⁸⁶ the contract included a provision that in the event of a dispute arising, the parties 'would meet in good faith and attempt to resolve the dispute without recourse to legal proceedings.'⁴⁸⁷ The clause also provided for structured negotiations with the assistance of a neutral or a mediator. McKinnon J, using the expression from *Channel Tunnel*,⁴⁸⁸ considered that

⁴⁸¹ Supreme Court of New South Wales, Giles J, 55093/94, 28 March 1995, unreported. This case is discussed below.

⁴⁸² See Pryles (note 477) at 169.

⁴⁸³ [1993] 1 All ER 664, followed in *Cott UK Limited v FE Barber* [1997] 3 All ER 540 as cited by Boule and Nestic (note 426) at 473.

⁴⁸⁴ [1993] 1 All ER 664 at 678, Mustill LJ.

⁴⁸⁵ Loukas A Mistelis 'ADR in England and Wales: A Successful Case of Public Private Partnership' in Alexander (ed) *Global Trends in Mediation* at 162.

⁴⁸⁶ [1999] 1 All ER 303. See also O Olatawura 'Managing Multi-layered Dispute Resolution under the Arbitration Act 1996, Smashing Bricks of Intention' (2001) 4(3) *International Arbitration Law Review* 70-73.

⁴⁸⁷ *Halifax Financial Services Ltd v Intuitive Systems Ltd* [1999] 1 All ER 303 at 305.

⁴⁸⁸ [1993] 1 All ER 664 at 678, Mustill LJ.

the clause was ‘not in any sense close to being “nearly an immediately effective agreement to arbitrate.”’⁴⁸⁹

The decision in *Halifax Financial Services* has been correctly criticised as unduly traditional and dated and inconsistent with the accepted approach of the English courts and the courts in other jurisdictions such as Australia, of giving effect to dispute resolution mechanisms agreed by the parties.⁴⁹⁰ As discussed below, it should also be noted that the changes to the CPR in England subsequent to Lord Woolf’s access to Justice Reports has radically overhauled the English courts’ approach to the enforceability of mediation clauses.

Procedure for the mediation

Mediation clauses should be carefully drafted and, in particular, should address the procedural aspects of the mediation process in order to ensure certainty and enforceability.⁴⁹¹ The *Hooper Bailie* decision in Australia became a watershed case for the enforcement of mediation clauses where the clause provides a sufficiently certain procedural framework within which the parties can operate.⁴⁹² The requirements in that case included the procedure for the appointment of the conciliator, procedural matters, the possibility of legal representation, information exchange, evidential matters and the court held that a solicitor’s letter setting out the procedure established a ‘clear structure’ for the mediation.⁴⁹³

Inconsistent approach

Despite the guidance provided by the *Hooper Bailie* decision, the enforceability of mediation clauses featured again in the Australian case *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd*⁴⁹⁴ where Giles J found that the mediation clause

⁴⁸⁹ *Halifax Financial Services Ltd v Intuitive Systems Ltd* [1999] 1 All ER 303 at 311.

⁴⁹⁰ H Brown and A Marriott *ADR Principles and Practice* at 60-64.

⁴⁹¹ Boulle and Nestic (note 426) at 473.

⁴⁹² Boulle and Rycroft (note 231) at 229

⁴⁹³ *Hooper Bailie Associated Ltd v Natcon Group Pty Limited* (1992) 28 NSWLR 194 at 209 as cited by Boulle and Nestic (note 426) at 473.

⁴⁹⁴ Supreme Court of New South Wales, Giles J, 55093/94, 28 March 1995, unreported, discussed in D Spencer ‘Enforceability of Dispute Resolution Clauses’ (1995) 33 *Law Society Journal* 17 as cited by Boulle and Rycroft (note 231) at 229. See also ‘American Arbitration Association’s National Construction ADR Task Force Makes Recommendations for Upgrading and Enhancing Dispute Resolution Services’ (1995) 6 *ADRJ* 225 as cited by Boulle and Rycroft (note 231) at 229.

in question lacked sufficient certainty to be enforceable as it provided that the parties should attempt to settle disputes by mediation ‘administered by’ a particular ADR organisation, but neither set out the procedure for the mediation in the clause or clearly incorporated the rules or guidelines for mediation issued by that organisation. The clause also failed to identify the agreement that the parties were required to sign when a dispute arose.⁴⁹⁵

Giles J found that the procedure to be followed in the mediation contained in the clause lacked certainty as it required the parties to sign an unknown mediation agreement, not referred to in the clauses, which could conflict with the mediation guidelines of the ADR organisation.⁴⁹⁶ Despite both parties conceding that they believed that the dispute resolution clause impliedly incorporated the guidelines of the ADR organisation, which provided a detailed procedure for mediation, the judge held that the clause could not be saved by the guidelines as they required the signing of a mediation agreement which was not identified in the clause, and the clause itself did not elucidate a procedure for the mediation.⁴⁹⁷

It has been correctly remarked that this case is inconsistent with broader contractual principles regarding the use of extrinsic evidence to establish certainty in agreements;⁴⁹⁸ as such evidence can be used to incorporate terms and conditions contained in separate documents into an agreement by courts to remove uncertainty.⁴⁹⁹ It does seem sensible that this principle should apply to mediation clauses where procedures exist in external documents that can provide the required certainty.⁵⁰⁰

The incongruity between this judgment and that in *Hooper Bailie*,⁵⁰¹ both of which were given by the same judge has been commented on.⁵⁰² The clause on its own was uncertain in *Hooper Bailie*⁵⁰³ but was found to be enforceable because of a letter from the plaintiff’s solicitor detailing the procedural features of the proposed conciliation. Yet a six page mediation appointment agreement and four pages of guidelines were not sufficient to provide the required certainty in *Elizabeth Bay*

⁴⁹⁵ See Boule and Nestic (note 426) at 473.

⁴⁹⁶ See Boule and Nestic (note 426) at 473.

⁴⁹⁷ See Boule and Nestic (note 426) at 474.

⁴⁹⁸ See Spencer (note 494) at 31 as cited by Boule and Rycroft (note 231) at 230.

⁴⁹⁹ See, for example, *Trustees Executors and Agency Co Ltd v Peters* (1960) 102 CLR 537 as cited by Boule and Rycroft (note 231) at 230.

⁵⁰⁰ See Boule and Rycroft (note 231) at 230.

⁵⁰¹ (1992) 28 NSWLR 194 as cited by Boule and Nestic (note 426) at 474.

⁵⁰² Spencer (note 443) at 33 as cited by Boule and Nestic (note 426) at 474.

⁵⁰³ (1992) 28 NSWLR 194 as cited by Boule and Nestic (note 426) at 474.

Developments.⁵⁰⁴ The evidence in the facts of this case suggests that the certainty requirement was satisfied and as Boulle and Nesic remark, it is to be hoped that in similar circumstances in future courts will find mediation clauses enforceable.⁵⁰⁵

This would certainly appear to be the case in what is arguably the most groundbreaking judgment encouraging the use of mediation in England following the changes to the CPR. In *Cable & Wireless v IBM United Kingdom Limited*⁵⁰⁶ an ADR clause that specifically referred disputes to mediation was vague in terms of the nature of the procedure that should be used, other than referring broadly to CEDR rules. The claimant argued that the ADR clause was unenforceable because it lacked certainty, imposing no more than an agreement to negotiate. The court believed that the dispute resolution structure contained in the agreement left no doubt that it was the mutual intention of the parties that litigation should be engaged in as a last resort. It concluded that the mere issuing of proceedings was not inconsistent with the simultaneous conduct of an ADR procedure, nor a mutual intention to have the issue ultimately decided by the courts in the event that the ADR procedure failed to resolve the dispute.

The clause was held to be contractually enforceable and a stay of the proceedings was granted while the parties complied with the ADR clause. Colman J stated:

I would wish to add that contractual references to ADR which did not include provision for an identifiable procedure would not necessarily fail to be enforceable by reason of uncertainty. An important consideration would be whether the obligation to mediate was expressed in unqualified and mandatory terms In principle however, where there is an unqualified reference to ADR, a sufficiently certain and definable minimum duty of participation should not be hard to find The reference to [mediation] is analogous to an agreement to arbitrate. As such, it represents a free standing agreement ancillary to the main contract and capable of being enforced by a stay of the proceedings or by injunction absent any pending proceedings.⁵⁰⁷

Colman J reasoned that if the court declined to enforce contractual references to ADR on the grounds of intrinsic uncertainty, it would fly in the face of public policy as expressed in the CPR and as reflected in *Dunnett v Railtrack PLC*.⁵⁰⁸

⁵⁰⁴ (1995) 36 NSWLR 709 as cited by Boulle and Nesic (note 426) at 474.

⁵⁰⁵ See Boulle and Nesic (note 426) at 474.

⁵⁰⁶ [2002] 2 All ER (Comm) 1041.

⁵⁰⁷ [2002] 2 All ER (Comm) 1041 at 1051.

⁵⁰⁸ [2002] 2 All ER 850, discussed in chapter 7 at 193.

As one commentator points out⁵⁰⁹ the judgment reinforces the decisions made in *Dunnett and Hurst v Leeming*⁵¹⁰ and emphasises the relevance of ADR to commercial disputes. Colman J insisted that this was a reasonable case to mediate and said that parties entering into an ADR agreement must recognise that mediation as a tool for dispute resolution is not designed to achieve solutions which reflect the precise legal rights and obligations of the parties, but solutions that are mutually commercially acceptable at the time of the mediation.

Agreement to agree on procedure

When considering the process to be followed by the parties, Australian courts have reflected the view that there should be no stage in that process that requires the parties to come to an agreement regarding a course of action before the process can continue.⁵¹¹ For example, where the parties cannot agree on how the mediator is to be selected, the mediation clause, or the mediation rules or guidelines to be incorporated by reference into the clause, they should specify a nominated third party to make the appointment.⁵¹²

In *Elizabeth Bay* the court considered the mediation process to be ‘open-ended, indeed unworkable, because the process... would come to an early stop when, prior to the mediation it was asked what the parties had to sign and the question could not be answered.’⁵¹³

As discussed, in *Aiton Australia Pty Ltd v Transfield Pty Ltd*⁵¹⁴ the court considered a dispute resolution clause too uncertain to be enforced for failing to refer to the apportionment between the mediator’s fees and other expenses, believing such

⁵⁰⁹ Michael Kallipetis QC ‘Mediation: A Talk for the Irish Bar’ 29 November 2003 *The Bar Council* Dublin at 5.

⁵¹⁰ [2002] LLPN 508, discussed in chapter 7 at 194.

⁵¹¹ See *State of New South Wales v Banabelle Electrical Pty Ltd* (2002) 54 NSWLR 503 as cited by Boule (note 263) at 428, where a dispute resolution clause providing for an expert to be appointed by agreement between the parties, was held void for uncertainty. The Court commented that if there had been an implied duty to cooperate, it would have had more scope in addressing the issue of good faith within mediation. While this case dealt with expert determination, Boule suggests that the rationale behind this case could be extended to mediation, see Boule (note 263) at 428.

⁵¹² As Boule and Nestic sensibly point out, it is important to ensure that the third party specified offers the service required, see *Cott UK Ltd v FE Barber Ltd* [1997] 3 All ER 540 as cited by Boule and Nestic (note 426) at 474.

⁵¹³ (1995) 36 NSWLR 709 at 715 as cited by Boule and Nestic (note 426) at 474. *Elizabeth Bay* was also referred to in *Heart Research Institute Ltd v Psiron Ltd* [2002] NSWSC 646 as cited by Boule (note 263) at 428, where a dispute resolution clause was void for uncertainty because it was not clear what procedures would apply in the dispute resolution process.

⁵¹⁴ [1999] NSWSC 996 as cited by Boule and Nestic (note 426) at 474.

apportionment was neither obvious nor implied and while it was usual for these costs to be divided equally by the parties, there were too many options that the parties could have intended.

Boulle remarks that such cases reflect an arcane approach to the certainty issue, imposing a heavy burden on the drafters of dispute resolution clauses.⁵¹⁵ A more flexible approach was displayed by the Victorian Supreme Court in *Computershare Ltd v Perpetual Registrars Ltd (No 2)*.⁵¹⁶ The agreement in this case contained a complex ADR clause that included a provision for mediation. The defendant successfully sought a stay of proceedings in order to comply with the clause before litigation proceeded, despite the fact that the actual ADR process was left to be agreed upon by the parties when a dispute occurred.

It has been suggested that this approach is more consistent with the flexibility of the mediation philosophy than the stern approach taken in alternate judgements that require a strict application of the certainty requirement.⁵¹⁷ As Boulle remarks, ‘the compromise between certainty and flexibility allows the former to be acquired not only in terms of a set of rules laid out in advance, but also from the intervention of third parties or by applying ascertainable external standards’.⁵¹⁸ The court granted a limited stay so that the clause could be performed as the parties could impose an obligation to attempt to reach an agreement, and if they did not act in good faith they would be abandoning the obligation.⁵¹⁹

It has been pointed out that if this approach had been taken in *Aiton*⁵²⁰ and *Elizabeth Bay*⁵²¹ the clauses are likely to have been held enforceable.⁵²² As Spencer⁵²³ points out, in *Elizabeth Bay* the court held that a term was uncertain because it was inconsistent with an external document conceded to be part of the contract, while in *Computershare*⁵²⁴ such an arrangement would be sufficiently certain to be enforceable

⁵¹⁵ Boulle (note 263) at 429.

⁵¹⁶ [2000] VSC 233, see also the commentary of D Spencer ‘Uncertainty and ADR Clauses: The Victorian View’ (2001) 12 *ADRJ* 214 as cited by Boulle (note 263) at 429.

⁵¹⁷ Boulle (note 263) at 429.

⁵¹⁸ Boulle (note 263) at 429.

⁵¹⁹ *Computershare Ltd v Perpetual Registrars Ltd (No 2)* [2000] VSC 233 [14] as cited by Boulle (note 263) at 429.

⁵²⁰ [1999] NSWSC 996.

⁵²¹ (1995) 36 NSWLR 709.

⁵²² Boulle (note 263) at 430.

⁵²³ Spencer (note 516) at 217 as cited by Boulle (note 263) at 430.

⁵²⁴ [2000] VSC 233 as cited by Boulle (note 263) at 430.

as a court does not need to see a set of rules in order to find a term certain. It has been sensibly suggested that the approach taken in the latter case is consistent with the assumptions of both mediation and commercial practice and provides a useful guide for future developments in this area.⁵²⁵

Certainty and good faith

As an agreement to negotiate ‘in good faith’ can prove unenforceable, similarly an agreement to mediate ‘in good faith’ may not be enforced by the courts, and the Australian jurisprudence has proved inconsistent.⁵²⁶ The court in *Elizabeth Bay*⁵²⁷ held that a mediation clause that required an attempt at ‘good faith’ negotiations was too uncertain in meaning to be enforceable. Conversely, Hayden J in *Con Kallergis v Calshonie*⁵²⁸ believed that the obligation to act in good faith or reasonably in mediation is certain. Einstein J adopted an alternate approach in *Aiton Australia Pty Ltd v Transfield Pty Ltd*,⁵²⁹ believing that as the concept of good faith depends on the agreement wording and the circumstances of each case, and notwithstanding that criteria to determine compliance would be undesirable, the provision of a framework would ensure sufficient certainty in the use of the phrase, e.g.:

- to agree to mediate, mediation being a defined process; and
- to agree to be open-minded in the mediation, particularly in the exchange of proposals with other parties and the mediator in an effort to resolve the dispute.

Einstein J concluded that an obligation to mediate in good faith is enforceable provided it is not an agreement to reach agreement. He believed that good faith mediation does not require that concessions be made by the parties that are inconsistent with their interests and does not ultimately require that the parties reach an agreement. It

⁵²⁵ See Boule (note 263) at 430.

⁵²⁶ Boule and Nesic (note 426) at 475.

⁵²⁷ (1995) 36 NSWLR 709 as cited by Boule and Nesic (note 426) at 475.

⁵²⁸ *Con Kallergis v Calshonie* (1998) 14 BCL 201 at 211-12 as cited by Boule and Nesic (note 426) at 475.

⁵²⁹ [1999] NSWSC 996 as cited by Boule and Nesic (note 426) at 475. The inconsistency of the approach of the judiciary to good faith was expressed again in the subsequent case of *Laing O'Rourke v Transport Infrastructure* [2007] NSWSC 723, which dealt with good faith negotiations rather than mediation, where Hammerschlag J referred to the approach of Einstein J in *Aiton*, but stated that he preferred the analysis of Hadley JA in *Coal Cliff Collieries* at 41-42 that ‘a promise to negotiate in good faith is illusory and therefore cannot be binding,’ Hammerschlag J at par 45.

has been sensibly suggested that this approach should be the preferred guide for future developments in this area.⁵³⁰

Providing the required certainty

On the certainty issue, it has been sensibly suggested that the *Hooper Bailie* rationale, upholding a mediation clause reflects the nature of the mediation process and is preferable.⁵³¹ It would also seem to be supported by the approach of some judges in foreign jurisdictions that they will, where possible, do everything they can to enforce the intention of the parties.⁵³² As previously noted, it would also seem to be consistent with modern business practice, as it is usual for commercial agreements to contain clauses that require parties to negotiate and endeavour to settle when a dispute arises.⁵³³

The following guidelines were developed by Spencer from the principles that have developed from the jurisprudence dealing with the certainty of dispute resolution clauses in Australia:⁵³⁴

- language should be used that reflects the limitations of the procedural rights and obligations between the parties with sufficient certainty;
- an external standard can be sufficient for the purposes of certainty, for example, a standard form document that is recognised in the industry;
- certainty can also be derived where a standard of reasonableness can be attributed to a term such as from industry standards;
- certainty can also be derived from a third party mechanism.

From a drafting perspective, Spencer⁵³⁵ recommends that parties not leave any element to be agreed on in the future unless there is a fall back arrangement, as this will amount to ‘an agreement to agree’. If parties, for example, agree that their mediator will be selected when the situation requires, they should allow for the possibility that they

⁵³⁰ See Boule (note 263) at 433.

⁵³¹ See Boule and Nestic (note 426) at 476.

⁵³² For example, *Aztec Mining Co Ltd v Leighton Contractors Pty Ltd* (14 February 1990 and 23 February 1990, unreported) Supreme Court of Western Australia (Murray J); and R Charlton ‘Case Note: *Aztec Mining Co Ltd v Leighton Contractors Pty Ltd*’ 1990 1 *ADRJ* 104-6 as cited by Boule and Nestic (note 426) at 476.

⁵³³ Boule and Nestic (note 426) at 476.

⁵³⁴ D Spencer *Mediation Practice Notes -Around the Grounds!* (2000) 15 *ADRJ* 149 at 156-7 as cited by Boule (note 263) at 435.

⁵³⁵ Spencer (note 534) at 160-1 as cited by Boule (note 263) at 435.

may not agree by providing that someone else, e.g. a professional association, will make the appointment.⁵³⁶ Where terms are imported by the parties into the contract from an external document it should be annexed to the agreement or a specified document should be referenced, and there should be no inconsistency between this document and the mediation clause.⁵³⁷

The Model Law on International Commercial Conciliation

Article 4 of the Model Law provides that where a dispute arises, a party will invite the other party to mediate and that only in circumstances where the invitation is accepted will the mediation commence. This is clearly unacceptable in situations where there is a pre-existing agreement to mediate as it would deprive the agreement of any real meaning if a party could refuse to engage in mediation when a dispute arises.⁵³⁸

In the event that the Model Law is to act as a framework for a mediation statute in South Africa then this article would clearly require revision. The revision should reflect the jurisprudence detailed above in cases such as *Hooper Bailie*, in support of enforcing agreements to mediate in order to give effect to the intentions of the parties.

Completeness

The issue of completeness is closely aligned to the issue of certainty, but it has been of less practical significance, and the question of the invalidity of a mediation clause due to incompleteness has not yet been raised in a case.⁵³⁹ Consistent with general contractual principles, an agreement will be void for incompleteness where it does not refer to an important part of the transaction.⁵⁴⁰ In *Triarno Pty Ltd v Triden Contractors Ltd*⁵⁴¹ an Australian court held that it had no jurisdiction to create procedures to be followed where a dispute resolution clause provided for binding expert determination, but failed to refer to procedures to follow or the rights that the parties were to have in the process. The traditional view seems to be that courts are not inclined to imply terms

⁵³⁶ Spencer (note 534) at 160-1 as cited by Boule (note 263) at 435.

⁵³⁷ Spencer (note 534) at 160-1 as cited by Boule (note 263) at 435.

⁵³⁸ See also Sanders (note 66) at 106-112.

⁵³⁹ Boule and Nesic (note 426) at 476.

⁵⁴⁰ Boule and Nesic (note 426) at 476.

⁵⁴¹ (1992) 10 BCL 305 as cited by Boule and Nesic (note 426) at 476.

into contracts in relation to procedures to be followed.⁵⁴² While this logic could be extended to mediation clauses, it has been sensibly suggested that increased use of and familiarity with mediation should result in courts being less concerned with the issue of incompleteness.⁵⁴³

Attempts to oust the jurisdiction of the courts

It is a basic constitutional principle in most jurisdictions that courts are accessible to people where a dispute is appropriate for adjudication by a court and it is not possible to contract out of this right.⁵⁴⁴ This would result where a contract provision declares that mediation is the exclusive alternative to litigation, and such a clause would be unenforceable as it is against public policy in attempting to oust the jurisdiction of the courts.⁵⁴⁵

In South Africa, article 34 of the Constitution⁵⁴⁶ reads:

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing in a court or, where appropriate, another independent and impartial forum.

It was pointed out some time ago that this clause is intended to protect the arbitration process, in particular the processes conducted under the auspices of the Commission for Conciliation Mediation and Arbitration (CCMA), from a constitutional challenge that a disputant had been deprived of a right of access to the courts.⁵⁴⁷ The position is less clear where there is an obligation in a contract to resolve a dispute by mediation and it has been suggested that the use of the word ‘resolved’ in article 34 implies a final resolution of a dispute by mediation, adjudication or arbitration.⁵⁴⁸ It follows that a contractual obligation to attempt mediation to resolve the dispute would

⁵⁴² Spencer (note 443) at 30 as cited by Boulle and Nesic (note 426) at 476.

⁵⁴³ Spencer (note 443) at 24 as cited by Boulle and Nesic (note 426) at 476.

⁵⁴⁴ Boulle and Nesic (note 426) at 477.

⁵⁴⁵ Boulle and Nesic (note 426) at 477.

⁵⁴⁶ Act 108 of 1996 as cited by Boulle and Rycroft (note 231) at 231.

⁵⁴⁷ Boulle and Rycroft (note 231) at 231. This was recently confirmed by the Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd* (Case no CCT 85/06) which overturned the decision of the Supreme Court of Appeal in *Rustenburg Platinum Mines Ltd v CCMA 2007 1 SA 576* (SCA) and confirmed that section 34 of the Constitution applies to CCMA arbitrations.

⁵⁴⁸ Cf Christie in Du Toit et al *The Labour Relations Act of 1995* at 327; E van Kerken ‘Arbitrasie en die Howe’ (1993) 13 *ILJ* 17 as cited by Boulle and Rycroft (note 231) at 231.

consequently not be an attempt to oust the jurisdiction of the courts.⁵⁴⁹ It is important in this context that mediation clauses are drafted so that mediation is reflected as a condition precedent to and not an alternative to litigation,⁵⁵⁰ so that if mediation fails, the parties are free to go to court.⁵⁵¹

However, section 34 refers to the dispute being decided ‘in’ not ‘by’ a court, or where appropriate, another independent tribunal or forum. In accordance with the definition of mediation in this thesis, mediators, unlike arbitrators do not decide the dispute, but the use of the word ‘in’ apparently leaves the doorway open to argue that section 34 could apply to mediation.

Other policy considerations affecting the enforceability of mediation clauses

There are policy considerations other than legal factors that favour the enforceability of mediation clauses that could prove influential when courts consider enforcement.⁵⁵² For example, a dispute resolution clause is unlikely to be unenforceable because it doesn’t uphold the requirements of procedural fairness.⁵⁵³ In the Australian case *Aztec Mining Co Ltd v Leighton Contractors Pty Ltd*⁵⁵⁴ the clause provided that disputes be referred to an independent expert who was required to follow certain expedited procedures prior to giving a binding decision. The procedures provided for the parties to make submissions to the expert, for consultation on matters of procedure and legal representation. The plaintiff submitted that the prescribed procedure was not appropriate given the complex nature of the dispute and should be deemed unenforceable as offending the fundamental requirements of fairness. The court held that there was

⁵⁴⁹ See Boule and Rycroft (note 231) at 231. It has also been accepted that an arbitration clause does not oust the jurisdiction of the courts, partly it would seem in view of the court’s existing discretion not to enforce the arbitration agreement, on good cause shown see *Parekh v Shah Jehan Cinemas (Pty) Ltd* 1980 1 SA 301 (D) at 305 F-H.

⁵⁵⁰ This principle has foundations in the law of arbitration, see *Scott v Avery* [1856] 5 HLCas 81; 10 ER 1121. The parties effectively covenant that no right of court action will accrue until mediation is attempted. See Boule and Nestic (note 426) at 477.

⁵⁵¹ Similarly, by analogy with labour law, where mediation failed to completely resolve the dismissal of strikers, the employees were not deprived of the normal disciplinary procedure to finally resolve the matter, see *MAWU & Others v Siemens Ltd* (1986) 7 ILJ553 (IC) 557H as cited by Boule and Rycroft (note 231) at 231.

⁵⁵² Boule (note 263) at 439.

⁵⁵³ Boule (note 263) at 440.

⁵⁵⁴ Supreme Court of Western Australia, Murray J, 1109 of 1990, 23 February 1990, unreported as cited by Boule (note 263) at 440.

nothing preventing a party from going to court where there are allegations of error or impropriety by the expert and declined to strike it down.⁵⁵⁵

Boulle contends that a mediation clause could be challenged on similar grounds, for example, where the parties are unable to prepare or access essential information or where the nominated mediator is not impartial. It seems that in circumstances where mediation is combined with arbitration and the same person acts in both (med-arb), the possibility of a successful challenge would be greater.⁵⁵⁶

There are numerous policy arguments that favour the enforcement of mediation clauses that do not undermine the principle against ousting the courts' jurisdiction.⁵⁵⁷ For example, where it is clearly the intention of the parties to postpone litigation until another dispute resolution process has been attempted, it has been suggested for some time that the courts should give effect to that intention by enforcing the contract.⁵⁵⁸

It has been suggested that the rationale behind the enforcement of arbitration clauses can to an extent be applied to other dispute resolution clauses.⁵⁵⁹ However, Astor and Chinkin⁵⁶⁰ point out that it is not as easy to assess compliance with a mediation clause when compared to an arbitration clause. Arbitration has a well established procedure and there is a binding outcome in the form of the arbitrator's award. It is not as easy to assess compliance with a mediation clause, given the flexibility of the process and the difficulties in assessing whether the parties engaged in good faith in the process. Similarly according to Astor and Chinkin, courts can ensure compliance with arbitration clauses by appointing arbitrators with binding authority, while there is no legislative basis permitting courts to appoint mediators where the parties do not. However, it is some time since this analysis by Astor and Chinkin and many changes have ensued and it has been suggested that there are now many situations where mediators are appointed for the parties.⁵⁶¹

⁵⁵⁵ See Boulle (note 263) at 440.

⁵⁵⁶ Boulle (note 263) at 440-441.

⁵⁵⁷ Foreign courts have for some time enforced clauses providing for dispute resolution processes other than arbitration, see the cases from the US from over 15 years ago analysed in H Astor and C Chinkin (note 236) at 209-10 as cited by Boulle and Rycroft (note 231) at 232.

⁵⁵⁸ See *Public Authorities Superannuation Board v Southern International Developments Corporation Pty Ltd*, New South Wales Supreme Court, No 17896 of 1987, 19 October 1987, unreported, analysed in Astor and Chinkin (note 236) at 198-202 as cited by Boulle and Rycroft (note 231) at 232.

⁵⁵⁹ Boulle and Rycroft (note 231) at 233.

⁵⁶⁰ Astor and Chinkin (note 236) at 209 as cited by Boulle and Rycroft (note 231) at 233.

⁵⁶¹ Boulle and Rycroft (note 231) at 233.

- mediators must sometimes evaluate if a mediation was satisfactorily conducted;
- parties may be sanctioned in mediation where they do not act reasonably and in good faith; and
- they will make it more difficult for courts to refuse to enforce clauses requiring private mediation.

Drafting mediation clauses

In order to avoid enforcement difficulties with mediation clauses and in view of the jurisprudence discussed above, it has been suggested that drafters of mediation clauses should be cognisant of the following factors.⁵⁶²

- clarity and certainty should be apparent or should be readily derived from extrinsic documents expressly referred to in the clauses;
- they should be comprehensive and complete;
- the procedures to be followed by the parties when setting up and undertaking the mediation should be specified, the identity of the mediator, the responsibility for payment of the mediator's fees and the timetables to be followed should also be referred to;
- alternatively, the mediation procedure of an organisation providing mediation services should be incorporated by reference;
- the non-ouster principle should be observed by requiring that the parties first submit their dispute to mediation prior to instituting court proceedings; and
- provisions requiring participation in 'good faith' should be viewed cautiously, particularly to avoid suggestions that it is an agreement to reach agreement.

Complying with mediation clauses

No firm authority exists as to what is required from parties in a mediation to comply with the obligations in an enforceable mediation clause.⁵⁶³ It has been suggested that

⁵⁶² See A Hood 'Commercial Contracts, Lawyers and Alternative Dispute Resolution: A Proactive Habit' (1998) 9 *ADRJ* 129; R Angyal 'Enforceability of Agreements to Mediate' in G Raftesath and S Thaler (eds) *Cases for Mediation* as cited by Boulle and Nestic (note 426) at 479.

criteria could include attendance at the mediation, disclosure of information to the other side, compliance with the procedural directions of the mediator, engagement in constructive negotiations until there is good reason to conclude them and participation at every stage with reason and in a spirit of good faith.⁵⁶⁴ However, assessing compliance with such requirements would involve difficult subjective judgments by outsiders to the mediation and there would also be difficulties in defining the obligations of the parties clearly.⁵⁶⁵

It has been suggested that it may sometimes be easier to deduce that parties had acted in bad faith or unreasonably, for example, by sitting silent throughout the mediation, than that they had acted in good faith and reasonably, and there are also practical difficulties in establishing proper compliance with mediation clauses given the private and confidential nature of the process.⁵⁶⁶ Nevertheless, it has been suggested that there is no reason in principle why courts could not, in appropriate cases, decide if a party has complied with their obligations under a mediation clause.⁵⁶⁷ Each case would turn on its own facts.⁵⁶⁸

In *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd*⁵⁶⁹ Giles J expressed difficulties with the ‘good faith’ requirement in a mediation clause, believing that the presence or absence of good faith was not the main difficulty, rather the tension between negotiation, where a party is self-interested (rather than having regard to the interest of the other party), and the maintenance of good faith. It has been correctly pointed out that this approach overlooks the differences between unassisted, adversarial negotiations and mediated negotiations where a trained mediator can assist the parties in moving towards collaborative, interest based bargaining.⁵⁷⁰

Australian and English courts have been willing for some time to enforce clauses that require parties to exercise their ‘best endeavours’,⁵⁷¹ which term has been

⁵⁶³ In *SAAWU & others v Nampark Products Ltd* (1987) 8 ILJ 452 (IC), cited by Boulle and Rycroft (note 231) at 234, the fact that workers did not comply with an agreement to mediate reached by their union with management was a factor in the court finding that subsequent dismissals were not unfair.

⁵⁶⁴ Boulle and Rycroft (note 231) at 234.

⁵⁶⁵ See Boulle and Nesic (note 426) at 483.

⁵⁶⁶ Boulle and Nesic (note 426) at 483.

⁵⁶⁷ Boulle and Nesic (note 426) at 483.

⁵⁶⁸ See the discussion in chapter 7 at 203.

⁵⁶⁹ Supreme Court of New South Wales, (1995) 36 NSWLR 709 (Giles J) as cited by Boulle and Nesic (note 426) at 483.

⁵⁷⁰ Boulle and Nesic (note 426) at 483.

⁵⁷¹ Boulle and Nesic give an example in relation to obtaining building approvals see *Hawkins v Pender Bros Pty Ltd* [1990] 1 Qd R 135, Boulle and Nesic (note 426) at 483.

held to not impose an infinite obligation, but merely conscientious and reasonable action. As mentioned above, in light of the increasing use of mediation clauses in other jurisdictions, should a dispute arise about a party's obligations under a mediation clause, the courts may be able to develop criteria for the satisfactory compliance with obligations arising from them, which in practice will be determined from the available evidence.⁵⁷² For example, in an Australian case based on a provision in the Native Title Act⁵⁷³ that requires good faith negotiations, the Tribunal found that it would consider the totality of the circumstances when determining whether the parties approached the negotiations with an open mind and a genuine desire to reach a settlement.⁵⁷⁴

Remedies for breach of mediation clauses

In circumstances where a mediation clause is not properly complied with, the issue of breach of contract arises as well as the possible remedies that are available where a breach occurs.⁵⁷⁵ There are primarily three potential remedies in such circumstances.⁵⁷⁶

Stay of proceedings

A stay of proceedings occurs where a court declines to accept a matter for trial because the defendant has raised special circumstances.⁵⁷⁷ In South Africa a defendant can apply to the High Court under the court's inherent jurisdiction to grant a stay of proceedings, and while this power is exercised sparingly, stays can be granted where the proceedings are vexatious or frivolous, where they amount to an abuse of process, or where they lack a probable cause of action.⁵⁷⁸

It has been suggested that these general principles could possibly be applied where a plaintiff commences legal proceedings without first complying with an enforceable mediation clause.⁵⁷⁹ The defendant would have to establish grounds for the

⁵⁷² Boulle and Nesic (note 426) at 483.

⁵⁷³ *Western Australia v Taylor* (1996) 134 FLR 211 as cited by Boulle and Nesic (note 426) at 484.

⁵⁷⁴ D Spencer 'Case Note: Complying with a Requirement to Negotiate in Good Faith' (1998) 9 *ADRJ* 226; and P Mead 'ADR Agreements: Good Faith and Enforceability (1999) 10 *ADRJ* 226 as cited by Boulle and Nesic (note 426) at 484.

⁵⁷⁵ See M Shirley 'Breach of an ADR Clause – A Wrong without a Remedy?' (1991) 2 *ADRJ* 117 as cited by Boulle and Rycroft (note 231) at 234

⁵⁷⁶ Boulle and Rycroft (note 231) at 234

⁵⁷⁷ Boulle and Rycroft (note 231) at 234.

⁵⁷⁸ Boulle and Rycroft (note 231) at 234.

⁵⁷⁹ Boulle and Rycroft (note 231) at 235.

stay and the court would have to decide whether the plaintiff's actions constituted an abuse of process, and in determining whether to grant the stay it would consider the likelihood that mediation would have led to a resolution of the dispute.⁵⁸⁰ While a stay of proceedings in the context of arbitration is specifically legislated for by section 6 of the Arbitration Act 42 of 1965, there is no statutory basis for the order relative to an enforceable mediation clause, but it seems that it could be granted in terms of the High Court's inherent jurisdiction.⁵⁸¹

The Australian courts' acceptance of the policy of granting stays of proceedings in *Hooper Bailie*⁵⁸² and *Elizabeth Bay*⁵⁸³ where one party had not complied with a mediation clause has been adopted by English courts, where it has been suggested that as the needs of the legal system change and where parties have chosen some form of ADR, there is a need for courts to stay proceedings.⁵⁸⁴

In *Cable & Wireless v IBM United Kingdom Limited*⁵⁸⁵ the judge concluded that the reference to ADR in the agreement was analogous to an agreement to arbitrate. As such it was a free-standing agreement ancillary to the main contract which, subject to the discretion of the court, was capable of being enforced by a stay of proceedings, or an injunction where no proceedings were pending. He believed that strong cause would have to be shown before a court could be justified in declining to enforce such an agreement.

The courts in the USA have also shown a willingness to stay proceedings to compel performance of a mediation clause. In *CB Richard Ellis, Inc v American Environmental Waste Management & Ors*⁵⁸⁶ the US District Court for the Eastern District of New York held that it was appropriate to stay the proceedings and compel the mediation because the mediation clause in the disputed agreement was sufficient to manifest the parties' intention to attempt to settle any dispute by reference to mediation.

⁵⁸⁰ Boulle and Rycroft (note 231) at 235.

⁵⁸¹ Boulle and Rycroft (note 231) at 235.

⁵⁸² (1992) 28 NSWLR 194 as cited by Boulle (note 263) at 444.

⁵⁸³ (1995) 36 NSWLR 709 as cited by Boulle (note 263) at 444.

⁵⁸⁴ See J Lee 'Enforcing an ADR clause: *Cott Ltd v Barber Ltd*' [1999] *Singapore Journal of Legal Studies* at 257 as cited by Boulle (note 263) at 444.

⁵⁸⁵ [2002] 2 All ER (Comm) 1041.

⁵⁸⁶ 1998 US Dist LEXIS 20064.

In the Australian case of *Hyslop v Liverpool Hospital*⁵⁸⁷ the court declined to exercise its discretion in favour of the defendant because the apparent unwillingness of the parties to make the process work meant that it had no confidence that a stay would result in a successful resolution of the dispute through the alternative procedure.⁵⁸⁸ In the subsequent case of *Allco Steel (Queensland) Pty v Torres Strait Gold Pty Ltd*⁵⁸⁹ one of the reasons a stay was refused was because the court believed that it would be a futile exercise to attempt conciliation.⁵⁹⁰

It has also been remarked that the general discretion of the courts also raises issues over section 34 of the Constitution and that an Australian case may be indicative of how courts might approach the matter.⁵⁹¹ In *Townsend and Townsend v Coyne*,⁵⁹² Young J believed that a stay could be granted in three exceptional situations:

- where the case is presented inadequately;
- where it is provided by statute; and
- where there is an abuse of process.

In this case, the court believed that there was no abuse of process to justify a stay being granted where the owners of a property sought to remove pre-existing caveats from land title at the ‘eleventh hour’ and an injunction was required to allow settlement to take place.⁵⁹³

Of the three remedies discussed, a stay would seem to be the most feasible option where one party is in breach of a valid mediation clause, which is perhaps the most practical reason as to why courts should be willing to give this relief where appropriate.⁵⁹⁴ The granting of stays would also seem to be supported by policy considerations where parties have freely consented to a mediation clause and where there are no overriding considerations of public interest or private harm.⁵⁹⁵ Courts will

⁵⁸⁷ Supreme Court of New South Wales, 3905 of 1987 (14 October 1987, unreported) (Hodgson J) as cited by Boule and Nestic (note 426) at 485.

⁵⁸⁸ Boule and Nestic (note 426) at 485.

⁵⁸⁹ Supreme Court of QLD, 2742 of 1989 (12 March 1990, unreported) Master Horton as cited by Boule and Nestic (note 426) at 485.

⁵⁹⁰ Boule and Nestic (note 426) at 485.

⁵⁹¹ Boule and Nestic (note 426) at 485.

⁵⁹² Supreme Court of NSW Equity Division, 002023/95 (26 April 1995, Unreported) (Young J) as cited by Boule and Nestic (note 426) at 485.

⁵⁹³ Boule and Nestic (note 426) at 485.

⁵⁹⁴ See Boule and Rycroft (note 231) at 235.

⁵⁹⁵ Boule and Rycroft (note 231) at 235.

no doubt have to strike a difficult balance between obliging participants to engage in a process that could result in, but cannot guarantee, a resolution more cheaply and quickly than through the courts (effectively enforcing mediation provisions), and facilitating the parties' entitlement to a court hearing that would guarantee an outcome but at a potentially higher cost and with greater delay.⁵⁹⁶

Specific performance

Specific performance is an order to perform a contractual obligation under a contract.⁵⁹⁷ This could include performing an act or acts, rendering services, making delivery or paying money. Under South African law a claimant is always entitled to claim specific performance, and the claim will be granted provided the case is made, subject to the discretion of the court.⁵⁹⁸

In the context of a mediation clause, the issue arises as to whether a court could compel participation in a mediation.⁵⁹⁹ Boulle and Rycroft point out that there are difficulties in granting this remedy, as it will not be ordered in circumstances where a close personal relationship exists between the parties, where it would be difficult for the court to supervise performance,⁶⁰⁰ and equitable principles also require that courts not issue futile orders or orders which they cannot enforce.⁶⁰¹

Damages

Another possible remedy for the breach of a mediation clause is an award of damages, which is usually designed to put plaintiffs back into the position they would have been in had the defendants complied with their contractual obligations.⁶⁰² In a mediation context it can only be estimated what position the plaintiff would have been in had there been compliance with the mediation clause, as it is uncertain whether there would have been a successful outcome, and in the event that there was, what the terms would have

⁵⁹⁶ See Boulle and Rycroft (note 231) at 235.

⁵⁹⁷ See Christie (note 465) at 522.

⁵⁹⁸ See Innes J in *Farmers' Co-op Society (Reg) v Berry* 1912 AD 343 350. See also Christie (note 465) at 523.

⁵⁹⁹ Boulle and Rycroft (note 231) at 235.

⁶⁰⁰ *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A); cf J T R Gibson *South African Mercantile and Company Law* at 103; Christie (note 465) at 523-529.

⁶⁰¹ Boulle and Rycroft (note 231) at 235.

⁶⁰² Boulle and Rycroft (note 231) at 236. See also Christie (note 465) at 543.

been.⁶⁰³ The injury resulting from the breach could also be so unique that damages would not constitute an adequate remedy.⁶⁰⁴ It has also been suggested that a mediation clause could include a genuine pre-estimate of damages that would be suffered by either party if a breach occurred,⁶⁰⁵ however, despite such hypothetical endeavours, there are likely to be difficulties in acquiring damages from a court for breach of a mediation clause.⁶⁰⁶

Agreements to mediate

Individuals and organisations offering mediation services usually require parties to sign an ‘agreement to mediate’ dealing with practical mediation issues such as conduct and procedure, confidentiality, the appointment of the mediator, the roles of the parties and mediator, the mediator’s fee, and matters of liability and indemnity prior to commencing work on the mediation.⁶⁰⁷ Terms can also be implied into agreements to mediate and given the potential for ambiguity it has been suggested that an agreement to mediate should make some reference to the roles and functions of the mediator,⁶⁰⁸ the procedures to be followed (or incorporate standard mediation rules) and clarify the status of agreements reached at the mediation.⁶⁰⁹

Where a mediator fails to comply with an agreement to mediate, either party could take an action for breach of contract, but this requires issuing legal proceedings, which is what it was attempting to avoid in the first place and would not prove helpful in resolving the original dispute.⁶¹⁰ In the context of arbitration, the relevant legislation provides for a party to apply for an arbitrator to be removed on ‘good cause’.⁶¹¹ While there is no comparable legislation regarding mediators, it has been suggested that

⁶⁰³ Boulle and Rycroft (note 231) at 236.

⁶⁰⁴ See Shirley (note 575) at 118 as cited by Boulle and Rycroft (note 231) at 236.

⁶⁰⁵ A penalty stipulation in a contract would also be enforceable in South Africa, subject to the court’s right to reduce it to a reasonable amount. See the comments of Snyman J in *Van Staden v Central SA Lands and Mines* 1969 (4) SA 349 (W) 351 on the aim of the Conventional Penalties Act 1962.

⁶⁰⁶ See Boulle and Rycroft (note 231) at 236.

⁶⁰⁷ Boulle and Rycroft (note 231) at 236.

⁶⁰⁸ The agreement of John Tyrill empowers the third party in construction disputes to act as a mediator or conciliator, to conduct a mini-trial, and to make recommendations to the parties, see J Tyrill ‘New ADR Agreement’ (1993) 31 *Australian Construction Law Newsletter* 26-9 as cited by Boulle and Rycroft (note 231) at 237.

⁶⁰⁹ Boulle and Rycroft (note 231) at 237.

⁶¹⁰ See Astor and Chinkin (note 236) at 203 as cited by Boulle and Rycroft (note 231) at 237.

⁶¹¹ See Section 13, Arbitration Act 1965 as cited by Boulle and Rycroft (note 231) at 237.

grounds and procedures for the removal of a mediator could be provided in the agreement to mediate.⁶¹²

The legal status and enforceability of mediated settlement agreements

When the mediation concludes with a settlement, the issue arises as to what happens if one of the parties contends that no agreement exists or that the agreement is unenforceable for some reason. With the growth of mediation, the conflicts that can arise in such circumstances have given rise to a substantial body of case law in other jurisdictions.⁶¹³ While enforcement of mediated settlement agreements does not currently appear to be a difficulty in South Africa, as mediation is increasingly adopted as the process to resolve commercial disputes, the discussion below will have increasing importance.⁶¹⁴

The parties' intentions, the mediation context, relevant statutory requirements and principles of contract law are all relevant factors in determining the legal status of mediated settlement agreements.⁶¹⁵ The parties may reduce their agreement to a 'heads of agreement' document and there may also be a cooling-off period, or it can take the form of a formal comprehensive signed agreement that will be binding and enforceable according to normal contractual principles provided it is correctly drafted.⁶¹⁶ In the event of non-compliance by one party, the other party cannot pursue the original course of action, but can sue on the settlement agreement.⁶¹⁷ Similar to non-compliance of an agreement to mediate, damages for breach, specific performance or an interdict are possible remedies for non-compliance with the terms of a mediated settlement

⁶¹² Boulle and Rycroft (note 231) at 237. Mediator liability is discussed in chapter 8 at 237.

⁶¹³ Regarding the US experience, see Edna Sussman 'A Brief Survey of US Case Law on Enforcing Mediation Settlement Agreements over Objections to the Existence or Validity of such Agreements and Implications for Mediation Confidentiality and Mediator Testimony' IBA Legal Practice Division *Mediation Committee Newsletter* April 2006 at 32.

⁶¹⁴ In the interviews of practising commercial mediators conducted in Cape Town and Johannesburg between 21 May and 20 June 2007, there was unanimity in the responses from those interviewed on this point. No difficulties were experienced with enforcement of settlement agreements.

⁶¹⁵ Boulle and Rycroft (note 231) at 249.

⁶¹⁶ Boulle and Rycroft (note 231) at 249.

⁶¹⁷ It is for this reason that a term was sometimes included in the mediated settlement agreement that, in the case of non-compliance, the parties' rights to pursue the original course of action were reinstated. See Boulle and Nesic (note 426) at 507.

agreement and the rules of law applicable to those remedies, such as rules regarding causation, remoteness and the duty to mitigate loss, are applicable.⁶¹⁸

In the South African case, *Stocks & Stocks (Cape) (Pty) Ltd v Gordon and others NNO*,⁶¹⁹ a construction contract provided for referral of disputes to a ‘mediator’, who was obliged to give his opinion which was final and binding unless disputed within 14 days. The mediator’s opinion was to be binding and effective until it was over-ruled by any subsequent arbitration or litigation.⁶²⁰ The court did not accept the argument that this last provision was inapplicable to monetary claims arising from the opinion of the mediator, as it believed that the ADR mechanisms provided in the agreement were designed to ensure continuation of the work pending arbitration.⁶²¹ While the case involved non-binding arbitration rather than mediation it has been suggested that it nonetheless points to judicial respect for mediation agreements.⁶²²

In the English case of *Thakrar v Ciro Citterio Menswear plc (in administration)*⁶²³ the court reversed a decision to refuse to approve a settlement that had been arrived at following the mediation of an insolvency dispute. While the decision involved technical issues relating to insolvency practice, it makes it clear that the English High Court is prepared to recognise and enforce mediated settlement agreements.

Review of mediated settlement agreements and grounds for evading them

The contractual requirement that mediated settlements are only binding if reduced to writing and signed by the parties is designed to avoid confusion over the content of the agreement.⁶²⁴ The agreement must be drafted to ensure that it accurately reflects the mediated settlement.⁶²⁵

A complex fact finding exercise is undertaken by a court or tribunal where a matter proceeds before it where it is unclear what was agreed in a mediation. While

⁶¹⁸ Boulle and Nesic (note 426) at 507.

⁶¹⁹ 1993 (1) SA 156 (T) as cited Boulle and Rycroft (note 231) at 250.

⁶²⁰ Boulle and Rycroft (note 231) at 250.

⁶²¹ Boulle and Rycroft (note 231) at 250.

⁶²² Boulle and Rycroft (note 231) at 250.

⁶²³ E.W.H.C. (Ch) October 1, 2002.

⁶²⁴ See S Emmett ‘Enforcement of Agreement Reached as a Result of Mediation’ in G Raftesath and S Thaler (eds) *Cases for Mediation* at 15 as cited by Boulle (note 263) at 450.

⁶²⁵ See D Spencer ‘Whether a Matter Settled or Not at Mediation’ (2003) 14 *ADRJ* 249 at 256 as cited by Boulle (note 263) at 450.

courts will usually only ‘look behind’ mediated settlement agreements between willing parties in exceptional circumstances,⁶²⁶ there have been circumstances, notably in Australia, where this has occurred. An eight-day hearing was required in one case in order to resolve the issue of whether a final settlement was reached in a mediation.⁶²⁷ There have also been situations where courts were asked to determine whether a valid mediation agreement existed between the parties, and if so what were its terms,⁶²⁸ whether a mediated settlement was represented in a particular document,⁶²⁹ whether settlement terms comprised sufficient certainty,⁶³⁰ and whether performance was in terms of a mediated settlement agreement.⁶³¹ Courts can be required to interpret clauses in complex mediated settlements, for example, on the effect of statutory obligations on a mediated settlement.⁶³²

Mediated settlement agreements are subject to the normal contractual principles regarding their validity, regardless of the practical problems caused by mediation confidentiality.⁶³³ Unlike other jurisdictions where there is legislation governing unfair terms in contracts, at this stage there is only draft legislation in South Africa which could affect this matter.⁶³⁴ It is of interest to consider how legislation can affect a mediated agreement.

While the USA comprises 50 state jurisdictions and the federal jurisdiction, there is no single body of law governing mediation or the enforcement of mediated settlement agreements in the United States. Some states have enacted legislation that establishes rules for mediation such as:⁶³⁵

⁶²⁶ *Brockhurst v Edconcombe Pty Ltd* [2000] QDC 313 (27 October 2000) as cited by Boule (note 263) at 451.

⁶²⁷ *Barry v City West Water Ltd* [2002] FCA 1214 at 8 as cited by Boule (note 263) at 451.

⁶²⁸ *ANZ Bank v Ciavarella* [2002] NSWSC 1186 as cited by Boule (note 263) at 451.

⁶²⁹ *Burchell v Golden Wood Pty Ltd* [2000] VSC 485 (10 November 2000) as cited by Boule (note 263) at 451.

⁶³⁰ *Miller v Owners Corporation* [2003] NSWCTT27 (22 January 2003) as cited by Boule (note 263) at 451.

⁶³¹ *Dalmation Nominees Pty Ltd v Franko Marinovich* [1998] WASC 354 (20 November 1998) as cited by Boule (note 263) at 451.

⁶³² *Myross (NSW) Pty Ltd v Kahlefeldt Securities Ltd* (2003) NSW ConvR 56-055 as cited by Boule (note 263) at 451.

⁶³³ See chapter 6 at 161.

⁶³⁴ See the Consumer Protection Bill and chapter 8 at 247 note 1403.

⁶³⁵ For a detailed overview of the earlier cases, a discussion on the underlying contract principles and mediation confidentiality, and citations to relevant state statutes, see Peter Robinson ‘Centuries of Contract Common Law Can’t be All Wrong: Why the UMA’s Exception to the Mediation Confidentiality in Enforcement Proceedings should be Embraced and Broadened’ (2003) *J Disp Resol* 135; Peter Thompson ‘Enforcing Rights Generated in Court Connected Mediation – Tension Between the Aspirations of a Private Facilitative Process and the Reality of the Public Adversarial Justice’ (2004) 19

- a requirement for a signed written agreement;
- a requirement that an agreement contain a specific confirmation of understanding of the significance of the agreement;
- a provision for a ‘cooling off’ period during which consent to an agreement can be withdrawn;
- a provision for greater confidentiality; and
- a provision for less confidentiality protection for the mediation process.

While summary procedures are emerging in some states in the USA for the enforcement of mediated settlement agreements, Sussman points out that the courts generally view them as contracts and apply traditional contract-law principles to disputes arising out of efforts to enforce them.⁶³⁶ Some courts apply contract law with little regard to the special nature of negotiations in the mediation process, and while they repeatedly state that they favour the enforcement of agreements that settle disputes,⁶³⁷ where contract law claims and defences are raised regarding a settlement agreement, the courts or a jury will usually consider evidence to determine whether a binding contract was entered into, and will normally review any defences raised as if it were any other contract dispute.⁶³⁸

Without prejudice bar

While the mediation proceeds on a without prejudice basis, when an agreement is reached, it is no longer protected and this issue has been considered by Australian courts, particularly in the context of mediated settlement agreements.⁶³⁹ In *State Bank of New South Wales v Freeman*,⁶⁴⁰ Badgery-Parker J found that a settlement agreement reached at mediation may be regarded as a document that comes into existence after, not in the course of, or pursuant to, a mediation. Rolfe J in *Commonwealth Bank of*

Ohio St J on Disp Resol 509; Ellen Deason ‘Enforcing Mediated Settlement Agreements: Contract Law Collides With Confidentiality’ (2001) 35 *UC Davis L Rev* 33. See also Sussman (note 613) at 39.

⁶³⁶ See Sussman (note 613) at 32.

⁶³⁷ The general rule is often referred to by the courts that ‘the law favours the settlement of disputes by agreement of the parties’ and that the courts ‘will enforce the agreement which the parties have made absent any fraud, mistake or overreaching,’ see *Chantey Music Publishing Inc v Malaco, Inc* 915 So 2d 1052, 1055 (Miss 2005); *Snyder-Falkinham v Stockburger* 457 SE 2d 36 (Va 1995). See also Sussman (note 613) at 32.

⁶³⁸ *M Martin v Senn Dunn LLC* 2005 WL 2994424 (MDNC 2005). See also Sussman (note 613) at 32.

⁶³⁹ Boulle and Nestic (note 426) at 507.

⁶⁴⁰ (31 January 1996 unreported), New South Wales Supreme Court as cited by Boulle and Nestic (note 426) at 507.

*Australia v McDonnell*⁶⁴¹ agreed, believing that, otherwise, the parties could reach an agreement at mediation and subsequently refuse to comply with it on the basis that it is inadmissible.

Binding contract

A mediated settlement agreement must be enforceable in order for its obligations to be binding, and this will depend on the intention of the parties, whether the agreement provides for further terms to be agreed and whether it requires formal documents to be executed.⁶⁴² The agreement will be reviewed to ensure that it complies with the criteria for a valid contract including, the intention to create legal relations, certainty of terms and, in some cases, specific formalities will be required.⁶⁴³

In jurisdictions such as England, the parties' intentions are assessed objectively from the circumstances so that where, for example, they act as if the original dispute still exists, evidence can be provided that no binding agreement was intended, while conversely, commencement of performance provides evidence to the contrary.⁶⁴⁴ With regard to certainty of the terms, if a term is reasonable or necessary to give the contract business efficacy or is so obvious that it goes without saying or can be clearly expressed and doesn't contradict an express term, it may be implied into the contract.⁶⁴⁵ The parties can provide that terms be agreed by a third party or some other mechanism without making the agreement uncertain.⁶⁴⁶

In complex commercial disputes, the agreement may be recorded in the form of heads of terms at the mediation, with a more formal document recording the agreed terms to follow, as the parties may want to be bound immediately even if some of the

⁶⁴¹ (24 July 1997, unreported), New South Wales Supreme Court as cited by Boulle and Nestic (note 426) at 507.

⁶⁴² Boulle and Nestic (note 426) at 509.

⁶⁴³ Boulle and Nestic (note 426) at 509. See also Christie (note 465) chapters 2 and 3.

⁶⁴⁴ *G Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25; and see *DMA Financial Solutions Ltd v Baan UK Ltd*, 28 March 2000, reported in New Law Digest 3 May 2000 (Chancery Division) as cited by Boulle and Nestic (note 426) at 509.

⁶⁴⁵ *The Moorcock* (1889) 14 PD 64; *Shirlaw v Southern Foundaries (1926) Ltd* [1939] 2 KB 206; *Morton v Morton* [1942] 1 All ER 273; and *Liverpool City Council v Irwin* [1977] AC 239 as cited by Boulle and Nestic (note 426) at 509. See also Christie (note 465) at 167-174.

⁶⁴⁶ Boulle and Nestic point out that it may be appropriate, when drafting the agreement, to provide for any ambiguity in it to be resolved by the mediator. A cautious approach would be required to ensure that the mediator is not perceived to be taking on an advisory or a partisan role. On this issue generally, see *Hillas and Co Ltd v Arcos Ltd* [1932] All ER Rep 494 as cited by Boulle and Nestic (note 426) at 509.

detail of the agreement needs to be teased out.⁶⁴⁷ The execution of a formal document may be required before a term will be performed; alternatively the parties may intend to be bound only when a formal document is executed.⁶⁴⁸ Agreements to mediate commercial matters usually contain a provision that any agreement reached in the mediation will only be binding when reduced to writing and signed by both parties.⁶⁴⁹

The USA provides an interesting body of jurisprudence in this area, where it has been the most successful basis in defeating efforts to enforce mediated settlement agreements, and also seems to be the most prevalent in an international dispute context, where the parties are generally sophisticated, legally represented and consequently, less likely to establish other possible issues that could be raised such as duress, lack of competence, and lack of authority.⁶⁵⁰

The courts have recognised the difficulty in completing a final settlement agreement in complex cases at the mediation meeting, and have enforced settlement agreements where all of the material terms had been the subject of mutual consent,⁶⁵¹ and the fact that a subsequent complete document was contemplated has not reversed this.⁶⁵² The wording of the agreement can be critical, for example, a settlement that was ‘subject to’ a formal agreement, rather than to ‘be followed’ by a formal agreement implementing the agreed terms, was held to not be enforceable.⁶⁵³ While insufficiently definite material terms in an agreement will not represent a basis for finding an enforceable agreement, the fact that a few ancillary issues remain to be resolved will not defeat enforcement of a mediated settlement agreement.⁶⁵⁴

A court refused to accept that a material term was left unresolved by a provision in an agreement, where it was alleged that an element of the settlement would be settled in future by certain employees, as the agreement was negotiated by senior executives

⁶⁴⁷ *First Energy (UK) Ltd v Hungarian Institutional Bank Ltd* [1993] 2 Lloyd’s Rep 194 as cited by Boulle and Nestic (note 426) at 510.

⁶⁴⁸ *Winn v Bull* (1877) 7 Ch D 29 as cited by Boulle and Nestic (note 426) at 510.

⁶⁴⁹ For example, CEDR’s Model Mediation Procedure, see Boulle and Nestic (note 426) at 510.

⁶⁵⁰ See Sussman (note 613) at 32.

⁶⁵¹ See *Harkader v Farrar Oil Co* 2005 WL 1252379 (Ky App 2005). Abbreviated settlement agreements or memoranda of understanding, often prepared at the mediation session as a shorthand record of the settlement terms, are often argued to only be agreements to make an agreement, and consequently not binding, see *Certainseed Corp v Celotex* 2005 WL 217032 at 14 (Del Ch 2005). See also Sussman (note 613) at 32-33.

⁶⁵² See *Claridge House One Condominium Ass’n v Beach Plum Properties* 2006 WL 290439 (NJ Super AD 2006); *Snyder-Falkinham v Stockburger* 457 SE 2d 36 (Va 1995). See also Sussman (note 613) at 33.

⁶⁵³ *Golding v Floyd* 539 S E 2d 735 (Va 2001). See also Sussman (note 613) at 33.

⁶⁵⁴ See *M Martin v Senn Dunn LLC* 2005 WL 2994424 (MDNC 2005); *Weddington Productions Inc v Flic* 71 Cal Rptr 2d 265 (Cal App 2 Dist 1998). See also Sussman (note 613) at 33.

who would not, in the court's view, have left a material term to be resolved by junior employees.⁶⁵⁵ Even if there was no written agreement, the courts, in applying general contract principles, have not allowed second thoughts to affect the enforceability of a mediated settlement agreement.⁶⁵⁶

Provisions in mediated settlement agreements stating that a release will be provided, have also caused problems regarding the exact nature of the release to be provided, for example where the parties provided that the release was to be mutually agreeable, the court held that there was no enforceable agreement as there was no meeting of the minds on a material term.⁶⁵⁷ Courts have also refused to enforce agreements where there was no agreement on the release language.⁶⁵⁸ The courts have also made agreements enforceable by deleting terms that were included in the final agreement that had not been expressly included in the original written settlement agreement, rather than nullify the entire agreement, including expanded release language.⁶⁵⁹

Oral agreements

In accordance with the standard contract law principle that recognises the validity of oral contracts, excepting the Statute of Frauds requirements, courts in the USA have enforced a mediated settlement agreement in the absence of an executed written agreement where they were persuaded that there was a meeting of the minds regarding all material terms and that it was the intention of the parties to be bound.⁶⁶⁰

⁶⁵⁵ *Heaven & Earth Inc v Wyman Properties Ltd* 2004 WL 2931347 (D Minn 2004). See also Sussman (note 613) at 33.

⁶⁵⁶ *Snyder-Falkinham v Stockburger* 457 SE 2d 36 (Va 1995); *Ford v Ford* 68 P 3d 1258 (Alaska 2003); *Ammons v Cordova Floors Inc* 904 So 2d 185 (Miss App 2005). See also Sussman (note 613) at 33.

⁶⁵⁷ *Chappell v Roth* 548 SE 2d 499 (NC 2001). See also Sussman (note 613) at 33.

⁶⁵⁸ *Krebs v United Refining Co of Pa* 2006 WL 348709 (Pa Super 2006); *Calderon v JB Nurseries Inc* 2006 WL 263644 (Fla App 1 Dist 2006). In one case however, the parties had entered into a written settlement agreement signed by their attorneys which provided for the execution of a 'general release', but did not make the agreement effective upon delivery of a signed release, and despite the fact that the parties were subsequently unable to agree on the wording of the release, the court found that there was a binding agreement, see *Strategic Staff Management v Roseland* 619 NW 2d 230 (Neb 2000). See also Sussman (note 613) at 33.

⁶⁵⁹ *A El-Fadly v Northridge Park Townhome Owners Association* 2005 WL 1503857 (Cal App 2 Dist 2005); *Union Pacific R Co v Larkin* 2005 WL 3664428 (DNM 2005). See also Sussman (note 613) at 33.

⁶⁶⁰ *White v Fleet Bank of Maine* 875 A 2d 680 (Me 2005); *Standard Steel LLC v Buckeye Energy Inc* 2005 WL 2403636 (WD Pa 2005); *Harkader v Farrar Oil Co* 2005 WL 1252379 (Ky App 2005); *Ford v Ford* 68 P 3d 1258 (Alaska 2003). See also Sussman (note 613) at 33.

However, where it was the intention of the parties not to be bound until there was an executed written document, an oral settlement agreement will not be enforced,⁶⁶¹ and the following factors were considered relevant in assessing such intention in the absence of a fully executed agreement:⁶⁶²

- an express stipulation not to be bound in the absence of a written agreement;
- partial performance of the contract by the parties;
- agreement on all of the contract terms; and
- the agreement was the type of contract usually expressed in writing.

An exception to the enforcement of oral mediated settlement agreements is where the governing law or applicable court rules require that it be in writing.⁶⁶³ The US Federal Third Circuit Court of Appeals reviewed the implications of its own court mediation rules, based on protecting the confidentiality of mediation, and refused to allow evidence about the existence and terms of a claimed oral settlement agreement. In rejecting the suggestion that excluding such testimony would enable parties that entered into settlement agreements to be released from such agreements, deterring the US federal policy of encouraging settlements, it pointed out that if parties know beforehand that only a written settlement agreement would be binding they would make appropriate efforts to record the agreement:

[I]f counsel know beforehand that the proceedings may be laid bare on the claim that an oral settlement occurred at the conference, they will of necessity feel constrained to conduct themselves in a cautious and tight-lipped non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute.⁶⁶⁴

Similarly, the Supreme Court of Indiana refused to interpret a local evidence rule to permit evidence of an oral agreement, and concluded that it was more important that the parties clearly understood what was agreed so that they would be less likely to dispute or challenge it, than enforcing agreements resulting from mediation.⁶⁶⁵

⁶⁶¹ *Catamount Slate Products Inc v Sheldon* 845 A 2d 324 (Vt 2003); *Gildea v Design Distributors Inc* 378 F Supp 2d 158 (EDNY 2005). See also Sussman (note 613) at 33.

⁶⁶² *Winston v Mediafare Entertainment Corporation* 777 F 2d 78 (2d Cir 1985). See also Sussman (note 613) at 33.

⁶⁶³ See Sussman (note 613) at 33.

⁶⁶⁴ *Beazer East Inc v Mead Corporation* 412 F 3d 429 (3d Cir 2005); *Thayer v Wells Fargo Bank NA* 2005 WL 1847174 (Cal App 1 Dist 2005) as cited by Sussman (note 613) at 33.

⁶⁶⁵ *Vernon v Acton* 732 NE 2d 805 (Ind 2000). See also Sussman (note 613) at 33.

It has been suggested that decisions such as these, excluding evidence of oral agreements, predict what will ultimately be the rule throughout the USA in light of the Uniform Mediation Act (UMA), which is in the process of being passed by state legislatures throughout the US.⁶⁶⁶ The UMA exempts written settlement agreements from the privilege that protects mediation communications, but does not make oral settlement agreements exempt, so that the latter are inadmissible in court.⁶⁶⁷

This approach is consistent with the current trend in mediation policy internationally. In South Africa, as a general rule, no special formalities are required for making an enforceable contract.⁶⁶⁸ There is no requirement that the contract be in writing.⁶⁶⁹ It is submitted that the international trend of exempting written (as opposed to oral) settlements from the privilege which protects mediation communications ought to be followed in South Africa.⁶⁷⁰

Rescission on account of an ‘unjust factor’

Factors such as fraud, undue influence, unconscionability, duress, lack of capacity or authority to contract, or illegality, may be claimed by a party in attempting to have the mediated settlement agreement set aside.⁶⁷¹ The remedy is equitable,⁶⁷² and consequently is discretionary.⁶⁷³

Undue influence

In the Australian case of *Studer v Konig*,⁶⁷⁴ all of the parties agreed to participate in a mediation to be conducted by an experienced commercial mediator following claims and cross-claims between the applicant and respondent regarding land dealings. The mediation resulted in a signed settlement agreement that was handed up in court and

⁶⁶⁶ Sussman (note 613) at 34.

⁶⁶⁷ See section 6 of the UMA. See also Sussman (note 613) at 34.

⁶⁶⁸ *Conradie v Rossouw* 1919 AD 279.

⁶⁶⁹ *Timoney and King v King* 1920 AD 133.

⁶⁷⁰ For a discussion on the advantages of written contracts generally see Christie (note 465) at 105.

⁶⁷¹ Boulle and Nesic (note 426) at 510.

⁶⁷² As mentioned in chapter 1 at 10, South African law does not make the law/equity distinction; consequently if such equitable remedies were to be adopted in South Africa, they would require slight modification.

⁶⁷³ See Boulle and Nesic (note 426) at 511.

⁶⁷⁴ Supreme Court of New South Wales Equity Division, McLelland CJ, No 4900 of 1992, 4 June 1993, unreported as cited by Boulle and Rycroft (note 231) at 251.

included terms covering the settlement figure, mortgage security pending payment of it, interim occupation of the land, interest and other ancillary matters.⁶⁷⁵ Following further proceedings by Konig, Studer initially took steps to fulfil the terms of the settlement but subsequently sought an order that the agreement be rescinded on the grounds of undue influence, negligence and misleading conduct on the part of his solicitor during the mediation.⁶⁷⁶

While the court dismissed the application on procedural grounds, McLelland CJ suggested that Studer would have encountered two major obstacles in making his claim: the lack of evidence that Konig was aware of the allegations against his solicitor, and the fact that he executed the mortgage and consequently endorsed the terms of settlement.⁶⁷⁷ It has been remarked that the case illustrates that the involvement of an experienced mediator in the process does not ensure that an agreement will not be subsequently challenged, and that there is a need for mediators to ensure that the parties give informed consent to mediated settlements.⁶⁷⁸

Duress and coercion

In the USA, the courts have adopted the basic contract principle that an agreement obtained through duress or coercion is unenforceable,⁶⁷⁹ and despite the fact that some of the facts alleged in the cases are quite exceptional, it is only in rare cases that the courts accept the claims as persuasive in establishing duress or coercion in order to defeat enforcement of a settlement agreement.⁶⁸⁰

In the Australian case *Abriel v Westpac Banking Corpn*⁶⁸¹, the court declined an application to strike out a claim where a party to a mediated agreement claimed duress on the basis that the other side took unfair advantage when their lawyers withdrew from the mediation, believing that while the claim was novel, it could not be concluded that it would fail.⁶⁸² In such circumstances it seems that consideration must be given to

⁶⁷⁵ Boulle and Rycroft (note 231) at 251.

⁶⁷⁶ Boulle and Rycroft (note 231) at 252.

⁶⁷⁷ Boulle and Rycroft (note 231) at 252.

⁶⁷⁸ Boulle and Rycroft (note 231) at 252.

⁶⁷⁹ For a discussion on duress and undue influence in respect of South African law generally, see Christie (note 465) at 301-311.

⁶⁸⁰ *Vernon v Acton* 732 NE 2d 805 (Ind 2000). See also Sussman (note 613) at 34.

⁶⁸¹ [1999] FCA 50, a judgment of the Federal Court of Australia, NSW Registry (Branson J) as cited by Boulle and Nestic (note 426) at 511.

⁶⁸² See Boulle and Nestic (note 426) at 511.

whether the party protested at the time, had an alternative course of action open, and received independent advice.⁶⁸³ Commercial pressure to settle is not likely to amount to duress.⁶⁸⁴

A court in the USA enforced a mediated settlement agreement despite the fact that one of the parties testified that he was not permitted to leave the room during a lengthy mediation, and that he was unable to exercise free will.⁶⁸⁵ Similarly, another US court enforced an agreement where a party claimed that he was threatened with an insolvency prosecution.⁶⁸⁶ In *Olam v Congress Mortgage Co*, a 65-year-old woman claimed duress at a mediation which started at 10am and concluded at 1am the next morning, while she suffered from high blood pressure, intestinal pain and headaches, and was told by both the mediator and her lawyer that if she went to trial she would lose her house.⁶⁸⁷ Olam sought to have the mediated settlement agreement set aside, claiming that due to her physical, intellectual and emotional state during the mediation, she was incapable of giving consent. Both parties requested that the mediator be compelled to testify as the mediator's evidence was necessary to determine the credibility of Olam's testimony. Olam's testimony that she did not participate in negotiations or discussions and that she did not understand the agreement was contradicted by the mediator's testimony and the settlement agreement was enforced.

Factors in the US that have been illustrative of excessive pressure include:⁶⁸⁸

- discussions at an unusual or inappropriate time;
- completion of the agreement in an unusual place;
- incessant demands that the agreement be completed promptly;
- emphatic emphasis on the adverse consequences of delay;
- use of numerous influences by a dominant party against a servient party;
- absence of third-party advisers to a servient party; and
- statements that there is no time to consult professional advisers.

⁶⁸³ See Boule and Nestic (note 426) at 511.

⁶⁸⁴ *Atlas Express Ltd v Kafco* [1989] QB 833 as cited by Boule and Nestic (note 426) at 511.

⁶⁸⁵ *DeVile v United States of America* 2006 WL 373491 (WD La 2006). See also Sussman (note 613) at 34.

⁶⁸⁶ *Chantey Music Publishing Inc v Malaco, Inc* 915 So 2d 1052, 1055 (Miss 2005). See also Sussman (note 613) at 34.

⁶⁸⁷ 68 F Supp 2d 1110 (ND Ca 1999). See also Sussman (note 613) at 34.

⁶⁸⁸ *Olam v Congress Mortgage Co* 68 F Supp 2d 1110 (ND Ca 1999) at 1142. See also Sussman (note 613) at 34.

Where a party was legally represented at the mediation and had an opportunity to reflect on the mediated settlement agreement, an attack based on duress and coercion in the USA is unlikely to succeed.⁶⁸⁹ An increasing number of cases in the USA have arisen from allegations that the mediator was the cause of duress and coercion, and while it has been suggested that such cases may suggest a need for more training and oversight of mediator methodologies, the courts have largely rejected such attempts to defeat settlement agreements.⁶⁹⁰

Mediator statements regarding the substantial legal fees that would be incurred, where it was claimed were made to make the party feel financially threatened and under duress, were deemed not to be a basis to have a mediated settlement agreement set aside.⁶⁹¹ Where the mediator was alleged to have remarked ‘you have no case’ because the case belonged to the bankruptcy trustee and the only way the plaintiff ‘would ever see a dime’ would be if he ‘agreed to the mediated settlement then and there’, the court upheld enforcement of the settlement agreement stating that a mediator’s statement as to the value of a claim where the value is based on fact that can be verified, cannot be relied on by a legally advised litigant, whose legal advisor was present when the statement was made.⁶⁹² However, it is likely that the courts will require an evidentiary hearing if persuaded that sufficient facts are presented to raise a question of fact on duress or coercion.⁶⁹³

⁶⁸⁹ *Advantage Properties Inc v Commerce Bank NA* 242 F 3d 387 (10th Cir 2000). See also Sussman (note 613) at 34.

⁶⁹⁰ For example, in *Vela v Hope Lumber & Supply Company* 966 P 2d 1196 (Okla Civ App Div 1 1998), an agreement was enforced where a party claimed that she was warned by the mediator of claims of insurance fraud against her, that she was bullied by the mediator, that she cried for an hour and that no consideration was shown to her distress. See Sussman (note 613) at 34.

⁶⁹¹ *Marriage of Banks* 887 SW 2d 160 (Tex App – Texarkana 1994). See also Sussman (note 613) at 34.

⁶⁹² *Chitkara v New York Telephone Company* 45 Fed Appx 53 (2d Cir 2002). See also Sussman (note 613) at 34.

⁶⁹³ For example, where it was alleged that the mediator exerted extreme time pressure and told the party that the court would have embryos destroyed rather than give them to her, that the property value was grossly disproportionate to the cost of litigating further, and that she would have a chance to protest any part of the agreement at a final hearing even if she signed the settlement agreement, the court held that if the mediator had in fact engaged in such conduct the agreement would not be enforceable, and set it down for a hearing, see *Vitakes-Valchine v Valchine* 793 So 2d 1094 (Dist Ct App Fla 2001). See also Sussman (note 613) at 34.

Unconscionability

In the Australian case *Pittornio v Meynert (as Executrix of the Wills of Guiseppa Pittornio (dec) and Guiseppina Pittornio (dec))*⁶⁹⁴ the applicant argued that the mediator attempted to influence her, that the mediation was excessively lengthy, that she had ruptured a cyst and that she was ignored when she requested to have the mediation adjourned. The court found that there was no acceptable evidence that the defendants had knowledge of the difficulties faced by the plaintiff and rejected the allegations of unconscionability.⁶⁹⁵

Incompetence or incapacity

In the US, as in South Africa,⁶⁹⁶ there is a presumption that adult persons are mentally competent, and the burden of proof in establishing incompetence rests on the person claiming it.⁶⁹⁷ In light of this burden, claims of incompetence, even based on facts that sound quite exceptional, have not proved successful in court in efforts to defeat enforcement of mediated settlement agreements. The courts have rejected claims that a party was incompetent due to the side effects of medication that included severe depression, memory loss, mental clouding, that she was crying during the mediation, and continually stated that she was confused and did not understand.⁶⁹⁸ Similarly, where a party claimed that she suffered physical pain during the mediation from recent surgery, had taken higher than prescribed pain and anti-depressant medication and developed a migraine that required that she administer a medicinal injection during the mediation, the claims were rejected.⁶⁹⁹ A claim of mental incapacity was also rejected where a party claimed he had no understanding of the nature and terms of the agreement, the court finding that expert testimony would be required to support such a claim.⁷⁰⁰

⁶⁹⁴ [2002] WASC 76 as cited by Boulle (note 263) at 456.

⁶⁹⁵ See Boulle (note 263) at 456.

⁶⁹⁶ See Christie (note 465) at 227.

⁶⁹⁷ See Sussman (note 613) at 34.

⁶⁹⁸ *Domangue v Domangue* 2005 WL 1828553 (Tex App – Tyler 2005). See also Sussman (note 613) at 34.

⁶⁹⁹ *Mc Mahon v Mc Mahon* 2005 WL 3287475 (Tenn Ct App 2005). See also Sussman (note 613) at 34.

⁷⁰⁰ *Alexander v Naden* 2005 WL 3150323 (Wa App Div 1 2005). See also Sussman (note 613) at 34.

Lack of authority

In the US, claims by a party that it had not signed the settlement agreement and that the signature by its attorney was unauthorised have not been viewed favourably.⁷⁰¹ In England, solicitors attending settlement discussions on behalf of parties were found to at least have ostensible authority to bind their clients to a settlement.⁷⁰² In the USA, a party's attorney is presumed to have authority to consent when present at a mediation that is intended to settle a case, with affirmative proof to the contrary required to overturn that presumption.⁷⁰³ A settlement agreement signed by an attorney can also be upheld on the basis that apparent authority existed where the attorney advising the party on the other side had no reason to doubt that authority.⁷⁰⁴ Even where the governing state statute required a party's signature, the courts have upheld a settlement agreement despite the absence of such a signature, where the party's absence from the mediation was unexcused.⁷⁰⁵

Fraud

While the courts in England have not had extensive exposure to cases where mediated settlement agreements have been challenged, there is one recent case where such allegations did arise. In *Crystal Decisions (UK) Ltd and others v Vedatech Corporation and another*⁷⁰⁶ the claimants were seeking a declaration from the court that the mediated settlement agreement was valid and enforceable, as the defendant was relying on the effectiveness of notices of rescission previously served as the basis for refusing to recognise the enforceability of the agreement, but declined to commence proceedings of their own based on the allegations contained in those notices.⁷⁰⁷ The court held that

⁷⁰¹ See Sussman (note 613) at 35.

⁷⁰² *Waugh v HB Clifford & Sons Ltd* [1982] CH 374; and *Von Schulz v Morriello* (1998) QCA 236. See also Boulle and Nesic (note 426) at 510.

⁷⁰³ *Inwood International Co v Wal-Mart Stores* 243 F 3d 567 (CA Fed 2000). See also Sussman (note 613) at 35.

⁷⁰⁴ *Little v Greyhound Lines Inc* 2005 WL 2429437 (SDNY 2005). See also Sussman (note 613) at 35.

⁷⁰⁵ *Georgos v Jackson* 790 NE 2d 448 (Ind 2003). See also Sussman (note 613) at 35.

⁷⁰⁶ [2007] EWHC 1062 (Ch).

⁷⁰⁷ It was in light of this that the court remarked that 'The purpose of these proceedings has been to establish the enforceability of the Settlement Agreement and in so doing to determine the challenges by the Defendants to its enforceability both on grounds of misrepresentation and also on the basis of alleged repudiation by the Claimants...an application for judgement in default does limit the Court to granting only the relief to which the Claimants are clearly entitled on the basis of their own unchallenged statement of case. It was essentially for this reason that I indicated ...that I was not prepared to grant declarations pronouncing on issues such as the alleged misrepresentations or duress during the course of the mediation which required a consideration of evidence from those present at the time. On the other

there was nothing in the agreement itself on which to base a challenge to its enforceability, and that recession based on innocent or negligent misrepresentation was not sufficient as a basis for setting aside the mediated settlement agreement. The court held that the Claimants were entitled to a permanent injunction in order to enforce the mediated settlement agreement.

In the Australian case *Guilford Pty Ltd v Burdon Pty Ltd*⁷⁰⁸ the court declined to grant relief believing that a claim was not sufficiently established where a claimant sought to have a mediated settlement agreement set aside, on the basis that fraudulent misrepresentations were made by a party in the mediation about its assets and liabilities.⁷⁰⁹

Despite the negotiating framework and relationship context of the mediation process, the courts in the USA have applied contract rules quite strictly, requiring a knowing and material misrepresentation with the intention of causing reliance on which a party justifiably relied.⁷¹⁰

In the absence of a duty to disclose, a mere failure to disclose a fact that could be material to the opposing party is not a basis for defeating a settlement agreement. For example, where a plaintiff thought the defendant's insurance limit was US\$100,000 rather than US\$1.1 million, the court held that the defendant was in an adversarial position rather than a position of special trust or confidence that would create a duty to disclose to the plaintiff. It did however require an evidentiary hearing to assess if the defendant had made an affirmative misrepresentation that could be a basis for defeating the settlement.⁷¹¹

In states in the US where there are strict rules on the confidentiality of mediation communications, the courts have refused to accept any evidence of fraud claims based on what transpired at the mediation session, holding that such evidence is inadmissible

hand where an issue raised in the Particulars of Claim turns simply on the construction of a document referred to in the pleadings, then the court can in my judgement look at the material and decide the point,' Patten J para 49. The Defendant alleged that inaccurate financial information was furnished by the Claimant as the basis for the agreed settlement, which amounted to fraudulent misrepresentation, and that consent was given to the settlement agreement on this basis.

⁷⁰⁸ 20 April 1995, Federal Court of Australia, NSW Registry, General Division (No AG79 of 1994 FED No 169/95) (Lockhart J) as cited by Boulle and Nestic (note 426) at 511.

⁷⁰⁹ See Boulle and Nestic (note 426) at 511.

⁷¹⁰ *JMJ Inc v Whitmore's BBQ Restaurant* 2005 WL 1792817 (Ohio App 8 Dist 2005). See also Sussman (note 613) at 35.

⁷¹¹ *Brinkerhoff v Campbell* 994 P 2d 911 (Wa App Div 1 2000). See also Sussman (note 613) at 35.

in light of the confidential nature of the process.⁷¹² The Delaware Chancery Court has suggested a possible solution in view of the confidentiality conundrum, remarking that if parties in a mediation know that they are basing their decision to settle on a representation of fact, they must extract that representation in a form that is not confidential, for example, as a representation in the settlement agreement itself.⁷¹³

Mistake

While mistake is often raised as a defence to enforcement of a settlement agreement, it is also a ground that is rarely accepted by the court. Courts in the USA have rejected claims of mutual mistake and the more arduous claim of unilateral mistake, where a party claimed that the amount to be paid was to be offset by an amount already paid,⁷¹⁴ where a plaintiff had not read the agreement to understand its terms,⁷¹⁵ but required a hearing where it was contended that a claim of mutual mistake led to a clerical error of US\$600,000.⁷¹⁶

Practical steps to avoid problems with the enforcement of settlement agreements

It has been suggested that it is sometimes better to leave the mediation with a deal that may not stand up in court than to walk out with no deal at all.⁷¹⁷ However, in light of the case law discussed above, steps can be taken by the mediator and legal advisors to the parties, in order to avoid subsequent problems.⁷¹⁸ While each commercial dispute is unique and may demand specific requirements for its own form of settlement agreement, the following steps have been gleaned from jurisprudence covering numerous types of disputes.⁷¹⁹

⁷¹² *Princeton Insurance Co v Vergano* 883 A 2d 44 (Del Ch 2005). See also Sussman (note 613) at 35.

⁷¹³ *Princeton Insurance Co v Vergano* 883 A 2d 44 (Del Ch 2005). See also Sussman (note 613) at 35.

⁷¹⁴ *Feldman v Kritch* 824 So 2d 274 (Fla App 4 Dist 2002). See also Sussman (note 613) at 35.

⁷¹⁵ *Stewart v Preston Pipeline* 36 Cal Rptr 3d 901 (Cal App 6 Dist 2005). See also Sussman (note 613) at 35.

⁷¹⁶ *DR Lakes Inc v Brandsmart USA* 819 So 2d 971, 974-75 (Fla Dist Ct App 2002). See also Sussman (note 613) at 35.

⁷¹⁷ Sussman (note 613) at 38-39.

⁷¹⁸ Sussman (note 613) at 38.

⁷¹⁹ See Sussman (note 613) at 38.

Record the agreement

While this is an obvious step, many mediations end with an oral agreement and a commitment by one of the parties to prepare the necessary documents. As upholding an oral agreement is more difficult than enforcing a written one, taking the time to record the agreement, even if the mediation concludes at a time that may not seem conducive to such efforts, such as late in the night, is likely to prove crucial in avoiding enforcement complications. If the mediation takes place over a period of time and involves complex issues, agreements achieved should be recorded and circulated in order that the parties can confirm they are correct, so that by the end of the mediation process agreement on the final form comprehensive settlement agreement is greatly facilitated. Even if the final form agreement does not emerge at the end of the mediation process, the Heads of Terms document or memorandum of understanding prepared at the close of the mediation should:⁷²⁰

- incorporate all of the material terms;
- reflect language that is certain enough to be understood and to require performance;
- confirm (where it is agreed), that the parties intend the agreement to be binding and enforceable;
- use language carefully regarding follow-up documents that implement the settlement terms, for example, the agreement should not be made ‘subject to’ follow-up documents or ‘effective only upon’ the execution of further documents, unless it is agreed and required;
- be signed either by the parties or authorised representatives;
- provide that the agreement is admissible in evidence in any proceeding to enforce its terms;
- consider incorporating a provision that mediation confidentiality is waived if any issue arises regarding the enforcement of the agreement.

List material representations

If a party has relied on material representations when making a decision on settlement, it may be sensible to incorporate them into the settlement agreement, stating that the

⁷²⁰ See Sussman (note 613) at 38.

listed representations represent all of the material representations on which the parties relied. This would ensure that testimony about representations made at the mediation would not be required, as the material representations would be contained in the agreement.⁷²¹

Prepare ancillary documents at the mediation

Material ancillary documents should be agreed during the mediation process, and it should not be assumed that the details of such documents, such as the amount of money to be paid, can be worked out after the major items are resolved. Effective preparation can assist in preventing later disputes over such documents. A confidentiality agreement, an apology or a release often fall into this category.⁷²²

Confirmation by the parties of issues such as competence and independent judgment

It would seem sensible for a mediator to ask the parties to confirm certain facts, possibly by way of a side document, to be signed by the parties confirming:⁷²³

- they understand the terms of the agreement having read or heard them;
- they are in agreement with the terms;
- they understand and agree that the terms are binding and can be judicially enforced;
- that no material representations were made to them during the mediation that were not incorporated into the settlement agreement;
- they understand that neither the mediator nor the opposing party or the opposing party's advisors were under any positive obligation to furnish them with information;
- they were not suffering from any physical impairment that adversely affected their ability to exercise their judgment in approving the settlement;

⁷²¹ This would also reduce claims of alleged material misrepresentations, see Sussman (note 613) at 38.

⁷²² See Sussman (note 613) at 39.

⁷²³ The need for such a side agreement will depend on the sophisticated nature of the parties in the mediation and whether they have legal representation present during the process. See also Sussman (note 613) at 39.

- there were opportunities to consult their lawyers regarding the settlement terms;
- they acted voluntarily and exercised their independent judgment in reaching the decision to settle the dispute; and
- they have authority to legally bind the party that they represented in the mediation.

If the dispute is being litigated, the terms of the settlement could be incorporated into the final judgement, or the settlement could provide for the court to retain jurisdiction over the matter for enforcement purposes. If the matter is not being litigated, it may be possible to request that the mediator act as an arbitrator to effectively make an arbitral award reflecting the mediated settlement agreement. Such a procedure is expressly provided for in some jurisdictions, while in a number of jurisdictions the settlement agreement may also be deemed to have the same force and effect as an arbitral award.⁷²⁴ This matter is discussed further below, as well as the possible recognition of an award under the New York Convention.

Making the mediated agreement a judgment or award

Where the parties convert the agreement into an arbitral award or a judgment, it is one way to further insulate the settlement agreement from possible challenge and facilitate enforcement, particularly in circumstances where the parties are not domiciled in the same jurisdiction.⁷²⁵

Where arbitration proceedings have already commenced but are suspended in order to mediate the dispute, the parties can request that the arbitration proceedings be reactivated in order to incorporate the result of the mediation into the award, effectively converting the mediated settlement agreement into an internationally enforceable arbitral award. If the mediation concludes successfully resulting in a settlement in

⁷²⁴ Sussman (note 613) at 39.

⁷²⁵ Eric W Fiechter 'Mediation: Confidentiality and Enforcement Issues and Solutions' IBA Legal Practice Division *Mediation Committee Newsletter* April 2005 at 46. Even where litigation is already underway and consent orders have been made regarding the outcome of a mediation, the enforcement of a mediated settlement agreement can be time consuming and difficult where there is opposition from one of the parties. In the English case of *Crystal Decisions (UK) Ltd and others v Vedatech Corporation and another* [2007] EWHC 1062 (Ch) for example, the final judgement of the court upholding the terms of a mediated settlement agreement was issued almost five years after it was executed. See also Joe Tirado and Amanda Greenwood 'Enforcing mediated settlement agreements in England- where to from here?' IBA Legal Practice Division *Mediation Committee Newsletter* December 2007 at 22 note 12.

circumstances where no arbitration or judicial proceedings commenced prior to the dispute being resolved by mediation, the possibility of converting the agreement into an arbitral award or a judgment depends on the jurisdiction where, or the organisation under which the mediation took place.⁷²⁶

It has been suggested that some organisations or judicial systems will refuse to open formal judicial or arbitral proceedings for the sole purpose of incorporating a mediated settlement into an arbitral award or a judgment, as there is no longer any dispute to be resolved. Similarly, some arbitration tribunals or courts could take the view that their responsibility is to deal with actual conflicts and not to convert private mediation agreements into something more easily enforceable internationally.⁷²⁷ This issue was recognised in the Annex to the proposal for an EU Directive on civil and commercial mediation,⁷²⁸ and led to the inclusion of a provision in the Directive for the enforcement of mediated agreements as judgments.⁷²⁹

The New York Convention

In 1958, a diplomatic conference organised by the United Nations in New York prepared a Convention on the Recognition and Enforcement of Foreign Arbitral Awards for universal adoption, more commonly referred to as the 1958 New York Convention (the ‘New York Convention’).⁷³⁰ This multilateral agreement, which essentially facilitates the enforcement of arbitral awards from one state in another, effectively waives judicial jurisdiction in favour of private dispute resolution.⁷³¹ Prepared in ‘an

⁷²⁶ Fiechter (note 725) at 46.

⁷²⁷ Fiechter (note 725) at 47.

⁷²⁸ Commission Staff Working Paper ‘Annex to the Proposal for a Directive of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters’ SEC (2004) 1314, 22 October 2004. See also Fiechter (note 725) at 47.

⁷²⁹ Directive 2008/52/EC ‘Directive on Certain Aspects of Mediation in Civil and Commercial Matters’, Article 6 provides that national law in each member state of the European Union (except Denmark) must ensure that it is possible for the parties to request that the content of a written agreement resulting from mediation be made enforceable, unless the agreement is contrary to the law of the member state or the law does not provide for its enforceability, the agreement may be made enforceable by a court or other competent authority in another member state. It has been suggested that if enforcement is or becomes a serious concern for the parties, legal advisers should check this point before the mediation concludes, so that if necessary, the mediation can be finalised in a ‘mediation-friendly’ legal environment, i.e. one that will support the conversion of the mediated settlement agreement into an arbitral award or a judgment. See Fiechter (note 725) at 47.

⁷³⁰ See Barin (note 60) at 69.

⁷³¹ William Park ‘A User’s Guide to The New York Arbitration Convention’ in B Barin (ed) *Carswell’s Handbook of International Dispute Resolution Rules* at 526. See also Barin (note 60) at 69.

imperfect world of sovereign nation states',⁷³² it has been suggested that due to the New York Convention, the world we live in, while still being imperfect, is arguably less so, due to the New York Convention, to which 142 jurisdictions have subscribed to date.⁷³³

Generally speaking, a mediated settlement agreement would not seem to fall within the Convention, which applies only to the recognition and enforcement of 'arbitral' awards:

This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought ...⁷³⁴

If arbitration rules provide for mediation to take place during the course of the arbitral process, and that any settlement reached can be made the subject of an arbitral award, the question arises as to whether such awards are enforceable under the New York Convention. This discussion about the conversion of a settlement agreement into an arbitration award is not new.⁷³⁵ In 1979, one commentator had suggested that 'subject to the relevant arbitration rules and applicable law, a settlement agreement arising out of [mediation] proceedings might be effectively converted into an arbitration award by agreement of the parties, thus giving advantages with regard to enforcement'.⁷³⁶ The reaction of at least two commentators was one of scepticism 'as to the practical possibilities of such a solution, not least because it seems unlikely that the party against whom the settlement agreement is to be enforced would agree to such a course; it may also be questioned whether an agreement can acquire the status of an award merely because the parties agree that it should do so.'⁷³⁷

A narrow interpretation of the New York Convention would suggest that the provisions of the Convention envisage that an arbitral tribunal will reach a decision on the issues in dispute.⁷³⁸ An arbitration award based on a mediated settlement agreement

⁷³² Fali S Nariman 'The Convention's Contribution to the Globalization of International Commercial Law' in *Enforcing Arbitration Awards under the New York Convention - Experience and Prospects* at 11. See also Barin (note 60) at 69.

⁷³³ There are currently 142 signatories to the New York Convention, see www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited 19 August 2008). See also Barin (note 60) at 69.

⁷³⁴ Article 1 of the New York Convention.

⁷³⁵ See Barin (note 60) at 70.

⁷³⁶ See Alan Redfern and Martin Hunter *Law and Practice of International Commercial Arbitration* at 506 and 507, and their reference to Hermann (1979) *IV Yearbook Commercial Arbitration* at 170, 185. See also Barin (note 60) at 70.

⁷³⁷ Redfern and Hunter (note 736). See also Barin (note 60) at 70.

⁷³⁸ See Connerty (note 740) at 65.

that is agreed prior to the arbitration agreement being executed or before it was invoked, could be challenged on the basis that the arbitrator appointed had no jurisdiction to issue the award.⁷³⁹

It has however been suggested that a broad interpretation of the Convention would suggest otherwise. For example, in England a mediated settlement agreement can be made the subject of a judgment of a court.⁷⁴⁰ Section 51 of the English Arbitration Act also provides that settlements reached during the course of arbitral proceedings can be recorded in the form of an award ‘if so requested by the parties, and not objected to by the tribunal’.⁷⁴¹

South Africa enacted the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 (the 1977 Act) to give effect to the New York Convention. The South African Law Commission identified a number of serious defects⁷⁴² in the legislation and recommended that this Act be repealed and replaced by improved legislation which should be incorporated into the same statute that will incorporate the UNCITRAL Model Law for international arbitrations.⁷⁴³ The Law Commission believed that a consolidated Act would have the advantage that the relevant legislation is readily accessible in a single statute for foreign users.⁷⁴⁴ This would seem to be a sensible course of action, particularly in light of the possibility that a broad interpretation of the New York Convention could result in a settlement agreement that is made the subject of an award receiving recognition in South Africa.

⁷³⁹ It has been suggested that in such circumstances an arbitrator should be appointed before commencing the mediation process, if parties want to ensure that their mediated settlement agreement will have the same enforcement status as an arbitral award, see Joe Tirado and Amanda Greenwood ‘Enforcing mediated settlement agreements in England- where to from here?’ IBA Legal Practice Division *Mediation Committee Newsletter* December 2007 at 20.

⁷⁴⁰ Anthony Connerty ‘Arb-Med/Med-Arb and Enforcement under the New York Convention’ IBA Legal Practice Division *Mediation Committee Newsletter* August 2005 at 65.

⁷⁴¹ See Connerty (note 740) at 66.

⁷⁴² These include, for example, the definition of ‘foreign arbitral award’, the failure to include an equivalent to article II of the New York Convention regarding the enforcement of arbitration agreements and problems with the wording of section 4 regarding the grounds on which enforcement of a foreign arbitral award may be refused. For a more detailed discussion on these and other points, see South African Law Commission Project 94 *Arbitration: An International Arbitration Act for South Africa* (1998) at 115-132. See also the submissions by Butler and Christie on behalf of the Association of Arbitrators in response to Working Paper 59 para 4.1.

⁷⁴³ See South African Law Commission Discussion Paper 69 *Arbitration: A draft International Arbitration Act for South Africa* 1996 chapter 3 and sections 8-12 of the Draft Bill annexed to the Discussion Paper.

⁷⁴⁴ South African Law Commission (note 742) at 111.

Draft legislation

The Arbitration Bill and International Arbitration Bill, when enacted, will update the law on domestic arbitration and introduce the UNCITRAL Model Law on Commercial Arbitration respectively into the South African legal system.

Under the Arbitration Bill, an agreement achieved through mediation can be enforced through the courts as a contractual obligation. The Arbitration Bill provides for a tribunal (arbitrator) to make an award on agreed terms.⁷⁴⁵ This provision could only apply to a settlement agreement achieved through mediation once the tribunal has been appointed. The draft provision gets around this problem by providing that a written settlement agreement entered into by the parties to an arbitration agreement *before* a tribunal (arbitrator) is appointed to settle their dispute is enforceable as an award on agreed terms.⁷⁴⁶

This provision is only intended to deal with a settlement agreement entered into in South Africa by parties to a domestic arbitration agreement. The enforcement of a settlement agreement entered into outside of South Africa by parties to a commercial dispute which is subject to an arbitration agreement will be regulated by the International Arbitration Bill when it is enacted.⁷⁴⁷

It seems that neither the New York Convention nor the Model Law on Commercial Arbitration define the term ‘award’, while the closest the New York Convention gets to defining ‘award’ is in Article I.2, which states: ‘The term ‘arbitral awards’ shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.’ Article 30 of the Model Law on Commercial Arbitration provides that ‘if, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.’⁷⁴⁸

Under the International Arbitration Bill, where the mediation takes place in terms of an arbitration agreement after the arbitral tribunal has been appointed, any

⁷⁴⁵ Section 44.

⁷⁴⁶ Section 16. The Association of Arbitrators supported this recommendation in its response to Discussion Paper 83 para 9. The insertion of section 44 in the Draft Bill addresses the concern raised by the Arbitration Forum in its response to Discussion Paper 83 para 3.5.

⁷⁴⁷ Section 13 of the International Arbitration Bill contains similar (although not identical) language to section 16 of the Arbitration Bill.

⁷⁴⁸ See also Barin (note 60) at 70.

agreement resulting from the mediation should provide for it to be made an award on agreed terms under Article 30(1) of the Model Law. This award will then be enforceable like any other arbitral award. As acknowledged by the Law Commission, the problem is therefore confined to international mediations before the arbitral tribunal has been appointed.⁷⁴⁹

As noted above, some maintain that procedures such as those comprised in Article 30 of the Model Law can only be resorted to when mediation follows the commencement of arbitration proceedings.⁷⁵⁰ The reverse, it is suggested, is legally impossible because where a mediated settlement agreement is reached in circumstances where there is not a pending arbitration, there would be no ‘dispute’ to be submitted to an arbitral tribunal for resolution.⁷⁵¹ Sekolec and Getty have observed that:

[I]n legislative solutions regarding the enforceability of settlements reached in conciliation proceedings differ widely. In some countries, a settlement reached in conciliation is enforceable as a contractual obligation (i.e. party must initiate proceedings to obtain an entitlement capable of being enforced by judicial organs charged with the enforcement of judicial decisions). In other countries, there exist rules declaring certain settlements to be enforceable entitlements, or possibilities for turning a settlement into an enforceable entitlement (e.g., the parties may appoint an arbitrator specifically to issue an award on agreed terms based on the settlement, or the settlement is notarized or co-signed by the attorneys of the parties).⁷⁵²

It is also clear that the provision under the International Arbitration Bill dealing with international mediations only operates for the enforcement of the settlement agreement in South Africa. It is therefore clearly not intended to give the agreement the status of an arbitral award for enforcement outside South Africa, either in another Model Law jurisdiction or under the New York Convention. Conversely, as presently drafted, the section is not restricted to a settlement agreement entered into in South

⁷⁴⁹ South African Law Commission (note 742) at 43.

⁷⁵⁰ See Henry Brown and Arthur Marriott *ADR Principles and Practice* at 512, where the authors remark that in situations where ‘adjudicatory proceedings are pending parallel to mediation ... the parties may record any settlement agreement reached ... as an award or order in those formal proceedings. So, if an arbitration is pending, the agreement may be recorded as a consent award (depending on the rules and procedures of the arbitration process); or in the case of pending litigation through the courts, the settlement could be recorded by consent of the court.’ See also Barin (note 60) at 70.

⁷⁵¹ See also Barin (note 60) at 70.

⁷⁵² Jernej Sekolec and Michael B Getty ‘The UMA and the UNCITRAL Model Rule: An Emerging Consensus on Mediation and Conciliation’ 2003:1 *Journal of Dispute Resolution* at 2. See also Jernej Sekolec ‘Introduction to the UNCITRAL Model Law on International Commercial Conciliation’ XXVII *ICCA Yearbook Commercial Arbitration* at 398-413. See also Barin (note 60) at 70.

Africa. Therefore a settlement between parties to an arbitration agreement outside South Africa could be enforced under this section in South Africa.⁷⁵³

Model Law on International Commercial Conciliation

Article 14 of the Model Law deals with the enforceability of settlement agreements. It states: ‘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].’

Some have remarked that this provision enunciates the ‘lowest acceptable common denominator’⁷⁵⁴ among 90 nations, 12 intergovernmental organisations and 22 non-governmental international organisations, many of which believed that the time had arrived for global agreement to be reached on a model law with more ‘teeth’.⁷⁵⁵ In a number of countries, notably Canada, the Model Law in general, and Article 14 specifically, have been criticised. As one commentator has remarked:

[The Model Law on Conciliation] rule on the enforceability of the settlement reached through conciliation ... leaves much to be desired ... Unfortunately, the provision does not state that the settlement agreement should benefit from some form of expedited recognition of its enforceability. As a result, the applicable local law will determine the expressions binding and enforceable. This is too much wriggle room ... In fact the resulting uncertainty is guaranteed, in that the words employed in the italics go beyond the procedure of execution.⁷⁵⁶

It is important that if the Model Law on International Commercial Conciliation is to be used as a template for the introduction of a mediation statute in South Africa, the wording used in the provision implementing Article 14 must be sufficiently robust to ensure the enforceability of mediated settlement agreements. While Article 14 may represent the lowest acceptable common denominator, it is up to South Africa, as with every nation when implementing it, to make up the difference.⁷⁵⁷

The Canadian province of Ontario offers a common-law solution, which permits litigants to convert a settlement agreement reached between them, which in the usual

⁷⁵³ See South African Law Commission (note 742) at 44.

⁷⁵⁴ Fali S Nariman (note 732) at 19. See also Barin (note 60) at 70.

⁷⁵⁵ See Barin (note 60) at 71.

⁷⁵⁶ Jeffrey Talpis ‘Enforcing International Commercial Agreements to Mediate and Settlements reached through Mediation’ Canadian Bar Association Conference, Montreal (18 June 2003) at 18. See also Barin (note 60) at 71.

⁷⁵⁷ See Barin (note 60) at 71.

course is a normal contractual obligation, into a subsequent judgment obtained by consent.⁷⁵⁸ In the absence of a similar common-law rule in South Africa, it is important to investigate the legislative option.

A different legislative approach

The Geneva Law on Civil Mediation⁷⁵⁹ provides for a simple incorporation of a mediated settlement agreement into a judgment.⁷⁶⁰ The parties can apply to ratify the settlement agreement through a simple application process, which only requires the parties' identities, a brief summary of the facts together with the request that the agreement, appending the appropriate exhibits, be ratified by the judge.⁷⁶¹ After verifying that the agreement is not contrary to public policy or imperative law,⁷⁶² the judge drafts official minutes that are signed by the judge, the clerk, the parties and their lawyers (if applicable), incorporating the settlement agreement into the minutes,⁷⁶³ and they are subsequently registered by the court office and recorded as a civil judgment, having the same value as any other Swiss civil court judgment.⁷⁶⁴

The Geneva Law on Civil Mediation also provides that the mediator does not intervene in the civil proceedings and the judge does not intervene in the mediation process,⁷⁶⁵ unless the mediated settlement agreement is against public policy or

⁷⁵⁸ Barin (note 60) at 71.

⁷⁵⁹ No 8931 of 28 October 2004. See also Fiechter (note 725) at 47.

⁷⁶⁰ Jean A Mirimanoff 'Civil and Commercial Mediation: "Overview of the Swiss Paradox"' Presentation to a Mediation Interest Group Meeting at WIPO, 8 September 2003. See also Fiechter (note 725) at 47.

⁷⁶¹ Geneva Law on Civil Mediation, art 71 D. See Fiechter (note 725) at 47.

⁷⁶² According to Art 71 F al 2, if the mediator who handled the proceedings is not registered on the official list of qualified mediators, the judge can refuse to ratify the settlement agreement, but neither nationality nor residence are legal criteria to qualify for registration as a qualified mediator in Geneva, the qualification requirements are:

- (a) aged thirty years or older;
- (b) hold a university degree or sufficient training;
- (c) have sufficient professional experience;
- (d) have sufficient experience or knowledge in the relevant field;
- (e) have qualifications and relevant skills to practice as a mediator; and
- (f) not have been convicted of a crime committed intentionally that affects the applicant's moral standing or honour.

Even non-Swiss mediation institutions and their members could join the Geneva official list of mediators if they meet the legal requirements and can guarantee that their members will do likewise. It has been suggested that this could be of particular interest to European and American mediators practising internationally, i.e. also occasionally in Geneva. As an alternative to registering, they could hold their mediations with a registered Geneva mediator, without losing the advantage of being able to easily incorporate the mediated settlement agreement into a judgment. See Fiechter (note 540) at 47 note 21.

⁷⁶³ Geneva Law on Civil Mediation, Art 71 F, al 1. See also Fiechter (note 725) at 47.

⁷⁶⁴ See Fiechter (note 725) at 47.

⁷⁶⁵ Geneva Law on Civil Mediation, art 71 B. See also Fiechter (note 725) at 47.

imperative law, in which case the judge permits the parties to revise the agreement and informs the mediator of his possible refusal to ratify the settlement.⁷⁶⁶ However, it has been pointed out that as Swiss contract and commercial law is more liberal than most other laws, it is only in very exceptional cases that a judge will need to object to the terms of a mediated settlement agreement.⁷⁶⁷

The immediate preference ought to be the adoption and implementation of a mediation statute by the South African legislature based on a revised version of the Model Law on International Commercial Conciliation giving, in particular, sufficiently clear wording to ensure the enforceability of mediated settlements. Approaches such as that adopted in the Geneva Law on Civil Mediation should be viewed as a guide to give the enforceability of mediated settlement agreements the protection they require.⁷⁶⁸

Many settlement agreements will not require that they be enforced as a judgment or award. For those situations where compliance may be an issue, making the settlement a judgment is likely to compromise confidentiality to a certain extent, for example, making public the fact that there was a dispute to begin with. However, provided the legislation facilitates the effective enforcement of a settlement agreement, the parties can obtain through mediation a result that has the same value for enforcement purposes as an arbitral award or a judgment, but through a conflict resolution process that is likely to produce more satisfactory results, while preserving confidentiality to a higher degree than ordinary court proceedings.⁷⁶⁹

⁷⁶⁶ Geneva Law on Civil Mediation, Art 71 J. See also Fiechter (note 725) at 47.

⁷⁶⁷ See Fiechter (note 725) at 47.

⁷⁶⁸ The Mediation Subcommittee of the International Bar Association published a report in October 2007 on the Model Law on International Commercial Conciliation, comprising responses to a questionnaire from participants in 17 countries. The report acknowledged that the model law is 'a floor of lowest common denominator protection, not a ceiling, so that it might be expected that some countries would add to the protection of mediation as a special regime,' see para 8. It noted that as Article 14 provides for binding and enforceable settlement agreements, but leaves open the method of enforcement, countries should consider adopting additional protective measures to supplement the enforcement contained in Article 14, and that a judgement, an arbitral judgement or a notarial deed should be available if the parties want it in mediated settlements, see paras 30-35. The report and questionnaire are available at www.ibanet.org/images/downloads/lpd/IBA_Mediation_Singapore_Report_Final.pdf (last visited 10 July 2008).

⁷⁶⁹ See also Fiechter (note 725) at 47.

CHAPTER SIX: CONFIDENTIALITY IN MEDIATION

As appears from the enforcement jurisprudence discussed above, in determining whether a settlement agreement should be enforced, the court engages in an intensely fact-based investigation and often delves into what happened at the mediation itself.⁷⁷⁰ While mediation confidentiality does not currently appear to be a difficulty in South Africa, as mediation is increasingly adopted as the process to resolve commercial disputes, the discussion below will have increasing importance.⁷⁷¹

While an unambiguous contract will, in the normal course, be interpreted by the courts without the need to look to evidence outside the contract, an investigation of the negotiation process is likely to be required in order to assess if an oral contract exists where there is no written agreement, and to review situations where ambiguities are claimed in order to clarify their meaning. The various contract law defences discussed above regarding mediated settlement agreements such as duress, lack of capacity, lack of authority, mistake and fraud, are all largely determined by what happened at the mediation.⁷⁷²

Courts and policy-makers have struggled with the tension between developing the facts to assess what transpired during the mediation in order to analyse claims made, and the need to preserve the confidentiality of the mediation process. Identification of the circumstances and the nature of the evidence that should be allowed, as well as the permissible scope of testimony by the mediator, have all been causes of concern.⁷⁷³

Courts in the USA, for instance, have explained the rationale behind the need for mediation confidentiality by stating that confidentiality ‘permits and encourages counsel to discuss matters in an uninhibited fashion often leading to settlement’⁷⁷⁴ and that ‘[p]ublic confidence in and the voluntary use of mediation can be expected to expand if people have confidence that the mediator will not take sides or disclose their statements,

⁷⁷⁰ See Sussman (note 613) at 35.

⁷⁷¹ In the interviews with practising commercial mediators conducted in Cape Town and Johannesburg between 21 May and 20 June 2007, there was unanimity in the responses from those interviewed on this point. No difficulties were experienced with regard to mediation confidentiality.

⁷⁷² Sussman (note 613) at 35.

⁷⁷³ Sussman (note 613) at 35.

⁷⁷⁴ *Beazer East Inc v Mead Corporation* 412 F 3d 429 (3d Cir 2005) at 435. See also Sussman (note 613) at 35.

particularly in the context of other investigations or judicial processes.⁷⁷⁵ As well as discouraging participation in the process, a lack of trust can destroy it as ‘agreement may be impossible if the mediator cannot overcome the parties’ wariness about confiding in each other during these sessions’.⁷⁷⁶ There has been a lack of uniformity in the development of institutional protection of mediation confidentiality throughout the USA,⁷⁷⁷ with some states providing a mediation privilege that is held by the parties, and other jurisdictions affording a separate right to the mediator.⁷⁷⁸ Clear rules exist in some states regarding the mandatory reporting of certain offences, while other states have more opaque rules or fail to have any at all.⁷⁷⁹

While an appreciation of the importance of mediation confidentiality would appear to be universal, court decisions in the USA cover the entire spectrum in their treatment of confidentiality where decisions have:⁷⁸⁰

- permitted limited disclosure of mediation communications based on a requirement for the evidence;
- found waivers of confidentiality because of the claims raised;
- barred all evidence of mediation communications;
- completely ignored the question of confidentiality and treated the matter as they would any other contract with relevant evidence from all available sources, sometimes even where there is a statute protecting mediation confidentiality.

The role of confidentiality in mediation

Mediation confidentiality is justified on numerous grounds.⁷⁸¹ It makes the process attractive to potential users who want to avoid publicity, and encourages the parties to

⁷⁷⁵ *Princeton Insurance Co v Vergano* 883 A 2d 44 (Del Ch 2005) at 63. See also Sussman (note 613) at 35.

⁷⁷⁶ *Foxgate Homeowners Association v Bramalea California Inc* 25 P 3d 1117, 1126 (Ca 2001). See also Sussman (note 613) at 35.

⁷⁷⁷ E Deason ‘The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?’ (2001) 85 *Marquette Law Review* 79 at 86.

⁷⁷⁸ See M. Rufenacht ‘The Concern over Confidentiality in Mediation: an in-depth Look at the Protection Provided by the Proposed Uniform Mediation Act’ (2000) *Journal of Dispute Resolution* 113 at 118, notes 41-53 and accompanying text.

⁷⁷⁹ See Deason (note 777) at footnote 47.

⁷⁸⁰ For a review of the cases on confidentiality, see E Deason ‘Enforcing Mediated Settlement Agreements: Contract Law Collides With Confidentiality’ (2001) 35 *UC Davis L Rev* 33. See also Sussman (note 613) at 35.

engage in the process as it protects them from any disclosures being used against them subsequently. It makes the process more effective by encouraging the parties to reveal their real needs and interests, which assists in reaching a settlement. The reputation of mediators is also protected and their impartiality is reinforced as it removes pressure on them to make disclosures during or after the mediation. It also contributes to finality in narrowing the basis on which to seek review or other ways to challenge mediated settlements. Despite the protection of mediation confidentiality, the process is not in practice as confidential as it is sometimes claimed to be.⁷⁸²

Forms of confidentiality

There are three forms of confidentiality relating to mediation.⁷⁸³ The first is when a party shares information with the mediator in caucus, the private meetings between mediators and individual parties. The context of this situation encourages parties to be open in a safe environment in order to express their fundamental concerns, where only the mediator is constrained and the relevant party can waive their rights to confidentiality.⁷⁸⁴

The second form of confidentiality, designed to prevent publicity for the process and to avoid adverse consequences for disclosures made by the parties, relates to the entire mediation process, imposing a general obligation on the parties, the mediator and other participants to keep confidential all information obtained during the mediation and not to disclose it to any third party.⁷⁸⁵

The third form of confidentiality is a right and/or duty not to disclose information obtained during the mediation process in pre-trial discovery or in evidence in a simultaneous or later arbitral, judicial or administrative proceeding and is often viewed as the most important form of confidentiality in mediation.⁷⁸⁶

⁷⁸¹ Boule cites the following authorities: F Crosbie 'Aspects of Confidentiality in Mediation: A Matter of Balancing Competing Public Interests' (1995) 2 *CDRJ* 51; S Lancken 'The Responsibility of the Neutral in respect of Mediation Confidentiality (2004) 7(2) *ADR Bulletin* 25; Astor and Chinkin (note 236) at 178-186 as cited by Boule (note 263) at 540.

⁷⁸² Boule and Rycroft (note 231) at 240.

⁷⁸³ See Eric van Ginkel 'The UNCITRAL Model Law on International Commercial Conciliation: A Critical Appraisal' (2001) 21 *J Int Arb* 1, 36.

⁷⁸⁴ Boule and Rycroft (note 231) at 240.

⁷⁸⁵ See Boule and Rycroft (note 231) at 240.

⁷⁸⁶ See also Eric van Ginkel 'Mediation under National Law: United States of America' IBA Legal Practice Division *Mediation Committee Newsletter* August 2005 at 47.

Ways of attempting to resolve confidentiality

Common law privileges

Perhaps the most obvious way the law may attempt to protect mediation information is by creating a privilege.

Without prejudice privilege

Evidence of admissions made in an honest attempt to reach a settlement of a dispute cannot be disclosed in evidence at common law without both parties' consent.⁷⁸⁷ Known as the 'without prejudice' privilege, it covers only oral or written admissions made in good faith to settle disputes in situations where settlement is not actually reached.⁷⁸⁸ Consequently the privilege only applies to communications made in situations where there is a dispute or negotiations are ongoing between the parties.⁷⁸⁹ The policy behind this privilege is that the law should encourage parties to negotiate freely in pursuit of settlement in an environment where they are not concerned about subsequent adverse consequences in litigation.⁷⁹⁰

Litigation need not have commenced nor do parties have to expressly stipulate that their negotiations are without prejudice, for the privilege to apply.⁷⁹¹ Consistent with the policy of the law in promoting the enforceability of agreements reached in negotiations, where an agreement is reached following without prejudice negotiations, evidence of statements made is subsequently admissible,⁷⁹² so that a settlement following without prejudice negotiations can be pleaded and proved for enforcement purposes.⁷⁹³ Consequently, it has been sensibly suggested that the extent of disclosure of the settlement is best provided for in the settlement agreement itself.⁷⁹⁴

⁷⁸⁷ L H Hoffmann and D Zeffertt *The South African Law of Evidence* at 196 as cited by Boule and Rycroft (note 231) at 241. In addition to the confidentiality attaching to the mediation process, in most cases the process will attract the privilege of 'without prejudice' negotiations, see Dreadon (note 479) at 16.

⁷⁸⁸ Boule and Rycroft (note 231) at 241.

⁷⁸⁹ Boule and Nesic (note 426) at 490.

⁷⁹⁰ See *Kapeller v Rondalia Versekeringskorporasie van Suid Afrika Bpk* 1964 (4) SA 722 (T) at 728F; *Naidoo v Marine and Trade Insurance Co Ltd* 1978 (3) SA 666 (A) at 677; *Tshabalala v President-verskeringsmaatskappy Bpk* 1987 (4) SA 73 (T) at 76 as cited by Boule and Rycroft (note 231) at 241.

⁷⁹¹ Boule and Rycroft (note 231) at 241.

⁷⁹² *Gcabashe v Nene* 1975 (3) SA 912 (D) as cited by Boule and Rycroft (note 231) at 241.

⁷⁹³ Boule and Rycroft (note 231) at 241.

⁷⁹⁴ Boule and Nesic (note 426) at 490.

The privilege is subject to all the common-law limitations and can be expressly or impliedly waived by the parties, but disclosure to the mediator of privileged information is not a waiver as in the case of disclosure to a court.⁷⁹⁵ The privilege is not without limitation and a court can order disclosure for numerous reasons where the interests of justice require it, for example, where the parties must report progress to outside constituents, such as in the mediation of public policy disputes.⁷⁹⁶

Australian courts have confirmed that the without prejudice privilege applies to mediation,⁷⁹⁷ even where a mediation is conducted to resolve only part of a dispute.⁷⁹⁸ The logic is that parties are less likely to agree to mediate where information gleaned during negotiations at the mediation could subsequently be used against them in litigation if the mediation proves unsuccessful.⁷⁹⁹ Standard form agreements to mediate generally include a provision that the mediation will be conducted on a without prejudice basis.⁸⁰⁰

Other participants and interested parties

As witnesses, experts, and other third parties who may be present during the mediation process are not parties to the agreement to mediate, or to confidentiality undertakings in the settlement agreement, it may be necessary for the mediator to ensure their commitment to confidentiality by asking ‘outside’ parties to sign confidentiality undertakings prior to participating in the process.⁸⁰¹ The confidentiality clause of an

⁷⁹⁵ Boulle and Rycroft (note 231) at 241. The English courts recently confirmed that it is only where all of the parties to a mediation agree to waive the privilege that a court can access the information, see *Earl of Malmesbury v Strutt & Parker* [2008] EWHC 424 (QB), Jack J at par 24 ‘I record here that it has been agreed that privilege shall be waived in respect of all ‘without prejudice’ matters.’ See also the discussion by Tony Allen ‘Peering behind the veil of mediation confidentiality, a new judicial move in *Mulmesbury v Strutt and Parker*’ available at www.cedr.com/index.php?location=/library/articles/20080421_234.htm. (last visited 19 July 2008).

⁷⁹⁶ Boulle and Nesic (note 426) at 492.

⁷⁹⁷ *AWA Ltd v Daniels (t/a Deloitte Haskins & Sells)* (1992) 7 ACSR 463 (Rolfe J and Rogers CJ) as cited by Boulle and Nesic (note 426) at 491.

⁷⁹⁸ *Lukies v Ripley (No 2)* (1994) 35 NSWLR 283 as cited by Boulle and Nesic (note 426) at 491.

⁷⁹⁹ Boulle and Nesic (note 426) at 491.

⁸⁰⁰ Boulle and Nesic (note 426) at 491. While most agreements to mediate contain an express statement that the negotiations are to be regarded as privileged, even in the absence of such an express provision it is likely that the negotiations will be covered provided the common-law requirements are satisfied, see *Chocoladenfabriken Lindt v Nestle* [1978] RPC 287.

⁸⁰¹ Sussman (note 742) at 38.

agreement to mediate can, but does not always bind legal advisors,⁸⁰² regardless of the fact that the information gleaned may be relevant to their areas of practice.⁸⁰³

As the without prejudice privilege can only be asserted by participants in a mediation, the issue arises as to whether the parties who settle can use it defensively against other interested parties, such as in a multi-party mediation where some parties settle without the knowledge of others who then seek information about the mediation when preparing for litigation.⁸⁰⁴ In an English case⁸⁰⁵ the main contractor in a construction dispute reached a mediated settlement with the owner, and the sub-contractors subsequently wanted to gain information about the weight their claims carried in the mediation in order to pursue their claims against the contractor.⁸⁰⁶ Despite the fact that a settlement had been reached, the court held that the public interest required the extension of the privilege protection to cover the situation of the contractor, owner and sub-contractors.⁸⁰⁷ As Boule and Rycroft point out, the judgment provides an exception to the established principle that the protection provided by the privilege ends when settlement occurs, and also reveals the degree to which the courts are willing to adapt common-law privileges.⁸⁰⁸

An Australian court subsequently extended the principle to prevent disclosure of documents provided in a mediation, to a party who did not participate in the mediation.⁸⁰⁹ Boule remarks that while such cases indicate that judicial policy favours maintaining confidentiality against outsiders to the mediation, it is likely that the jurisprudence on this issue will be shaped by the individual circumstances of cases,

⁸⁰² As Boule points out, there may be an ethical obligation on lawyers not to disclose, but this can be unclear; see G Sammon 'Ethical Duties of Lawyers Who Act for Parties to a Mediation' (1993) 4 *ADRJ* 190, 195, as cited by Boule (note 263) at 569.

⁸⁰³ See Boule (note 263) at 569.

⁸⁰⁴ Boule and Rycroft (note 231) at 242. See also Boule and Nestic (note 426) at 493.

⁸⁰⁵ *Rush and Tompkins Ltd v Greater London Council* [1989] 1 AC 1280 as cited by Boule and Rycroft (note 231) at 242. See also Boule and Nestic (note 426) at 493-494.

⁸⁰⁶ Boule and Rycroft (note 231) at 242.

⁸⁰⁷ Boule and Rycroft (note 231) at 242.

⁸⁰⁸ Boule and Rycroft (note 231) at 242. See also Boule and Nestic (note 426) at 493-494.

⁸⁰⁹ *Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants & Bars* [1999] QCA 276, Court of Appeal, Queensland where Byrne J cited English case law in support; in particular, Lord Griffiths in *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 at 1305, and Hobhouse J in *Prudential Assurance Co Ltd v Foundation Page Ltd* [1991] 1 WLR 756 at 771, leave to appeal to the High Court was refused: High Court of Australia, 21 June 2000 as cited by Boule and Nestic (note 426) at 494.

particularly the issue of who is trying to access the information, the person from whom it is being sought and the purposes for which it is sought.⁸¹⁰

Limitations of the privilege

The following is a list of possible limitations to the without prejudice privilege.⁸¹¹

- the context in which the statement is made cannot be objectively viewed as part of the negotiations for the settlement, or reasonably ancillary to them;
- while being a part of the settlement negotiations, the statements are unqualified admissions relating to objective facts;
- the statement involves a different subject-matter than the negotiations;
- a party is responsible for conduct that is misleading or deceptive or contrary to trade practices or fair trading legislation and an action for breach of the legislation is instituted;
- they involve communications that contain an offer and an acceptance that consequently creates a contract;
- they involve communications that constitute or reveal conduct that is criminal;
- they involve communications that will prevent a party from misleading the court if they are disclosed; and
- they involve communications that constitute delictual conduct.

The Australian case, *AWA Ltd v Daniels (t/as Deloitte Haskins and Sells)*⁸¹² illustrates the limitations of the without prejudice privilege. This case involved proceedings brought by AWA Ltd against its auditors for allegedly failing to audit its accounts properly, and was referred to mediation by the trial judge, Rogers J, with the consent of the parties. When the mediation proved unsuccessful, the auditors issued a Notice to Produce documents, the existence of which was revealed during the mediation. AWA Ltd sought to have the Notice set aside as an abuse of process, on the basis that the statements that revealed the existence of the documents were confidential

⁸¹⁰ Boulle (note 263) at 570.

⁸¹¹ This list is drawn from the Law Institute of Victoria 'Mediation – A Guide for Victorian Solicitors' Law Institute of Victoria, 1995 at 41 as cited by Boulle and Rycroft (note 231) at 242, who also indicate that some mediator Codes of Conduct and agreements to mediate contain similar exceptions to the confidentiality obligation. See also *Unilever Plc v Proctor & Gamble Co* [1999] 2 All ER 691.

⁸¹² (1992) 7 ASCR 463 as cited by Boulle and Rycroft (note 231) at 243.

and without prejudice. Rolfe J examined the relevant authorities⁸¹³ and competing policy considerations and held that the privilege did not apply as the auditors did not seek to prove what was said at the mediation but to prove, by admissible evidence, facts by reference to the source of what was said at the mediation.

As Boule and Rycroft point out, on a broad reading the judgment suggests that evidence of something discussed or disclosed at a mediation will not be excluded where it can be proved by independent evidence before a court or tribunal.⁸¹⁴ It seems that where facts are referred to or documents are produced in mediation, they will not be rendered inadmissible if they are otherwise admissible.⁸¹⁵ Shirley and Harris point out that there is nothing, in this context, stopping a party approaching a mediation as a pre-trial fishing expedition and where its opponent makes revelations of fact, the information can be used strategically against the disclosing party at trial.⁸¹⁶

When the hearing in the *AWA Ltd v Daniels* case resumed, the auditors successfully sought to admit in evidence the documents referred to in the mediation.⁸¹⁷ However, Rogers CJ, while coming to the same conclusion as Rolfe J, found that the prior High Court judgments were not directly applicable, but that the evidence showed that the auditors were aware of the existence of the deed before the mediation, and that it ought to have been discovered previously by AWA Ltd.⁸¹⁸ In light of this approach, it has been pointed out that the precedent value of the judgment is limited to its particular facts.⁸¹⁹

Rogers CJ remarked that in other circumstances, for example, if the auditors were unaware of the document, it would have been more persuasive in extending protection by applying the privilege. However, he did indicate⁸²⁰ that in principle, it should not be possible to sterilise otherwise admissible objective evidence simply by saying something about it during a mediation, regardless of its irrelevance to the discussions. In a subsequent Australian case the court upheld the privilege; interpreting

⁸¹³ In particular *Field v Commissioner for Railways (NSW)* (1957) 99 CLR 285 as cited by Boule and Rycroft (note 231) at 243.

⁸¹⁴ Boule and Rycroft (note 231) at 243.

⁸¹⁵ Boule and Nestic (note 426) at 494.

⁸¹⁶ See M Shirley and W Harris, 'Confidentiality in Court-Annexed Mediation, Fact or Fallacy?' (1993) 13 *Queensland Lawyer* 221, 228 as cited by Boule and Rycroft (note 231) at 243.

⁸¹⁷ Boule and Rycroft (note 231) at 242.

⁸¹⁸ Boule and Rycroft (note 231) at 242.

⁸¹⁹ Boule and Rycroft (note 231) at 243.

⁸²⁰ *AWA Ltd v Daniels* (1992) 7 ACSR 463, 468, as cited by Boule (note 263) at 546.

Rogers CJ's approach as giving force to the principle that public policy generally requires the maintenance of mediation confidentiality.⁸²¹

*Aird v Prime Meridian Ltd*⁸²² is an English case that has an important bearing on the documents prepared in the course of mediation that are considered to be privileged. During a case management conference which was conducted during the course of litigation, the parties informed the court that they wished to attempt mediation. The judge stayed the proceedings, and the parties were ordered to prepare a statement of issues that was to set out the points the parties agreed on and the points they did not agree on, as well as a brief statement of reasons as to why they did not agree on the latter. As a result of time and financial constraints, the statement prepared by the claimant and the claimant's expert was prepared for the purposes of mediation and made on a without prejudice basis. The joint statement by the parties' experts was marked 'without prejudice'. The mediation failed and the claimants' expert subsequently decided that 'without prejudice' should be removed from the statement.

During the litigation, the defendant sought to rely on the joint statement, while the claimant contended that the defendant was not permitted to do this as the statement had been prepared for the purposes of mediation. The defendant submitted that the joint statement was not privileged as it had been prepared in accordance with a court order for the purposes of litigation.

The Court of Appeal decided that the joint statement produced by the expert witnesses pursuant to a court order was not privileged, despite the fact it was made with a contemplated mediation in mind, and that if the parties did not comply with it to prepare statements they would be in breach of the order. The fact that the order had been made to assist in a contemplated mediation had no effect on the status and construction of the order.

In the subsequent case of *Brown v Rice*⁸²³ the judge held that communications during the mediation process could be admitted as evidence to establish whether a settlement had been reached. There was no need for the court to consider whether a separate concept of 'mediation privilege' existed. This case could be decided on the existing without prejudice rule. The issue was whether a settlement had been reached

⁸²¹ Young J in *Lukies v Ripley (No 2)* (1994) 35 NSWLR 283, as cited by Boule (note 263) at 547.

⁸²² [2006] EWCA Civ 1866.

⁸²³ [2007] EWHC 625 (Ch).

and not the reason as to why it had not been reached. On the facts, however, no settlement had been concluded.⁸²⁴

As previously mentioned, it is common for mediation agreements to include a clause which provides that any settlement reached in the mediation will only be binding if it is in writing and signed by all parties or their representatives. In this case the court held that this clause was effective. It is advisable to include a similar clause in any agreement to mediate and the parties should be made aware of it from the outset of the mediation.

There are a number of English cases where judges have received evidence about what happened at a mediation in order to determine the issue of costs.⁸²⁵ In *Chantrey Vellacott v Convergence Group plc and others*,⁸²⁶ the defendants had lost at trial, and the claimants sought an order for their costs at an unsuccessful mediation three years earlier. In making his decision, the judge received evidence from and with the consent of both parties regarding offers exchanged at the mediation and awarded the claimants their mediation costs due to the defendants' intransigence and unrealistic position both during the mediation and trial.

In *SITA v Watson Wyatt; Maxwell Batley (Pt 20 defendant)*⁸²⁷ the judge heard evidence of what a mediator had allegedly said during a mediation in determining that Maxwell Batley's refusal to mediate was not unreasonable.

At face value these cases seem to be at variance with the dictum laid down by Dyson LJ in the leading English case of *Halsey v Milton Keynes NHS Trust and Steel v Joy and Halliday*⁸²⁸, where he said:

We make it clear at the outset that it was common ground before us (and we accept) that parties are entitled in an ADR to adopt whatever position they wish, and if as a result the dispute is not settled, that is not a matter for the court. As is submitted by the Law Society, if the integrity and confidentiality of the process is to be respected, the court should not know, and therefore should not investigate, why the process did not result in agreement.

⁸²⁴ This approach is consistent with the author's view expressed below in respect of the approach that the South African legislature should take in striking the necessary balance when promulgating a process that adequately protects mediation confidentiality.

⁸²⁵ See chapter 7 at 203 for a more detailed discussion of conduct, confidentiality and costs.

⁸²⁶ [2007] EWHC 1774 (Ch).

⁸²⁷ [2002] EWHC 2025 (Ch). See also the discussion by Tony Allen 'Does Mediation need further privilege? Thoughts on two recent cases', on the need for developing statutory guidelines in order to deal with such cases in future, available at www.cedr.com/index.php?location=/library/articles/20071029_222.htm (last visited 19 July 2008).

⁸²⁸ [2004] EWCA (Civ) 576, Dyson LJ at par 14.

It is important to note however, that neither of these cases involved a requirement by a judge to be informed of what went on during the respective mediations.

In the case of *Earl of Malmesbury v Strutt & Parker*⁸²⁹ the parties decided to waive privilege completely, seemingly for their own self interests. The judge held that as both parties were recalcitrant, one party's recalcitrance about mediating could not be used to gain a costs sanction benefit from another recalcitrant party's refusal to mediate. It has been suggested that it would be wise for parties not to waive privilege about what happened at a mediation unless they are sure they can benefit from it.⁸³⁰

In *Cumbria Waste Management Ltd and Lakeland Waste Management Ltd v Baines Wilson* [2008] EWHC 786 (QB)⁸³¹ the court had to decide whether disclosure of mediation documentation could be ordered against one party's wishes because of an exception to the without prejudice privilege and whether the confidentiality provisions of the agreement to mediate precluded disclosure where one of the parties did not consent. HHJ Kirkham found that on the basis of the without prejudice privilege and the contracted confidentiality between the parties, it would be wrong to order the disclosure of the mediation documents. In particular, she wanted mediators to be free to conduct mediations without fear that their notes might be disclosed to others, and saw this as an exception to the general rule that confidentiality is not a bar to disclosure of material to a court.

It has been remarked that this is a bold decision and reinforces the security of what goes on at mediations, and seems to suggest that the courts in England may be willing to find that there is a special mediation privilege worthy of judicial protection, because the parties and the mediator formally contract in writing to keep the mediation process confidential.⁸³²

⁸²⁹ [2008] EWHC 424 (QB).

⁸³⁰ See the discussion by Tony Allen 'Peering behind the veil of mediation confidentiality, a new judicial move in *Mulmesbury v Strutt and Parker*' available at www.cedr.com/index.php?location=/library/articles/20080421_234.htm (last visited 19 July 2008).

⁸³¹ [2008] EWHC 786 (QB). See the discussion by Tony Allen 'Mediation: protection by privilege and confidentiality? A review of *Cumbria Waste Management Ltd and Lakeland Waste Management Ltd v Baines Wilson*' available at www.cedr.co.uk/index.php?location=/library/articles/20080701_241.htm (last visited 19 July 2008).

⁸³² It has been suggested that the security of what goes on at mediations has been under investigation in recent decisions such as *Chantrey Vellacott v Convergence Group plc and others* [2007] EWHC 1774 (Ch) and *Earl of Malmesbury v Strutt & Parker* [2008] EWHC 424 (QB) discussed above. In these previous cases however, as noted, the parties opted to waive privilege so that the relevant judge could access information regarding the mediation. See the discussion by Tony Allen 'Mediation: protection by privilege and confidentiality? A review of *Cumbria Waste Management Ltd and Lakeland Waste Management Ltd v Baines Wilson*' available at www.cedr.co.uk/index.php?location=/library/articles/20080701_241.htm (last visited 19 July 2008).

Legal professional privilege

Legal professional privilege is a common law protection that covers documents and other communications that arise from legal proceedings or from giving or obtaining legal advice,⁸³³ so that clients and their lawyers can communicate openly, confidently and without fear of being forced to disclose their confidential communications.⁸³⁴ For a document to qualify for this privilege, the dominant purpose of the communications must have been to acquire legal advice,⁸³⁵ and a strong suggestion of any other equal or more dominant purpose will destroy a claim of privilege.⁸³⁶

It is subject to exceptions,⁸³⁷ for example, it does not apply where communications are made in order to pursue any illegal purpose,⁸³⁸ nor does it apply to any fact that reveals to a lawyer that a crime or fraud has been committed since the lawyer became involved. As it is intended to protect clients, a lawyer can disclose the communications with a client's express consent, and it can also be waived by a party making an intended or unintended disclosure,⁸³⁹ or if a client takes an action against his or her lawyer regarding advice.⁸⁴⁰

The privilege is applied in relation to judicial, administrative and other proceedings where people can be compelled to furnish information.⁸⁴¹ It has been suggested that communications created for the purpose of giving or obtaining legal advice would cover work prepared by lawyers for clients going into mediation,⁸⁴² and that public policy would also support this belief as it involves a broader concept of justice than litigation.⁸⁴³

⁸³³ E A L Lewis *Legal Ethics: A Guide to Professional Conduct for South African Attorneys* at 291 – 299; Hoffmann and Zeffertt (note 787) at 247 – 267 as cited by Boulle and Rycroft (note 231) at 244.

⁸³⁴ *S v Safatsa and others* 1988 (1) SA 868 (A), which approved the fundamental principle set out in the Australian case of *Baker v Campbell* (1983) 153 CLR 52 as cited by Boulle and Rycroft (note 231) at 244.

⁸³⁵ *Waugh v British Railways Board* [1980] AC 521, where the House of Lords rejected the High Court of Australia's 'sole use' test in *Grant v Downs* (1976) 135 CLR 674 in favour of Barwick CJ's approach in that case as cited by Boulle and Nesic (note 426) at 495.

⁸³⁶ Boulle and Nesic (note 426) at 495.

⁸³⁷ For example, *Derby & Co. Ltd v Weldon (No. 7)* [1190] 1 WLR 1156 as cited by Boulle and Nesic (note 426) at 495.

⁸³⁸ *R v Cox and Raitton* (1884) 14 QBD 153 as cited by Boulle and Nesic (note 426) at 495.

⁸³⁹ *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* (a firm) [1987] 2 All ER 716 as cited by Boulle and Nesic (note 426) at 495.

⁸⁴⁰ *Ridehaulgh v Horsefield* [1994] Ch 205 as cited by Boulle and Nesic (note 426) at 495.

⁸⁴¹ *Baker v Campbell* (1983) 153 CLR 52 as cited by Boulle and Nesic (note 426) at 495.

⁸⁴² F Crosbie (note 781) at 60 as cited by Boulle and Nesic (note 426) at 495.

⁸⁴³ Boulle and Rycroft (note 231) at 244.

As the privilege can be waived by a party voluntarily disclosing to a party on the other side,⁸⁴⁴ the issue arises as to whether a disclosure to a mediator of documents such as legal opinions, that would otherwise be privileged, amounts to a waiver in which case a party on the other side could demand production of the documents if the matter ultimately goes to trial.⁸⁴⁵ This would be problematic where an agreement to mediate provides that the mediator calls for documents from the parties. Boulle and Rycroft suggest that one could argue that the privilege is waived as the mediator is, for some purposes, the agent of each party, but they remark that this argument would be difficult to sustain.⁸⁴⁶ They suggest that the better view, which would seem to be supported by public policy, is that parties make disclosures to mediators for the limited purpose of assisting them in the negotiations and this is not a waiver, as otherwise the confidentiality for both parties would be removed and mediators would be placed in impossible positions.⁸⁴⁷

A privilege for mediation or mediators

The common law currently extends the without prejudice privilege only to the parties in the mediation⁸⁴⁸ and the process enjoys no protection, unless provided by statute, over and above the other common-law privileges.⁸⁴⁹ At common law there is no specific privilege for mediators, nor is there any authority for extending the ‘without prejudice’ privilege to mediators.⁸⁵⁰ The traditional view seems to be that mediators do not have sufficient interest to warrant this protection, so that where there is no statutory or contractual protection, mediators are compellable witnesses.⁸⁵¹

⁸⁴⁴ Cf *Watts v Goodman* 1929 WLD 199 as cited by Boulle and Rycroft (note 231) at 244.

⁸⁴⁵ Boulle and Rycroft (note 231) at 244.

⁸⁴⁶ Boulle and Rycroft (note 231) at 244.

⁸⁴⁷ Boulle and Rycroft (note 231) at 244.

⁸⁴⁸ See Brown and Marriott (note 750) at 497-498 as cited by Boulle (note 263) at 549.

⁸⁴⁹ Boulle (note 263) at 549.

⁸⁵⁰ Boulle and Rycroft refer to Helen Garner’s book *The First Stone: some questions about sex and power*, where the author refers to a conciliator involved in an allegation of sexual harassment, who gave evidence after being subpoenaed in a criminal trial without the issue of privilege being raised. See Boulle and Rycroft (note 231) at 245.

⁸⁵¹ Boulle and Nesic (note 426) at 497. The recent English case *Earl of Malmesbury v Strutt & Parker* [2008] EWHC 424 (QB) discussed above, where both parties waived privilege, confirms that the confidentiality of the process belongs to the parties and not to either the mediator or the mediation process. See also Tony Allen ‘Peering behind the veil of mediation confidentiality, a new judicial move in *Mulmesbury v Strutt and Parker*’ available at www.cedr.com/index.php?location=/library/articles/20080421_234.htm (last visited 19 July 2008).

It seems however, that existing categories could be extended by applying the policies underlying other privileges to mediators,⁸⁵² which would also avoid credibility conflicts between parties and mediators.⁸⁵³ The public interest rationale has been used by US courts to permit a mediator to object to testifying⁸⁵⁴ and US commentators have claimed that this approach is essential if mediation is to function properly.⁸⁵⁵ In the event that the privilege is extended to mediators, the consent of both the mediator and the parties would be required in order to waive the privilege.⁸⁵⁶

A wider issue relates to a possible privilege covering the whole mediation process which would encourage a candid flow of information in a mediation.⁸⁵⁷ It has been suggested that developments in relation to the public interest privilege,⁸⁵⁸ which excludes otherwise relevant evidence from being admitted in court proceedings if the disclosure would prejudice or damage the public interest, could have implications for mediation.⁸⁵⁹ In England this privilege traditionally covered national security matters or the proper running of government at the highest level, but the privilege has been extended to other matters of government where there has been a public interest in

⁸⁵² See the statement of policy in the English case *Rush and Tomkins v Greater London Council* [1988] 3 All ER 737, 739 as cited by Boule and Nestic (note 426) at 498.

⁸⁵³ *Brown and Marriott* (note 750) at 497-498 as cited by Boule (note 263) at 549.

⁸⁵⁴ For example, *NLRB v Macaluso* 618 F 2d 51 (9th Cir 1980) as cited by Boule and Nestic (note 426) at 498.

⁸⁵⁵ J McCrory 'Confidentiality in Mediation of Matrimonial Disputes' (1988) 51 *MLR* 442 as cited by Boule and Nestic (note 426) at 498.

⁸⁵⁶ Boule and Nestic (note 426) at 498.

⁸⁵⁷ W D Brazil 'Protecting the Confidentiality of Settlement Negotiations' (1988) 39 *Hastings Law Journal* 1955; and M L Prigoff 'Toward Candour or Chaos: the Case of Confidentiality in Mediation' (1988) *Seton Hall Legislative Journal* 1 as cited by Boule and Nestic (note 426) at 498. In the recent English case *Brown v Rice* [2007] EWHC 625 (Ch) discussed above, the sitting deputy High Court Judge acknowledged that while the case could be decided on the existing without prejudice rule, 'it may be in the future that the existence of a distinct mediation privilege will require to be considered by either the legislature or the courts,' Stuart Isaacs QC at par 20. See also the comments above regarding the English case of *Cumbria Waste Management Ltd and Lakeland Waste Management Ltd v Baines Wilson* [2008] EWHC 786 (QB), in particular the suggestion that the English courts may be willing to find a special mediation privilege worthy of judicial protection. In the UK, as with the rest of the EU (except Denmark), the Directive on Certain Aspects of Mediation in Civil and Commercial Matters will have implications for mediation confidentiality. Under Article 7 member states are required to ensure that unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process will be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of, or in connection with a mediation process. Exceptions include circumstances where the information is required to implement or enforce a mediated settlement or where there are overriding reasons of public policy such as child protection or personal harm.

⁸⁵⁸ Technically, it is an immunity rather than a privilege, that cannot be waived by the parties as it is public-interest based. See Boule and Nestic (note 426) at 499.

⁸⁵⁹ Boule and Nestic (note 426) at 499.

suppressing information that outweighs the public interest in disclosing it,⁸⁶⁰ and the categories of this privilege are not closed and can change over time.⁸⁶¹

The logic for adopting a mediation privilege across the USA is that public confidence in and voluntary use of mediation will increase if exchanges made in mediation between parties are not used subsequently against them.⁸⁶² Privilege rules must be tailored according to the particular type of mediation being protected and the public interest in protecting it.⁸⁶³

Testimony by the mediator

Confidentiality in the form of a privilege rather than an absolute rule can be waived by the individuals that would otherwise benefit from it.⁸⁶⁴ Mediator codes of conduct do not generally prevent mediators testifying under legal compulsion, and some require that a mediator inform the parties where the mediator is subpoenaed or otherwise compelled to testify about a mediation in court proceedings.⁸⁶⁵

The testimony of mediators and the specific importance of mediator confidentiality have been reviewed by the courts in the USA.⁸⁶⁶ One court, when refusing to admit mediator testimony into evidence remarked that ‘[i]t is a challenge to posit a more poisonous means to weaken the promise of confidentiality our public policy regards as critical to the effectiveness of mediation than authorising the use of a mediator as an opinion witness against a mediating party.’⁸⁶⁷

Another court summarised the necessity of mediator confidentiality by stating:

[I]f mediation confidentiality is important, the appearance of mediator impartiality is imperative. A mediator, although neutral, often takes an active role in promoting candid dialogue by identifying issues and encouraging parties

⁸⁶⁰ See C Tapper *Cross and Tapper in Evidence* at 472-509 as cited by Boule and Nestic (note 426) at 499.

⁸⁶¹ Boule and Nestic (note 426) at 499.

⁸⁶² Boule and Nestic (note 426) at 499.

⁸⁶³ K Gibson ‘Confidentiality in Mediation: A Moral Re-assessment’ (1992) *Journal of Dispute Resolution* 25 at 43; and A Kirtley ‘The Mediation Privilege: Transformation from Theory to Implementation - Designing a Mediation Privilege to Protect Mediation Participants, the Process and the Public Interest’ (1995) *Journal of Dispute Resolution* 1 at 8-10 and 16-18 as cited by Boule and Nestic (note 426) at 499.

⁸⁶⁴ Boule (note 263) at 564-565.

⁸⁶⁵ Queensland Law Society Guidelines for Mediators, section 4.3. This would give them an opportunity to try to quash the proceedings, as cited by Boule (note 263) at 565.

⁸⁶⁶ Sussman (note 613) at 36.

⁸⁶⁷ *Princeton Insurance Co v Vergano* 883 A 2d 44, 66 (Del Ch 2005). See also Sussman (note 613) at 36.

to accommodate each others interests To perform that function, a mediator must be able to instill the trust and confidence of the participants in the mediation process. That confidence is ensured if the participants trust that information conveyed to the mediator will remain in confidence. Neutrality is the essence of the mediation process. Thus courts should be especially wary of mediator testimony because no matter how carefully presented, it will inevitably be characterised so as to favour one side or the other.⁸⁶⁸

While these recent US decisions, based on governing rules and statutes, reflect the approach of the judiciary in refusing to admit mediator testimony, many courts have admitted such evidence, relied greatly on mediator testimony,⁸⁶⁹ and used the mediator to determine the credibility between the conflicting testimonies of two parties.⁸⁷⁰ From the court's perspective such court ordered intervention is unsurprising, given that the mediator is often the person in the best position to give the court an unbiased view of what transpired at the mediation.⁸⁷¹

For example, the mediator can confirm whether:⁸⁷²

- it was the intention of the parties to be bound by the settlement agreement or whether they anticipated further negotiations in order to complete the terms of the agreement;
- terms that may appear ambiguous on the face of a memorandum of understanding prepared under pressured circumstances during a mediation were actually discussed and agreed between the parties;
- anything coercive occurred regarding a party;
- the misrepresentations alleged actually occurred; and
- a party was unwell to the extent that it was impossible for him or her to make a competent decision regarding settlement.

While there is little doubt that the mediator's testimony is likely in some cases to be helpful, it has been remarked that when it is balanced against the importance of

⁸⁶⁸ *Lehr v Afflito* 889 A 2d 462, 474-5 (NJ Super .D 2006). See also Sussman (note 613) at 36.

⁸⁶⁹ *Claridge House One Condominium Ass'n v Beach Plum Properties* 2006 WL 290439 (NJ Super AD 2006); *White v Fleet Bank of Maine* 875 A 2d 680 (Me 680); *Barnebei v St Paul Fire & Marine Ins Co* 2005 WL 351754 (Ohio App 5 Dist 2005); *Chantey Music Publishing Inc v Malaco, Inc* 915 So 2d 1052, 1055 (Miss 2005). See also Sussman (note 613) at 36.

⁸⁷⁰ *Standard Steel LLC v Buckeye Energy Inc* 2005 WL 2403636 (WD Pa 2005). See also Sussman (note 613) at 36.

⁸⁷¹ See Sussman (note 613) at 36.

⁸⁷² Sussman (note 613) at 36.

confidentiality and measured in light of the availability of evidence from other sources, the balance will often favour mediation confidentiality.⁸⁷³

The evidence of mediators has proved crucial in Australia however, where one party in a mediation rejected allegations of misleading and deceptive conduct and unconscionability by another.⁸⁷⁴ In *NAB v Freeman*, where there were conflicting views about what happened during the mediation, Ambrose J placed ‘considerable weight’ on the mediator’s evidence.⁸⁷⁵ There are understandably serious reservations about the trend toward mediator testimony and it has been suggested that practical precautions should be taken against this eventuality.⁸⁷⁶ While mediation agreements can provide that the parties will not call the mediator or that he cannot act as a witness in any action over matters in dispute following the mediation, despite the existence of such an agreement, an Australian court subpoenaed a mediator to testify in court.⁸⁷⁷ In *Bezant v Ushers Brewer*, an English district judge adopted the opposite approach.⁸⁷⁸ In Belgium, Sweden and Italy, lawyers who acted as mediators can invoke confidentiality provisions in subsequent litigation while in Germany, an agreement between the parties not to call the mediator as a witness will be upheld in civil courts and in arbitrations.⁸⁷⁹

In the Australian case of *Knight v Truss-Michaelis and Truss-Michaelis*⁸⁸⁰ the mediator had specified to the parties when the mediation started that his notes would not be made available to them. Despite this, the plaintiff applied for an order that the Legal Aid Office of Queensland provide for inspection all books, records, files and notes that it possessed regarding the mediation that it hosted.⁸⁸¹ The plaintiff argued that a compromise was reached in the mediation and that the documents would have to be accessed in order to confirm the fact and terms of this compromise on which the plaintiff wanted to sue. Pratt DCJ granted the order, acknowledging that disclosure

⁸⁷³ Sussman (note 613) at 36.

⁸⁷⁴ *National Australia Bank v Freeman* [2000] QSC 295 (11 October 2000). Reliance was also placed on the evidence of the parties, as cited by Boule (note 263) at 565.

⁸⁷⁵ *National Australia Bank v Freeman* [2000] QSC 295 (11 October 2000). See also D Spencer ‘Capacity to Enter a Deed of Mediation’ (2001) 12 *ADRJ* 209 as cited by Boule (note 263) at 565.

⁸⁷⁶ See J Rothfield ‘A Mediator’s Nightmare: Giving Evidence in Court about what happened in Mediation’ (2003) 5 (9) *ADR Bulletin* 157 as cited by Boule (note 263) at 566.

⁸⁷⁷ *Commonwealth Bank of Australia v McDonnell* (24 July 1997, unreported) New South Wales Supreme Court (Rolfe J) as cited by Boule and Nesic (note 426) at 498.

⁸⁷⁸ Bristol County Court, Stuart Brown DJ, 1997 as cited by Boule and Nesic (note 426) at 498.

⁸⁷⁹ Boule and Nesic (note 426) at 498.

⁸⁸⁰ District Court of Queensland, Pratt DCJ, 14 April 1993, unreported. See G Clarke, M Shirley and B Rogers, ‘Dispute Resolution’ (1993-1994) *Queensland Annual Law Review* 78-9 as cited by Boule and Nesic (note 426) at 499.

⁸⁸¹ Boule and Nesic (note 426) at 498.

would fundamentally affect the mediation system, but that in this case it was essential to use the evidence to explain the intention of the parties regarding the compromise.⁸⁸² As previously mentioned and similar to the approach adopted by CEDR in the UK, in order to avoid the impact of this approach the agreement to mediate should condition a provision that any agreement reached will only be enforceable when it is reduced to writing and signed by the parties.⁸⁸³

A duty to report

One piece of South African legislation that has potential implications for mediators assisting parties in commercial disputes is the Financial Intelligence Centre Act 2001.⁸⁸⁴ The act provides⁸⁸⁵ that a person who is employed by a business and knows or suspects that the business has received or is about to receive the proceeds of unlawful activities, is involved in the transfer of the proceeds of unlawful activities, has no apparent business or lawful purpose, is conducted for the purpose of avoiding a potential reporting duty under the act or may be relevant to the investigation of issues such as tax evasion, or where the business is or has been used for money laundering purposes, that person must report that fact to the Financial Services Centre. There is a further requirement that when a report is made, the person who is making the report cannot disclose the fact of the report to the person about whom the report is being made.⁸⁸⁶

Reporting under the act is obligatory unless there is a common-law right to legal professional privilege as between an attorney and the attorney's client.⁸⁸⁷ While lawyers will most likely be covered by privilege, information that comes into the possession of mediators is not subject to legal professional privilege. Consequently there would be an obligation on mediators to make a report under the act in appropriate circumstances.

This places a mediator in a conundrum, and runs directly to the issue of trust between the mediator and the parties. In order to avoid running into difficulties with the obligation to report under the act, a mediator might be tempted to inform the parties

⁸⁸² Boulle and Nestic (note 426) at 498.

⁸⁸³ See G Clarke, M Shirley and B Rogers 'Dispute Resolution' (1993-1994) *Queensland Annual Law Review* 78-9; Scott Pettersson 'To Keep or Not to Keep, is That Really the Question?' (2004) 6 (9) *ADRB* 177; Lancken (note 781) as cited by Boulle and Nestic (note 426) at 499.

⁸⁸⁴ The Act established the Financial Intelligence Centre with the aim of identifying the proceeds of unlawful activities and in order to combat money laundering activities.

⁸⁸⁵ Section 29(1).

⁸⁸⁶ Section 29(3).

⁸⁸⁷ Section 37.

before a mediation commences of his or her reporting obligations. This is likely to result in the parties being less than open in their discussions. It seems unjust to impose an obligation on a mediator to report while the parties' legal representatives are exempt from such an obligation. It is submitted that the exemption afforded attorneys under the act should be extended to mediators when assisting parties in resolving commercial disputes.

Contract

The oldest way of trying to protect mediation information is where the parties and the mediator, together with any other participants, enter into a confidentiality agreement in which each party undertakes to keep information disclosed in the mediation confidential, and not to testify in later arbitral or judicial proceedings.⁸⁸⁸ While these provisions have not yet been considered by South African courts, the traditional view seems to be that public policy favours the enforcement of confidentiality clauses in agreements.⁸⁸⁹ These clauses seem to provide much broader scope than common-law privileges, but some of the limitations on the common-law privileges are likely to be imposed on confidentiality clauses where they are not provided for in the agreement to mediate, and it seems that there would also be limitations on the types of remedies for breaching such undertakings.⁸⁹⁰

While confidentiality agreements are persuasive as to the parties' intentions, courts may not necessarily uphold such agreements. The confidentiality provision is frequently weakened by an exception covering the eventuality that a party is obliged by law or by a court to reveal such information in court proceedings, but even without this exception, a contractual duty to keep mediation information confidential is likely to encounter difficulties in the United States,⁸⁹¹ and in other jurisdictions such as South Africa.

The difficulty with relying on a contractual confidentiality provision, is that it can prove to be unenforceable as against the public policy that courts are entitled to every person's evidence, and even where such a provision may succeed in a subsequent

⁸⁸⁸ Van Ginkel (note 786) at 48.

⁸⁸⁹ Crosbie (note 781) at 70 as cited by Boule and Rycroft (note 231) at 246.

⁸⁹⁰ See Boule and Rycroft (note 231) at 246.

⁸⁹¹ Van Ginkel (note 786) at 48.

proceeding between the parties, it is less likely to be respected in proceedings involving third parties.⁸⁹²

Nonetheless, in the absence of a statute, an agreement may be the only way that the parties can attempt to protect their right to mediation confidentiality. In Ontario, for example, there is no statute to protect mediation confidentiality,⁸⁹³ and this issue was raised in 2004 when *Rudd v Trossacs Investments Inc*⁸⁹⁴ came before the Ontario Superior Court of Justice. The plaintiffs were seeking an interim order requiring the mediator to give evidence regarding events at a mediation, including the terms of the settlement reached. The Plaintiffs claimed that the record of the settlement, which was handwritten by the mediator with the assistance of counsel and executed at the mediation, inadvertently excluded Morris Kaiser ('Kaiser') as a party to the settlement. The defendants denied that Kaiser was a party to the settlement agreement.

The court referred to the mediation agreement which contained the following confidentiality provision:

The parties agree that all communications and documents shared, which are not otherwise discoverable, shall be without prejudice and shall be kept confidential as against the outside world, and shall not be used in discovery, cross-examination, at trial, in this or any other proceeding, or in any other way. ... The mediator's notes and recollections cannot be subpoenaed (sic) in this or any other proceeding.⁸⁹⁵

Interestingly, Lederman J went on to say:

Having said that, since privilege and confidentiality are critical to the success of the mediation process, they should not be lightly disturbed. Some evidence must be adduced on the motion to demonstrate that the mediator's evidence is likely to be probative to the issue and that the benefit gained by the disclosure for the correct disposal of the litigation will be greater than any injury to the mediation process by the disclosure of discussions that took place.⁸⁹⁶

Despite such remarks, Lederman J believed that the mediator was in a position to provide important information as to whether the record of the settlement as executed was inconsistent with any prior or oral agreement between the parties. He ordered that

⁸⁹² See Kirtley (note 863) at 10-11. See also Van Ginkel (note 783) for a discussion on the experience in the USA.

⁸⁹³ Paul Jacobs 'Confidentiality in Mediation – Right or Risk' IBA Legal Practice Division *Mediation Committee Newsletter* August 2005 at 15.

⁸⁹⁴ *Rudd v Trossacs Investments Inc.* (2004), 72 O.R. (3d) 62 (Ont. S.C.J.). See also Jacobs (note 893) at 16.

⁸⁹⁵ (2004), 72 O.R. (3d) 62 (Ont. S.C.J.) at par 16. See also Jacobs (note 893) at 16.

⁸⁹⁶ (2004), 72 O.R. (3d) 62 (Ont. S.C.J.) at par 20. See also Jacobs (note 893) at 16.

the mediator be examined as a witness with questions being limited to his knowledge and understanding, if any, as to whether Kaiser was or was not a party to the mediated settlement agreement.⁸⁹⁷

Leave to appeal this decision was sought at the Divisional Court, and on 7 March 2005 the court permitted the Ontario Bar Association leave to intervene, and permitted leave to appeal the decision of Lederman J. Howden J wrote that '[i]t is desirable that leave be granted because any added exceptions to the confidentiality principle in mediation will arise again, and as compelling testimony by order is per se an interlocutory matter there is no other way for the issue to be determined.'⁸⁹⁸

He went on to say that he had doubts about whether the earlier decision was the correct one, 'because it requires a mediator to in effect cast a tie-breaking vote in a case where he wrote the agreement during the latter stages of the mediation session with input from counsel'.⁸⁹⁹ Howden J added: 'The public importance of this (as the first decision re: exception to mediation confidentiality known to counsel who appeared before me) issue in respect of the expectation and significance of confidentiality in ... mediation is, I think, self evident.'⁹⁰⁰

It has been pointed out that it was important that Howden J recognised that a mediator ordered to testify would essentially become a witness against one party regardless of what he said, which would run contrary to the neutrality concept that should apply to every mediator. The earlier decision also seems to disrespect the parties' agreement despite the judge's recognition that it was in place.⁹⁰¹ When a jurisdiction has no statute and no rule governing mediation confidentiality, it is critical to have good case law, and on 9 March 2006 the appeal was allowed. Subject to issues such as fraud or other criminal situations, the court emphasised that confidentiality is necessary in order for mediation to be successful.⁹⁰²

This case illustrated the importance of having a confidentiality clause in a mediated settlement agreement, and while there was nothing wrong with the clause in

⁸⁹⁷ See also Jacobs (note 893) at 16.

⁸⁹⁸ (2004), 72 O.R. (3d) 62 (Ont. S.C.J.) at par 3. See also Jacobs (note 893) at 16.

⁸⁹⁹ (2004), 72 O.R. (3d) 62 (Ont. S.C.J.) at par 3. See also Jacobs (note 893) at 16.

⁹⁰⁰ (2004), 72 O.R. (3d) 62 (Ont. S.C.J.) at par 5. See also Jacobs (note 893) at 17.

⁹⁰¹ See Jacobs (note 893) at 17.

⁹⁰² Paul Jacobs 'Confidentiality in Mediation According to the Divisional Court of Appeal' IBA Legal Practice Division *Mediation Committee Newsletter* September 2006 at 17.

this case, the first judge did not consider it as important as the public interest in substantive justice, while the court on appeal clearly disagreed.⁹⁰³

The English courts have gone even further in protecting confidentiality clauses in contracts. In *David Instance v Denny Bros Printing Limited*⁹⁰⁴ the agreement to mediate contained an express confidentiality provision, and the parties attempted unsuccessfully to mediate their dispute. A confidential letter written by the claimant prior to but in connection with the mediation was subsequently attached as an exhibit to an affidavit in proceedings between the parties. The claimant sought an injunction to restrain the use of that letter and of other material produced in connection with the mediation. Lloyd J granted the injunction, remarking that the confidentiality provision in the agreement was wide enough to cover not only material written after the agreement to mediate had been made, but also material relating to the mediation which had been created before the agreement to mediate was formally made.

It has been suggested that the terms of an agreement to mediate or confidentiality agreement between the mediator and the parties should clearly elucidate the intentions of the parties regarding confidentiality and in particular, specify:⁹⁰⁵

- the elements of the process that the confidentiality obligation covers;
- the type of information that the confidentiality provision covers;
- the individuals that can claim confidentiality and the individuals against whom confidentiality can be claimed;
- the exceptions (if any) to confidentiality; and
- the mediator's obligations during and after the mediation regarding information received in confidence during the process.

Mediation rules

The duty of confidentiality can also result from the rules established by the organisation under which the mediation takes place.⁹⁰⁶ For example, mediation confidentiality for

⁹⁰³ See Jacobs (note 893) at 17.

⁹⁰⁴ [1999] Court of Appeal FSR 869.

⁹⁰⁵ Boule and Nesic (note 426) at 500-501.

⁹⁰⁶ WIPO Arbitration and Mediation Rules of 1 October 2002, available at www.arbiter.wipo.int/amc/en (last visited 15 July 2008). See also Fiechter (note 725) at 45. Mediation Rules:

‘Art 15: Each person involved in the mediation, including, in particular, the mediator, the parties and their representatives and advisors, any independent experts and any other persons present during the meetings of the parties with the mediator, shall respect the confidentiality of the mediation and may not, unless

mediations conducted in England by members of the legal profession can be derived from the rules governing ‘privileged communications’ laid down by the Law Society of England and Wales.⁹⁰⁷ In other jurisdictions, a solemn oath may elucidate the obligations towards and the protection offered by confidentiality.⁹⁰⁸

Exclusion by an influential professional or mediation organisation may in practice have a deterrent effect that is equal to, or even greater than, a limited monetary fine, and the damage caused to a party by unlawful disclosure can only be contained by appropriate procedural provisions in the proceedings following an unsuccessful mediation, for example, by having the judge or the arbitrator exclude such evidence from the subsequent proceedings.⁹⁰⁹ It has also been pointed out that this serves as a reminder of the fact that the benefits, as well as the risks of the process cannot be assessed without taking into account the legal framework within which the dispute will have to be resolved in case the mediation fails.⁹¹⁰

Equitable remedy for breach of confidence

Where contract does not provide a practical or effective remedy, equity⁹¹¹ may be exercised by a court in granting relief against an actual or a threatened abuse of

otherwise agreed by the parties and the mediator, use or disclose to any outside party any information concerning, or obtained in the course of, the mediation. Each such person shall sign an appropriate confidentiality undertaking prior to taking part in the mediation.

Art 17: Unless otherwise agreed by the parties, the mediator and the parties shall not introduce as evidence or in any manner whatsoever in any judicial or arbitration proceeding:

- (i) any views expressed or suggestions made by a party with respect to a possible settlement of the dispute;
- (ii) any admissions made by a party in the course of the mediation;
- (iii) any proposals made or views expressed by the mediator;
- (iv) the fact that a party had or had not indicated willingness to accept any proposal for settlement made by the mediator or by the other party.’

⁹⁰⁷ Stephen D York *Practical ADR* at 67 and 69. See also Fiechter (note 725) at 45.

⁹⁰⁸ Geneva Oath, which is declared by approved mediators before the Geneva Government:

‘I swear or I solemnly promise:

To practice mediation with respect for the law, with honour, competence and humanity, to safeguard the independence that is inherent to mediation, not to exert any pressure on the parties in a dispute in order to obtain their consent to a settlement agreement that would not have been freely negotiated, to watch out that the persons in a dispute enter into a settlement agreement that has been freely consented to and thought through, not to interfere in any way whatsoever with the civil proceedings once the mediation process is terminated, *to preserve the secret nature of mediation*’ (emphasis added). See also Fiechter (note 725) at 46.

⁹⁰⁹ See Fiechter (note 725) at 46.

⁹¹⁰ See Fiechter (note 725) at 46.

⁹¹¹ As noted in chapter 1 at 10, South African law does not make the law/equity distinction; consequently, if such equitable remedies are to be adopted in South Africa, they would require slight modification.

confidential information.⁹¹² Protection exists in the form of an equitable remedy where individuals who receive information in confidence make unauthorised use of it, provided the following criteria are satisfied:⁹¹³

- the information to be protected has the required quality of confidence about it;
- that information was communicated in a context requiring an obligation of confidence;
- the information was used in an authorised way to the detriment of the party who originally communicated it; and
- there is actual or potential detriment where the claimant is a private individual.

As a result of the special relationship that exists between a mediator and disputing parties, it has been suggested that a court of equity could protect confidential communications that are disclosed without authorisation.⁹¹⁴ It could be argued that mediators receive confidential information on the limited basis that it is used to assist them in performing their functions effectively, with a breach of confidence occurring where mediators use the information for purposes other than assisting the mediation, or where they disclose it to a third party without authorisation.⁹¹⁵ Where there is a breach, the affected party could seek injunctive relief, and if the mediator's use of the information was for their own benefit, restitution of any profits acquired could be ordered with damages also being ordered where appropriate.⁹¹⁶ A mediator may have a public interest defence where the information disclosed relates to complicity in fraud or criminal activity by a party.⁹¹⁷ However, as Boule points out, where other safeguards

⁹¹² *Saltman Engineering Co Ltd v Campbell Engineering Co* [1963] 3 All ER 413n; and *Fraser v Thames Television Ltd* [1984] QB 44 as cited by Boule and Nestic (note 426) at 501. See also Boule (note 263) at 552.

⁹¹³ *Coco v A N Clark (Engineers)* [1969] RPC 41; and *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 as cited by Boule and Nestic (note 426) at 501.

⁹¹⁴ Boule (note 263) at 552.

⁹¹⁵ Boule and Nestic (note 426) at 501.

⁹¹⁶ Boule and Nestic (note 426) at 501.

⁹¹⁷ *Initial Services Ltd v Putterill* [1968] 1 QB 396; and *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408 as cited by Boule and Nestic (note 426) at 501-2.

are available, equity is not likely to be a prominent means of protecting mediation confidentiality.⁹¹⁸

Confidentiality and conflict of interests

The structural circumstances of a mediation can provide opportunities for communications that undermine the confidentiality principle.⁹¹⁹ Contract, rules and the potential use of equity can give rise to issues for mediators in restraining their involvement where conflict of interest is of concern. The factually complicated Australian case of *Frank Stephen Wolf v Adelle Grivas*⁹²⁰ involved a custody hearing, and reveals one of the unintended consequences for lawyers of mediation confidentiality.⁹²¹ The solicitor for the father disclosed to the court that she had a vague recollection of having acted as a mediator ten months previously involving one of her client's witnesses, who was the ex-wife of the man that the mother in the current custody hearing was engaged to, and was to give evidence about the fiancé's (her former husband's) alleged behavioural problems with children, in support of the child's father's claim that their mother should not be granted custody.⁹²² The mother applied for the solicitor (and her barrister) to be restrained from further acting in the case.⁹²³

The court believed that the perceived risk of injustice to the mother if the father's solicitor continued to act was outweighed by factors if she was removed, such as the increased costs for the father, delay for both parties and the fact that any information gleaned from the previous mediation by the father's solicitor was already available to the father through his witness, and the fact that the solicitor undertook to leave the court when her client's witness or the witness's former husband gave evidence

⁹¹⁸ Boulle (note 263) at 552.

⁹¹⁹ See *Ruffles v Chilman & Hamilton* (unreported, 19 May 1997, LIB No 970246), cited by Boulle (note 263) at 566-567, where the full Supreme Court of Western Australia overturned a judge's decision where he had refused to disqualify himself from hearing a case that he had referred to mediation because the court-appointed deputy registrar communicated during a mediation that he believed that, having been in contact with the judge, the judge had adopted an adverse view of the plaintiff's evidence. See also *The Duke Group (in liq) v Alamain Investments Ltd* No SCCIV-02-1675 as cited by Boulle (note 263) at 567 where a judge recused himself from a case where he had acted as mediator nine years earlier in a different action between the parties.

⁹²⁰ ACT Family Court, Finn J, No CA 1440 of 1986, 11 August 1994, unreported as cited by Boulle and Rycroft (note 231) at 248.

⁹²¹ Boulle and Rycroft (note 231) at 248.

⁹²² Boulle and Rycroft (note 231) at 248.

⁹²³ Boulle and Rycroft (note 231) at 248.

and to refrain from discussing the evidence of either until the case was over.⁹²⁴ The solicitor was allowed to continue acting in the case, but the court emphasised that in circumstances such as these the mediator owed a duty of confidence to the witness and the witness's former husband and that it could restrain a lawyer who owed a duty of confidence under a mediation agreement from acting in a case that involved one or both parties to the mediation.⁹²⁵

Finn J expressed a broader concern about conflict of interest issues when he remarked that as solicitors and barristers become increasingly involved in mediation, there is an increased likelihood that problems such as the one in this case, will arise in future and that the professional bodies will need to consider putting in place procedures that avoid, as far as possible, situations arising that can undermine public confidence in the legal system or ADR procedures.⁹²⁶

Boulle remarks that there is also a concern that lawyers acting for a party in a mediation could acquire information that could be used against the other party in subsequent proceedings, and while this case related to conflict of interest issues facing lawyers in other contexts, the judge's remarks highlight one of the issues that will need to be addressed as mediation becomes more popular.⁹²⁷

The English case of *Prince Jefri Bolkiah v KPMG*⁹²⁸ confirmed that a solicitor in England can act against a former client, even where the solicitor's firm holds confidential information relating to the client, where the client consents or, if the client does not consent, where it can act consistently with its confidential obligations or other fiduciary duties owed to the client.⁹²⁹ The case developed the following principles:⁹³⁰

- the possibility of increased risk of disclosure or misuse of a former client's confidential information must be considered; and
- while the risk does not have to be substantial, it should be real, rather than fanciful or theoretical.

⁹²⁴ Boulle and Rycroft (note 231) at 248.

⁹²⁵ Boulle and Rycroft (note 231) at 248.

⁹²⁶ Boulle and Rycroft (note 231) at 248.

⁹²⁷ Boulle (note 263) at 568. See also *Williamson v Schmidt* [1998] 2 Qd R 317 as cited by Boulle (note 263) at 568.

⁹²⁸ [1999] 2 AC 222 as cited by Boulle and Nestic (note 426) at 504.

⁹²⁹ See also R S G Chester et al 'Conflicts of Interests, Chinese Walls and Changing of the Law' 2 January 2000 *Business Law International* at 35 as cited by Boulle and Nestic (note 426) at 505.

⁹³⁰ Boulle and Nestic (note 426) at 504.

With regard to mediators, mediation agreements usually prohibit a mediator from acting for or against a party in relation to a dispute where the mediator received confidential information in the course of the mediation.⁹³¹ The Law Society of England & Wales Codes of Practice for Mediators provide that solicitor mediators should withdraw from a mediation where they have received confidential information regarding the dispute or the parties in the mediation from another source, or when confidential information relevant to another client is likely to be received in the course of the mediation.⁹³²

Statute

Statutory Privilege

Privilege and secrecy provisions are often used in statutes dealing with mediation to protect the confidentiality of the process and reinforce the common-law position, and sometimes extend it by providing increased protection for parties and broader obligations for mediators.⁹³³ Statutes generally provide that the process is confidential and that evidence of what is said or admitted in a mediation is inadmissible in any proceedings before any court, that documents prepared for the purposes of or in the course of a mediation are inadmissible⁹³⁴ and the statutory provisions usually contain exceptions to the general grant of privilege.⁹³⁵

⁹³¹ See, for example, The Law Society of England & Wales *Code of Practice for Civil/Commercial Mediation* as cited by Boule and Nestic (note 426) at 505.

⁹³² The Law Society of England & Wales *Guide to Professional Conduct of Solicitors* chapter 22 on ADR as cited by Boule and Nestic (note 426) at 505.

⁹³³ Boule (note 263) at 552.

⁹³⁴ Boule (note 263) at 552. See also Fiechter (note 725) at 47 and for example the Geneva Law on Civil Mediation No 8931 of 28 October 2004:

‘Art 161E – Confidentiality:

1 A civil mediator is obliged to keep secret all the facts he learned as a result of the mediation process and any actions he took, participated in, or witnessed; this obligation continues even after he ceases to act as a mediator.

2 Whatever the outcome of the mediation, neither party may avail itself, during the rest of the proceedings, of anything that was said before the civil mediator.

Art 161F – Testimony and Files:

1 A civil mediator may not be heard in any capacity whatsoever on facts that he learned of in the course of a mediation process or any actions he took, participated in, or witnessed.

2 The courts are not authorised to order discovery of the files of the civil mediator.’

⁹³⁵ Boule and Nestic (note 426) at 502.

While South African statutes provide confidentiality protection covering niche elements of areas such as employment⁹³⁶ and land,⁹³⁷ there is currently no statute that protects the commercial mediation process. The need to remedy the fact that there is no statutory protection in South African law afforded to mediators against a requirement to testify in court on issues raised during the course of mediation has been commented on for some time.⁹³⁸

The mediation confidentiality requirements of parties in civil proceedings are not always clearly detailed, and there are different penalties for breaching these duties in different jurisdictions.⁹³⁹ Sanctions and remedies to possible breaches are often beyond the reach of the organisations under which the mediation takes place, except for exclusion from their recommended mediator lists, which only applies to a breach of confidentiality by the mediator.⁹⁴⁰ In contrast, mediation that takes place under statutory provisions can include the full range of disciplinary and even penal sanctions,⁹⁴¹ as well

⁹³⁶ Section 126(3) of the Labour Relations Act 66 of 1995 provides that the Commission (defined under section 126(1) as (a) the governing body; (b) a member of the governing body; (c) the director; (d) a commissioner; (e) a staff member of the Commission; (f) a member of any committee established by the governing body; and (g) any person with whom the governing body has contracted to do work for, or in association with whom it performs a function of the Commission) may not disclose to any person or in any court any information, knowledge or document that it acquired on a confidential basis or without prejudice in the course of performing its functions except on the order of a court. This section anticipates an application to court by an interested party to compel disclosure of evidence which emerged in the course of a mediation. The Act gives no guidance to a court as to the circumstances under which disclosure should be ordered nor does it differentiate mediation from the other ADR processes which require less protection. See C F Christie (note 410) at 304.

⁹³⁷ Section 13(4) of the Restitution of Land Rights Act 22 of 1994 states that ‘all discussions taking place and all disclosures and submissions made during the mediation process shall be privileged, unless the parties agree to the contrary’. Christie suggests that even this requires further clarity because ‘privilege’ is a term of art with its ‘own logic and limitations’, and that the term ‘confidential’ should have been used. It has also been suggested that the reference to ‘parties’ could be made clearer by using the term ‘participants’ because people whose interests were affected but who were not parties, may have participated in a mediation, see C F Christie (note 410) at 303. The same formulation is reflected in section 22(5) of the Development Facilitation Act 67 of 1995 and section 36(3) of the Land Reform (Labour Tenants) Act 3 of 1996.

⁹³⁸ Nupen (note 22) at 49.

⁹³⁹ Fiechter (note 725) at 46.

⁹⁴⁰ See Fiechter (note 725) at 46.

⁹⁴¹ See Fiechter (note 725) at 46, and the Geneva Law on Civil Mediation as an example which provides: ‘Art 161H – Disciplinary Sanctions:

1. In case of non-compliance with the provisions set forth in the present Title or the standards of conduct that apply to them, mediators may be the object of disciplinary sanctions pronounced by the *Conseil d’Etat* following a preliminary recommendation from the committee.
2. Depending on the gravity of the circumstances, the sanctions shall be as follows:
 - a) a warning;
 - b) blame;
 - c) fine of up to CHF10,000;
 - d) deletion from the official list for up to one year;
 - e) permanent deletion from the official list.

as procedural sanctions against a party attempting to introduce non-authorised evidence.⁹⁴²

Confidentiality is reviewed below in respect of specific statutes in an effort to decipher the most appropriate statutory approach for South Africa. The Uniform Mediation Act, which is intended to have a nationwide impact across the USA, is reviewed first. The Texas Alternative Dispute Resolution Procedures Act is then discussed briefly before a more detailed discussion on the approach taken in the state of California in the form of the California Rules of Court and California's Evidence Code. An overview of the confidentiality provisions in the UNCITRAL Model Law on International Commercial Conciliation follows.

The Uniform Mediation Act and California's Rule of Evidence

Statutory protection is the solution adopted in efforts to protect mediation confidentiality by a large number of states in the USA, as well as the drafters of the Uniform Mediation Act ('UMA').⁹⁴³ With the growth of mediation, by 2001 there were over 2,500 separate state statutes or rules relating to mediation in the USA, and the UMA was adopted that year by the National Conference of Commissioners on Uniform State Laws to deal with the different provisions relating to mediation across the nation, with the principal purpose of assuring confidentiality and fostering uniformity.⁹⁴⁴

The adoption of the UMA will eventually assist in making mediation confidentiality more consistent across the USA. While the UMA is intended to create a baseline minimum confidentiality standard, it provides a mechanism for protecting the confidentiality of mediation, and specifies the limited exceptions where other policy considerations take priority.⁹⁴⁵

Privileges are common in the USA regarding confidential professional relationships, such as attorney-client and psychiatrist-and/or psychologist-patient.⁹⁴⁶ Privileges may be established by codes of ethics of a professional organisation or by

3. Possible sanctions for criminal malpractice are also possible, pursuant to article 37, subsection 1, number 54 of Geneva penal law dated September 20, 1941.'

⁹⁴² See Fiechter (note 725) at 46.

⁹⁴³ See Van Ginkel (note 783) note 213 and the accompanying text. See also Van Ginkel (note 786) at 48.

⁹⁴⁴ See Sussman (note 613) at 36.

⁹⁴⁵ Sussman (note 613) at 36.

⁹⁴⁶ Scott H Hughes 'The Uniform Mediation Act: To the Spoiled go the Privileges' (2001) 85 *Marquette Law Review* 9 at 24-26. See also Van Ginkel (note 786) at 48.

statute, and usually include both (a) a duty to keep information confidential and (b) an exemption from involuntary testimony.⁹⁴⁷

The mediator-disputant privilege is different from other privileges as the duty of confidentiality in the other professional relationships is imposed on the professional but not on the client, while the mediator-disputant privilege created by statutes such as the UMA is imposed on both the mediator and all other participants to the mediation.⁹⁴⁸ Similarly, the other privileges do not necessarily prevent a third party from trying to compel testimony on these issues, while the mediator-disputant privilege is absolute unless it is covered by an express waiver or exception. In addition, the other privileges do not prevent a client from making voluntary disclosures outside arbitral or judicial proceedings, whereas the mediator-disputant privilege created by statutes such as the UMA is intended to prohibit this.⁹⁴⁹

It has been suggested that approaching the confidentiality issue as an evidentiary privilege has the advantage that it can define with clarity:⁹⁵⁰

- the extent of the privilege regarding the mediation information and activities that are covered;
- the people that are burdened by the privilege;
- the subsequent proceedings in which the privilege will be applicable;
- the holders of the privilege, having the right to invoke or waive it and the extent to which they can; and
- the information that will be excepted from the privilege.

This approach has been adopted in sections 4, 5 and 6 of the UMA. Section 4⁹⁵¹ creates the privileges of the participants in the mediation, section 5⁹⁵² details who is

⁹⁴⁷ Hughes (note 946) at 25-34. See also Van Ginkel (note 786) at 48.

⁹⁴⁸ Hughes (note 946) at 33-4. See also Van Ginkel (note 786) at 48.

⁹⁴⁹ Hughes (note 946) at 33-4. See also Van Ginkel (note 786) at 48.

⁹⁵⁰ It has also been suggested that such a provision can account for the separate and possibly conflicting interests of mediation parties and the mediator in maintaining confidentiality, see Kirtley (note 865) at 19; Van Ginkel (note 783). See also Van Ginkel (note 786) at 48.

⁹⁵¹ Section 4

PRIVILEGE AGAINST DISCLOSURE; ADMISSIBILITY; DISCOVERY

(a) Except as otherwise provided in Section 6, a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Section 5.

(b) In a proceeding, the following privileges apply:

(1) A mediation party may refuse to disclose a mediation communication, and may prevent any other person from disclosing, a mediation communication.

(2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

permitted to waive the relevant privileges, and section 6⁹⁵³ provides the exceptions to the privileges.⁹⁵⁴

The UMA's chief purpose is to ensure that mediation communications remain confidential to make mediation a fairer, more effective and more attractive means to settle disputes.⁹⁵⁵ Many US states have refused to adopt the UMA despite its invitation

(3) A non-party participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the non-party participant.

(c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

⁹⁵² SECTION 5

WAIVER AND PRECLUSION OF PRIVILEGE

(a) A privilege under Section 4 may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and:

(4) in the case of the privilege of a mediator, it is expressly waived by the mediator; and

(5) in the case of the privilege of a non-party participant, it is expressly waived by the non-party participant.

(b) A person that discloses or makes representation about a mediation communication that prejudices another person in a proceeding is precluded from asserting a privilege under Section 4, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

(c) A person that intentionally uses a mediation to plan, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting a privilege under Section 4.

⁹⁵³ SECTION 6

EXCEPTIONS TO PRIVILEGE

(a) There is no privilege under Section 4 for a mediation communication that is:

(1) in an agreement evidenced by a record signed by all parties to the agreement;

(2) available to the public under [insert statutory reference to open records act] or made during a session of a mediation which is open, or is required by law to be open, to the public;

(3) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;

(4) intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity;

(5) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator;

(6) except as otherwise provided in subsection (c), sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, non-party participant, or representative of a party based on conduct occurring during a mediation; or

(7) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party, unless the [Alternative A: [State to insert, for example, child or adult protection] case is referred by a court to mediation and a public agency participates.]

[Alternative B: public agency participates in the [State to insert, for example, child or adult protection] mediation].

Section 6 (b) There is no privilege under Section 4 if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:

(1) a court proceeding involving a felony [or misdemeanour]; or

(2) except as otherwise provided in subsection (c), a proceeding to prove a claim to rescind or reform or a defence to avoid liability on a contract arising out of the mediation.

Section 6(c) A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection (a)(6) or (b)(2).

⁹⁵⁴ See Van Ginkel (note 786) at 49.

⁹⁵⁵ See Brian Shannon 'Confidentiality of Texas Mediations: Ruminations On Some Thorny Problems' at www.texasadr.org/umaconfid.pdf (last visited 11 March 2008) at 3.

to incorporate existing state laws, largely because existing state mediation laws, particularly those dealing with confidentiality, are already much stronger than the UMA's.⁹⁵⁶ For example, the UMA permits a party to disclose another party's mediation communications as long as the disclosure does not occur in subsequent court proceedings, while many states' confidentiality laws prohibit the disclosure of any mediation communications.⁹⁵⁷

Texas is one example of such a state, having enacted the Texas Alternative Dispute Resolution Procedures Act in 1987. Apart from certain narrow exceptions contained in the Act, the statute provides that any communication relating to the subject matter of any civil or criminal dispute made by a participant in a mediation, before or after judicial proceedings are issued, is confidential and cannot be used as evidence against the participant in any judicial or administrative proceeding.⁹⁵⁸ Similarly, any record made during a mediation is confidential, and the participants and mediator cannot be required to testify in any proceedings or be subject to any process that requires disclosure of confidential information relating to or arising out of the matter in dispute.⁹⁵⁹ The statute also explicitly places a duty on the mediator to 'at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute.'⁹⁶⁰ In an effort to avoid any possible ambiguity, the act goes on to provide that 'unless the parties agree otherwise, all matters, including the conduct and demeanour of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone.'⁹⁶¹ As one commentator remarked, the statute represented 'perhaps the broadest ADR confidentiality provision in the country.'⁹⁶²

California provides an interesting example of another state that has gone considerably further than the UMA in protecting mediation confidentiality. In California, the first form of confidentiality discussed above, where a party shares

⁹⁵⁶ See the ABA Section of Environment, Energy and Resource's webpage at www.abanet.org/enviro/committees/adr/uma.html (last visited 21 June 2007). For a more detailed discussion see also Shannon (note 955).

⁹⁵⁷ See generally Shannon (note 955).

⁹⁵⁸ Section 153.073(a). See also Shannon (note 955) at 1.

⁹⁵⁹ Section 154.073 (b). See also Shannon (note 955) at 2.

⁹⁶⁰ Section 154.053 (b). See also Shannon (note 955) at 2.

⁹⁶¹ Section 154.053 (c). See also Shannon (note 955) at 2.

⁹⁶² Edward F. Sherman 'Confidentiality in ADR Proceedings: Policy Issues Arising From the Texas Experience' (1997) 38 *South Texas Law Review* 541, 542 as cited by Shannon (note 955) at 2. For a discussion of the problematic interpretation of the confidentiality provisions and the case law arising under this legislation, see Shannon (note 955).

information with the mediator in caucus, is handled in California Rules of Court (CRC) 1620.4 (c),⁹⁶³ which, similar to many contemporary institutional rules,⁹⁶⁴ provides that the mediator keeps information that was revealed in caucus confidential unless the person sharing the information expressly consents to the mediator disclosing that information with the other participants in the mediation. The UMA does not have a corresponding provision.⁹⁶⁵

The second form of confidentiality, the general obligation on all participants not to disclose information to any third party, is covered in California by section 1119 (c) of the Evidence Code (EC), which provides that ‘[a]ll communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential’.⁹⁶⁶

The equivalent provision in the UMA, section 8, was inserted after extensive discussion regarding the usefulness of such a provision, and the reluctance of the Drafting Committee to adopt it is clear from the text.⁹⁶⁷ ‘Unless subject to the [insert statutory references to Open Meetings Act and Open Records Act], mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.’ This section effectively bars confidentiality of mediation

⁹⁶³ CRC Rule 1620.4 (c) provides:

‘[Confidentiality of separate communications; caucuses] If, after all the parties have agreed to participate in the mediation process and the mediator has agreed to mediate the case, a mediator speaks separately with one or more participants out of the presence of the other participants, the mediator must first discuss with all participants the mediator’s practice regarding confidentiality for separate communications with the participants. Except as required by law, a mediator must not disclose information revealed in confidence during such separate communications unless authorised to do so by the participant or participants who revealed the information.’ See also Van Ginkel (note 786) at 47.

⁹⁶⁴ For example the CPR Mediation Procedure art 3 (h) provides that ‘The mediator will not transmit information received in confidence from any party to any other party or any third party unless authorized to do so by the party transmitting the information, or unless ordered to do so by a court of competent jurisdiction.’ (available at www.cpradr.org/med_proced.asp?M=9.2.4#rules (last visited 21 June 2007)); the LCIA Mediation Procedure Art 5.3 provides that ‘Nothing which is communicated to the mediator in private during the course of the mediation shall be repeated to the other party or parties, without the express consent of the party making the communication’ (available at www.lcia.org/med/ (last visited 21 June 2007).) Most of the older mediation rules seem to provide the reverse, i.e. that the mediator can share information obtained in caucus from the other mediation participants unless the person revealing the information specifically requests that it be kept confidential. See, for example, Article 12 of the UNCITRAL Conciliation Rules (available at www.uncitral.org (last visited 21 June 2007)), which was adopted almost verbatim by the UNCITRAL Model Law on International Commercial Conciliation (available at www.uncitral.org (last visited 21 June 2007)). See generally, Van Ginkel (note 783) at 36-7. See also Van Ginkel (note 786) at 47.

⁹⁶⁵ Similarly, there is no corresponding provision in rules such as the ICC ADR Rules (available at www.iccwbo.org/drs/english/adr/pdf_documents/adr_rules.pdf (last visited 21 June 2007)), nor in the ICDR International Mediation Rules (available at www.adr.org/sp.asp?id=22090#M12 (last visited 21 June 2007)). See also Van Ginkel (note 786) at 47.

⁹⁶⁶ See Van Ginkel (note 786) at 47.

⁹⁶⁷ See Van Ginkel (note 786) at 47.

communications unless and to the extent that either (i) the parties have agreed to it, or (ii) another law or rule of the state provides otherwise, and the consent of the mediator is not required.⁹⁶⁸

Conversely, section 1119 (c) of the EC is at the other end of the spectrum as it provides for a broad duty of confidentiality, from which a departure can only be made under section 1122 (a) of the EC, which effectively requires the express written agreement of all parties and the mediator.⁹⁶⁹

California covers the third form of confidentiality in section 1119 (a) [for oral communications] and (b) [for writings], providing in principle that evidence of information disclosed in a mediation is inadmissible, both in pre-trial discovery and in arbitral and non-criminal judicial proceedings.⁹⁷⁰ Section 1120 (a) of the EC provides, the general exception, that '[e]vidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.'⁹⁷¹

In addition to the general exception contained in section 1120 (a), section 1119 (a) and 1119 (b) of the EC, by limiting the protection of mediation communications to non-criminal proceedings, the provision implicitly excludes criminal proceedings from

⁹⁶⁸ See Van Ginkel (note 786) at 47.

⁹⁶⁹ Section 1122 (a) of the EC reads as follows:

(a) A communication or a writing, as defined in Section 250, that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if either of the following conditions is satisfied:

(1) All persons *who conduct or otherwise participate* in the mediation expressly agree in writing, or orally in accordance with Section 1118, to disclosure of the communication, document, or writing.

(2) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with Section 1118, to its disclosure, *and* the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation,' (emphasis added). See also Van Ginkel (note 786) at 47.

⁹⁷⁰ Section 1119 (a) and 1119 (b) provides as follows:

'Except as otherwise provided in this chapter:

(a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.' See also Van Ginkel (note 786) at 48.

⁹⁷¹ See also Van Ginkel (note 786) at 48.

the inadmissibility rule.⁹⁷² In addition, section 1120 (b)⁹⁷³ provides specific exceptions to the exclusionary rule of section 1119 relating to (1) an agreement to mediate, (2) any agreement not to take a default or to extend time to act in a pending action, and (3) the fact that a particular mediator served or was otherwise involved in the mediation process, so that these three elements are admissible in any subsequent proceeding. The provisions of sections 1119 and 1120 are not mandatory, and can be waived by agreement among all participants in the mediation, including the mediator, by section 1122(a) of the EC.⁹⁷⁴

It has been pointed out that the difficulty created by this system is that the scope of each of the two provisions is uncertain, and it is easy to see that it may be difficult to distinguish between documents, photographs, etc that have been ‘prepared for the purpose of, in the course of, or pursuant to, a mediation’, and evidence otherwise admissible that ‘shall not become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation’.⁹⁷⁵

It was this problem that was fundamentally at the core of *Rojas v Superior Court*.⁹⁷⁶ In this case, the California Supreme Court overturned the ruling by the Court of Appeal which had devised an exception to mediation confidentiality in order to permit the plaintiffs in a subsequent proceeding to access documents that the trial court had held, as a non-appealable finding of fact, to have been prepared for the sole purpose of mediation. In reversing that ruling, the Supreme Court held that the confidentiality of mediation communications is absolute as it applies to evidence prepared for the sole and limited purpose of mediation, with the only exception being evidence that is expressly specified by statute.⁹⁷⁷

⁹⁷² See Van Ginkel (note 786) at 48.

⁹⁷³ Section 1120(b) reads:

- (b) This chapter does not limit any of the following:
 - (1) The admissibility of an agreement to mediate a dispute.
 - (2) The effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending civil action.
 - (3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute. See also Van Ginkel (note 786) at 48.

⁹⁷⁴ Section 1122 (a) applies equally to section 1119 (a) and 1119 (b) as it does to section 1119 (c). See also Van Ginkel (note 786) at 48.

⁹⁷⁵ See Van Ginkel (note 786) at 48.

⁹⁷⁶ *Rojas v Superior Court for the State of California, County of Los Angeles* 33 Cal 4th 407 (2004).

⁹⁷⁷ For an extensive discussion of the *Rojas* case, see Van Ginkel ‘Battle of Two Opposing Public Policies’ IBA Legal Practice Division *Mediation Committee Newsletter* April 2005 at 31.

Before embarking on a specific discussion of *Rojas*,⁹⁷⁸ three preceding cases that redefined the relationship between mediators and the courts warrant a mention. In *Olam v Congress Mortgage Company*,⁹⁷⁹ Federal Magistrate Wayne Brazil ordered a mediator to testify about whether an agreement signed in mediation was the product of duress or free will.⁹⁸⁰ The parties asked that the mediator testify and the judge assumed that the mediator would object, and ruled that even over such an objection, the mediation privilege was subordinate to the orderly administration of justice.⁹⁸¹

In *Rinaker v Superior Court*,⁹⁸² a juvenile accused of a crime had participated in an earlier mediation during which the juvenile allegedly made statements that would contradict critical testimony he offered at his juvenile proceeding.⁹⁸³ The trial judge ordered the mediator to testify, suggesting that the trial was criminal in nature. The California Court of Appeals held that the juvenile proceeding was like any other civil matter, but that mediation confidentiality was subordinate to the ‘constitutional right to effective impeachment.’⁹⁸⁴

In *Foxgate Homeowners’ Association v Bramalea California Inc.*,⁹⁸⁵ the court ordered mediation and the parties stipulated that the mediation would be a procedure in which experts would debate the merits of the claim. The plaintiff brought nine experts and the defendant arrived late and didn’t bring any. The mediation ended early and with no progress being made, and the mediator filed a report with the court indicating that the defendant had shown bad faith and should be sanctioned. The trial court acknowledged the mediator’s report, and awarded \$30,000 in damages. The defendant appealed and the appellate court ruled that the mediator’s report could be considered in a case involving sanctions without infringing unduly on mediation confidentiality.⁹⁸⁶ The California Supreme court took a different view and held that confidentiality was to be respected even in a sanctions case.⁹⁸⁷

⁹⁷⁸ 33 Cal 4th 407 (2004).

⁹⁷⁹ (1999) 68 F. Supp. 2d 1110 (N.D. Cal 1999). For a more detailed discussion of this case see chapter 5 at 126.

⁹⁸⁰ (1999) 68 F. Supp. 2d 1110 (N.D. Cal 1999) at 1113-1119.

⁹⁸¹ (1999) 68 F. Supp. 2d 1110 (N.D. Cal 1999) at 1132.

⁹⁸² (1998) 62 Cal. App. 4th 155.

⁹⁸³ (1998) 62 Cal. App. 4th 155 at 161.

⁹⁸⁴ (1998) 62 Cal. App. 4th 155 at 164.

⁹⁸⁵ (2001) 26 Cal. 4th 1, 25 P.3d 1117, 108 Cal. Rptr.2d 642.

⁹⁸⁶ (2000) 78 Cal. App. 4th 653.

⁹⁸⁷ (2001) 26 Cal. 4th 1, 25 P.3d 1117, 108 Cal. Rptr.2d 642 at 17.

As mentioned above, these three cases all preceded *Rojas*,⁹⁸⁸ which is the most recent example of a case that represents the dilemma that arises when the policy that requires parties to disclose all relevant evidence conflicts with the policy supporting mediation confidentiality. In this case, the policy of disclosure prevailed in the court of appeal while the policy of mediation confidentiality ultimately prevailed in the Supreme Court.⁹⁸⁹

The background to this case involved Julie Coffin and others who purchased a building complex in Los Angeles in 1994. In December 1996, they filed a construction defect action⁹⁹⁰ against the developers, contractors and subcontractors ('developers'), which included allegations that water leakage resulted from poor construction work, which caused the presence of toxic moulds and other microbes on the property.⁹⁹¹

The parties mediated the dispute and settled the underlying litigation in April 1999. As it was in both parties' interests to keep this evidence out of the hands of the tenants who might have been injured by the presence of toxic mould when living at the apartment complex,⁹⁹² they specifically agreed in their mediated settlement agreement that the defect reports, repair reports, and photographs for informational purposes were protected by sections 1119⁹⁹³ and 1152 (an exclusionary rule relating to negotiations in compromise of litigation) of the Evidence Code, and that such materials and information contained in them would not be published or disclosed in any way without the prior consent of Coffin or by court order.⁹⁹⁴

⁹⁸⁸ 33 Cal 4th 407 (2004).

⁹⁸⁹ See Van Ginkel (note 977) at 31.

⁹⁹⁰ *Coffin v KSF Holdings* Unreported, see Van Ginkel (note 977) at 32.

⁹⁹¹ 102 Cal App 4th 1062, 1067 (2002). See also Van Ginkel (note 977) at 32.

⁹⁹² See Max Factor III 'The Trouble with Foxgate and Rojas: When should Public Policy Interests Require that Mediation Confidentiality in California be Subject to Certain Common Sense Exceptions?' at mediate.com/articles/factorm1.cfm (last visited 16 July 2008). See also Van Ginkel (note 977) at 32.

⁹⁹³ The relevant part of section 1119 of the EC provides:

1119. *Written or oral communications during mediation process; admissibility.* Except as otherwise provided in this chapter:

- (a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any ... civil action ...
- (b) No writing, as defined in Section 250, that is prepared for the purpose of in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any ... civil action ...
- (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential. See also Van Ginkel (note 977) at 32.

⁹⁹⁴ In April 1997, Coffin had prepared a preliminary defect list identifying structural defects and mould infestation and in April 1998, began air-testing. Later that year one of the buildings at the complex was closed for abatement, including demolition and replacement of drywall and ceilings, and an application of

Four months later, in August 1999, Rojas and almost 200 other tenants (‘Rojas’) of the building complex, including children, commenced their action against Coffin and some of the contractors, alleging that the tenants were not aware of the building defects until April 1999, when the remedial work had commenced, and that Coffin and the developers colluded to conceal the defects and microbe infestation from them.⁹⁹⁵

At the hearing, the trial court indicated it was troubled by applying the mediation privilege⁹⁹⁶ to raw evidence, as the photographs were just fixed representations of the state of a place at a particular time, and that if there was no alternative way for the plaintiff to get the relevant evidence, the mediation privilege was not meant as a device to block such evidence. However, it felt bound by the statutory language and ruled that the materials were absolutely protected from discovery, despite the showing of necessity by Rojas.⁹⁹⁷

The Court of Appeal rejected Coffin’s reading of sections 1119 and 1120 that all materials introduced at the mediation, or prepared for the mediation, including those of a purely evidentiary nature, are incorporated within the scope of the privilege because they were ‘prepared for the purpose of, in the course of, or pursuant to’, the mediation. The court remarked that ‘such a reading would render section 1120 complete surplusage and foster the evils it is designed to prevent: namely, using mediation as a shield for otherwise admissible evidence.’⁹⁹⁸

The Court of Appeal found that non-derivative material such as raw test data, photographs and witness statements are not protected by section 1119, and to the extent that any of the materials sought are part of a compilation, it would have to be produced if it could be reasonably separated from the compilation. The court also noted that as Rojas had not been joined in the prior lawsuit, and that Coffins’ and the developers’ remediation works had eliminated most, if not all, of the relevant evidence, Rojas had no other means of acquiring this information.⁹⁹⁹

anti-microbial agents, and plumbing repairs. The evidence at issue had originally been introduced almost two years previously, in 1998, 33 Cal 4th 407, at 412 (2004). See also Van Ginkel (note 977) at 32.

⁹⁹⁵ See Van Ginkel (note 977) at 32.

⁹⁹⁶ It has been pointed out that although courts often refer to the evidentiary rule regarding mediation confidentiality as a privilege, technically, section 1115 of the California Evidence Code does not create a privilege in the true meaning of the word, such as the mediation privilege created by the UMA, see Van Ginkel (note 977) at 32 note 10.

⁹⁹⁷ See Van Ginkel (note 977) at 32.

⁹⁹⁸ 102 Cal App 4th 1062, 1076 (2002). See also Van Ginkel (note 977) at 33.

⁹⁹⁹ See Van Ginkel (note 977) at 33.

The Supreme Court granted review on 15 January 2003¹⁰⁰⁰ and delivered its opinion confirming ‘absolute confidentiality’ on 12 July 2004. In reversing the Court of Appeal’s decision, which had argued, as noted above, that an interpretation such as the one advocated by Coffin and now proposed by the Supreme Court, would render section 1120 ‘surplusage’,¹⁰⁰¹ Judge Ming Chin, delivering the opinion for a unanimous Supreme Court, noted that the Court of Appeal’s construction of section 1119 (a) would mean that section 1119 (b) would serve no purpose,¹⁰⁰² and would result in that section being ‘essentially useless’.¹⁰⁰³ It also found that the Court of Appeal’s decision was inconsistent both with the plain meaning of section 1119¹⁰⁰⁴ and the legislative history of sections 1119 and 1120.¹⁰⁰⁵

Referring to its earlier decision in *Foxgate Homeowners’ Association v Bramalea California*,¹⁰⁰⁶ the Supreme Court emphasised that:

‘[C]onfidentiality is essential to effective mediation’ because it ‘promote[s] a candid and informal exchange regarding events in the past’ This frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.¹⁰⁰⁷

¹⁰⁰⁰ After the Supreme Court granted review of the Court of Appeal’s decision, the parties settled but failed to file a motion to dismiss the review, and the discovery of the relevant materials remained an issue in certain cross-claims that had not settled, 33 Cal 4th 407, at 415, n 3 (2004), see also Van Ginkel (note 977) at 33 note 18.

¹⁰⁰¹ 102 Cal App 4th 1062, 1076 (2002). See also Van Ginkel (note 977) at 33.

¹⁰⁰² 102 Cal App 4th 1062, 1076 (2002) at 418. See also Van Ginkel (note 977) at 33.

¹⁰⁰³ 102 Cal App 4th 1062, 1076 (2002). See also Van Ginkel (note 977) at 33.

¹⁰⁰⁴ 102 Cal App 4th 1062, 1076 (2002) at 416. See also Van Ginkel (note 977) at 33.

¹⁰⁰⁵ 102 Cal App 4th 1062, 1076 (2002) at 418. See also Van Ginkel (note 977) at 33.

¹⁰⁰⁶ *Foxgate Homeowners’ Association v Bramalea California Inc* 26 Cal 4th 1 (2001). It has been pointed out that there are no exceptions to the confidentiality of mediation communications or to the statutory limits on the content of mediator’s reports, and while a party may do so, a mediator may not report to the court about the conduct of participants in a mediation. See Van Ginkel (note 779) at 33 note 24.

¹⁰⁰⁷ 102 Cal App 4th 1062, 1076 (2002) at 415-16, quoting *Foxgate*, 26 Cal 4th 1, 14. The only California case upholding admission, over objection, of statements made during a mediation where no statutory exception to confidentiality applied was *Rinaker v Superior Court* 62 Cal App 4th 155 (1998), discussed above, which the Supreme Court distinguished in *Foxgate*, 26 Cal 4th at 15, along with *Olam v Congress Mortgage Company* 68 F Supp 2d 1110 (N D Cal 1999), also discussed above. In *Rinaker*, the Court of Appeal held that, although a delinquency proceeding is a civil action within the meaning of section 1119 and that the confidentiality provisions were applicable, that statutory right must be subordinate to a minor’s due process rights to defend and confront, cross-examine and impeach the victim witness with their prior inconsistent statements. The Court of Appeal stated that in order for confidentiality to be maintained as far as possible, the juvenile court judge should first have held an in-camera hearing to weigh the minor’s claim that he needed to question the mediator, against the statutory privilege to determine if the mediator’s testimony was sufficiently probative to be necessary, see *Rinaker v Superior Court*, 62 Cal 4th 169-170. The court in *Foxgate* stated that *Rinaker* was consistent with the previous recognition given by the court and that of the United States Supreme Court that due process entitles juveniles to some of the fundamental constitutional rights that adults enjoy, including the right to confront and cross-examine. However, in *Foxgate*, the plaintiffs had no comparable supervening due process based

The Supreme Court also recalled that in *Foxgate*¹⁰⁰⁸ it had:

... stated that '[t]o carry out the purpose of encouraging mediation by ensuring confidentiality, [our] statutory scheme ... unqualifiedly bars disclosure of 'specified communications and writings associated with a mediation 'absent an express statutory exception'. We also found that the 'judicially crafted exception' to section 1119 there at issue was 'not necessary either to carry out the legislative intent or to avoid an absurd result.' We reach the same conclusion here; as Judge Mohr observed, 'the mediation privilege is an important one, and if courts start dispensing with it by using the (Court of Appeal)... test you may have people less willing to mediate.'¹⁰⁰⁹

The *amicus curiae* brief that was submitted by the Southern California Mediation Association ('SCMA') in support of Rojas pointed out that under the interpretation of sections 1119 and 1120 proposed by Coffin and adopted by the California Supreme Court, there was nothing to prevent a party to a mediation in a litigated case to declare certain writings to be 'prepared for mediation' at a time that the parties know they have a settlement, so that those writings can be excluded from subsequent proceedings.¹⁰¹⁰

This is not what actually happened in *Coffin v KSF Holdings*,¹⁰¹¹ as the parties marked the relevant writings with the words 'mediation privileged' before the commencement of the mediation.¹⁰¹² However, such a marking would not appear to

right to use evidence of statements and events at the mediation, see *Foxgate*, 26 Cal 4th 1, 15. As Van Ginkel points out, it is surprising that the *Rinaker* argument was not employed in *Rojas*, as it could be argued that there was a comparable supervening due process based need to use evidence presented during the mediation. See Van Ginkel (note 739) at 33 note 25.

In an unpublished opinion of the Court of Appeal for the First Appellate District, the court denied a motion that sought disclosure of statements made during a mediation, which were required to substantiate allegations of attorney malpractice. Following the decision in *Rojas*, the Court of Appeal held that there was no applicable exception to the confidentiality privilege safeguarding mediation sessions that would permit disclosure, and declined to create one, see *Malcolm v Malcolm*, 2004 Cal App Unpub LEXIS 10675 (1st Dis 2004). See Van Ginkel (note 739) at 33 note 25.

¹⁰⁰⁸ 26 Cal 4th 1 (2001). See also Van Ginkel (note 977) at 33.

¹⁰⁰⁹ 33 Cal 4th at 424 (emphasis in original). See also Van Ginkel (note 977) at 33.

¹⁰¹⁰ *Amicus Curiae* Brief of Southern California Mediation Association in Support of Petitioners ('SCMA Amicus Brief') at 9. Both Max Factor III (note 992) and the SCMA Amicus Brief (at 3-4, 9) seem to suggest that the parties in the first action, *Coffin v KSF Holdings*, agreed after the production of documents in the mediation that the documents used in the mediation should be treated as 'prepared for mediation'. However, Coffin and the developers argued that after the trial court ordered the parties in *Coffin v KSF Holdings* to participate in mediation and to share the reports of their non-designated expert consultants, the participants marked their reports, which contained expert photographs and analyses, with the words 'mediation privileged'. Brief in Answer to Amicus Brief by Southern California Mediation Association at 2-3. As Van Ginkel concludes, the worrying fact remains that the Supreme Court's interpretation of section 1119 does not distinguish between writings marked before their introduction into a mediation and writings marked towards the end of the process, see Van Ginkel (note 977) at 34 note 30.

¹⁰¹¹ Unreported, see Van Ginkel (note 977) at 34.

¹⁰¹² Brief in Answer to Amicus Brief by Southern California Mediation Association at 2-3, see Van Ginkel (note 739) at 35 note 31. See also note 1010.

prohibit the use of such writings in a trial in the *Coffin v KSF Holding* case,¹⁰¹³ should the mediation not have resulted in a settlement.¹⁰¹⁴

It has been suggested¹⁰¹⁵ that the only practical solution may be to amend the statute so that the mediation privilege would attach only to those writings that have been marked ‘prepared for mediation’ prior to their introduction into a mediation, and also expressly authorises the trial court to weigh the interests of the two conflicting public policies in a subsequent trial, whether it is between the same parties or involves one or more third parties.¹⁰¹⁶ With this type of discretionary authority, in appropriate circumstances the court could admit such a writing despite the proposed rule of its subsequent inadmissibility, if the interests of access to evidence in litigation outweighed the interests of keeping it confidential because it had been prepared for mediation, for example, where there is no other way for a party to acquire such evidence as it no longer exists.¹⁰¹⁷

It is clear from the above discussion that absolute mediation confidentiality does not provide an appropriate solution, despite the fact that it now appears to be the doctrine of the California Supreme Court. It has been sensibly suggested that the solution must be found in an appropriate mechanism that allows the two conflicting public policies to live in harmony, and that this goal is difficult to achieve by drafting ‘static’ statutory exceptions to the mediation confidentiality rule.¹⁰¹⁸

A court empowered with the appropriate discretionary authority to weigh the particular interests involved on a case-by-case basis, in combination with a statutory rule which in principle limits the subsequent use by or against a party that designates a

¹⁰¹³ Unreported see Van Ginkel (note 977) at 34.

¹⁰¹⁴ Van Ginkel (note 977) at 34.

¹⁰¹⁵ Van Ginkel (note 977) at 35.

¹⁰¹⁶ It seems that a similar process was employed in *Rinaker v Superior Court* 62 Cal App 4th 155 (1998), discussed above, of weighing the public policy of mediation confidentiality against that of a juvenile’s due process right to defend and confront, cross-examine and impeach the victim witness with his prior inconsistent statements and evidence, and in *Olam v Congress Mortgage Company* 68 F Supp 2d 1110 (N D Cal 1999), also discussed above, of weighing the public policy of mediation confidentiality against that of establishing the competence of one of the parties to enter into a settlement agreement, with the judge deciding to allow the mediator’s testimony as it was the most reliable and probative evidence and there was no likely alternative source. See Van Ginkel (note 977) at 35 note 40.

¹⁰¹⁷ See Van Ginkel (note 977) at 35.

¹⁰¹⁸ It has been suggested that statutory exceptions can work in other settings. See, for example section 6 (a) of the Uniform Mediation Act at www.law.upenn.edu/bll/ulc/mediat/UMA2001.htm (last visited 20 June 2007). See also Van Ginkel (note 977) at 35. However, see the discussion below regarding proposed exceptions to mediation confidentiality contained in the Irish Arbitration and Mediation Bill.

writing as prepared for mediation prior to its introduction, would appear to be a workable solution.¹⁰¹⁹

The Model Law on International Commercial Conciliation

The main provision in the Model Law dealing with the general obligation of confidentiality in mediation is Article 9, which states: ‘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 purposes of implementation or enforcement of a settlement agreement.’

This is preceded by Article 8, which protects information entrusted to the mediator in caucus, if the relevant party requires that it not be disclosed to the other side. As Boule points out, this article reverses the normal presumption about information disclosed unilaterally by each side, as it may be disclosed by the mediator to the other side unless there are contrary arrangements, which is the converse of the more usual mediation presumption.¹⁰²⁰ It is submitted that if this law is to act as a framework for the introduction of a mediation statute in South Africa, as the author believes it should,¹⁰²¹ it will require amendment to reflect the normal presumption that a mediator may only divulge information to a party when he or she is explicitly permitted to do so by the party furnishing the information. This would avoid any possible confusion in this area in future.

The third form of confidentiality, covering the non-disclosure of information in pre-trial discovery or in evidence in arbitral, judicial or similar proceedings is covered by Article 10. Hence, as Boule points out, confidentiality applies regardless of whether or not the mediated dispute is the same dispute that is subject to the court or arbitral proceedings where the disclosure is being sought, which broadens the scope of confidentiality.¹⁰²²

¹⁰¹⁹ See Van Ginkel (note 977) at 35.

¹⁰²⁰ Boule (note 263) at 571

¹⁰²¹ See chapter 1 at 12.

¹⁰²² Boule (note 263) at 571-572.

Tinkering with the Model Law

Ireland is currently proposing the promulgation of a new law on mediation in the form of the Arbitration and Mediation Bill. The draft legislation is currently at consultative stage. The mediation part draws heavily upon the UNCITRAL Model Law on International Commercial Conciliation.

The provisions regarding confidentiality in the draft legislation are quite extensive. All information and documentation relating to the mediation is confidential, unless the parties agree otherwise, if it is used to implement or enforce a settlement agreement, or if a court or arbitral tribunal orders that the mediator provides a report. If a report is required, it will be limited to whether a mediation occurred or was terminated, whether a settlement was reached, or in order to identify those who attended the mediation.¹⁰²³

There are numerous stated exceptions to the confidentiality of communications. These provisions represent the most significant departure from the Model Law contained in the draft legislation. They are largely identical to the exceptions listed in Section 6 (a) of the UMA.¹⁰²⁴ The exceptions are quite specific. For example, communications regarding plans to inflict bodily injury or commit a crime fall outside the protection.¹⁰²⁵ The author has elsewhere¹⁰²⁶ expressed the view that restricting a disclosure to such specific circumstances could be covering many matters with a veil of privilege that may prove difficult to circumvent where necessary. It would be better to provide that communications in the course of the mediation are privileged to the same extent and on the same basis as without prejudice negotiations between the parties.

Similarly documents produced by a party for the purposes of a mediation would be privileged to the same extent that documents produced for the purposes of actual or contemplated litigation are privileged. If these more generalised formulations were adopted, they would both be necessarily subject to the common-law 'fraud' exception, a usefully elastic concept which rarely requires to be invoked. Such wording would give clear protection to virtually all mediation communications. On the occasional

¹⁰²³ Section 8.

¹⁰²⁴ The only omission from section 6 (a) of the UMA in the Arbitration and Mediation Bill is section 6 (a) (5).

¹⁰²⁵ Section 8 (a).

¹⁰²⁶ Ronan Feehily and Petria McDonnell 'Mediation developments in Ireland' IBA Legal Practice Division *Mediation Committee Newsletter* December 2006 at 24.

circumstance when the veil of privilege needs to be pierced, it would allow the court greater latitude than the prescriptive circumstances detailed in the current draft.¹⁰²⁷

Confidentiality policy and practice

The law on confidentiality in mediation is clearly complex, partially unclear and seemingly incomplete.¹⁰²⁸ Confidentiality in mediation involves striking a balance between encouraging settlement through the protected process of mediation and ensuring that litigants and courts have adequate access to evidence, between supporting mediation and not freezing litigation or upholding illegality.¹⁰²⁹ For some time courts in Australia have acknowledged that further consideration should be given to the confidentiality issue.¹⁰³⁰

While the principle of sanctity of contract supports maintaining confidentiality where there is an agreement, if it is too wide, it will sterilise too much evidence and seriously undermine the trial process and if it is too narrow, it will discourage parties from engaging in good faith in mediation.¹⁰³¹

As a result of the approach taken in other jurisdictions, it has been suggested for some time that the exceptions to confidentiality, as they apply to mediation are so numerous that they almost erode confidentiality, as it applies to mediation.¹⁰³² The practical implication of mediation confidentiality's legal complexities require caution in the promotion and explanation of the process,¹⁰³³ for example it has been recommended that mediators should advise disputants that there may be limitations on the extent to which courts will protect communications made during mediations.¹⁰³⁴

In light of the Supreme Court decision that where facts about which information is revealed in the course of mediation are discoverable in the normal course, evidence of

¹⁰²⁷ See Feehily and McDonnell (note 1026) at 24.

¹⁰²⁸ See Boule and Rycroft (note 231) at 248.

¹⁰²⁹ Boule and Rycroft (note 231) at 248-9.

¹⁰³⁰ See Rogers J in *AWA Ltd v Daniels (t/as Deloitte Haskins and Sells)* (1992) 7 ACSR 463, 469 as cited by Boule and Rycroft (note 231) at 249.

¹⁰³¹ See L Boule 'Confidentiality and the Mediation Process' (1992) 3 *ADRJ* 272 as cited by Boule and Rycroft (note 231) at 248.

¹⁰³² L R Freedman and M L Prigoff 'Confidentiality in Mediation: The Need for Protection' (1986) 2 *Ohio State Journal on Dispute Resolution* 37 at 40.

¹⁰³³ Boule and Rycroft (note 231) at 248.

¹⁰³⁴ Boule and Nestic (note 426) at 506.

these facts is admissible in proceedings,¹⁰³⁵ the New South Wales Law Society altered its guidelines for solicitor mediators.¹⁰³⁶ The revised section 6.6 of the guidelines now adopts a cautious approach to the issue of confidentiality:¹⁰³⁷

The mediator shall inform the parties that, in general, communications between them, and between them and the mediator, during the preliminary conference and the mediation, are agreed to be confidential. In general, they cannot be used as evidence in the event that the matter does not settle at mediation and goes to a court hearing. The mediator shall also inform the parties that they should consult their legal representatives if they want a more detailed statement of the position or if they have a specific question about it.

As mediation develops as a viable alternative form of dispute resolution, there are issues of credibility and legitimacy for the process in light of the limitations to mediation confidentiality, which should be dealt with as clearly as possible before the commencement of the process.¹⁰³⁸

Going forward

With the exponential growth of mediation as a form of alternative dispute resolution in other jurisdictions such as the USA, it seemed inevitable that the number of disputes regarding enforcement issues would grow as well.¹⁰³⁹ The increased use of mediation has led to the development of model laws in the USA that preclude broad categories of post-mediation enforcement disputes, limit the scope of others and assist participants in the process to develop practices that also reduce areas of potential enforcement conflict. The disputes that remain require a careful balance between the need for evidence to assess the claims made and the need for confidentiality in mediation that will protect both interests.¹⁰⁴⁰

While the approach of absolute rules such as the California evidence rule seems to create a straightforward rule suitable to an informal process, it is an over-reaction to the shortcomings of more liberal evidentiary rules, statutes and contractual

¹⁰³⁵ *AWA Ltd v Daniels (t/as Delloite Haskins and Sells)* (1992) 7 ACSR 463 as cited by Boule and Rycroft (note 231) at 249.

¹⁰³⁶ Boule and Rycroft (note 231) at 249.

¹⁰³⁷ Boule and Rycroft (note 231) at 249. The guidelines are available at www.lawsociety.com.au/uploads/filelibrary/1048744833121_0.8990171634879579.pdf (last visited 17 July 2008).

¹⁰³⁸ Boule and Rycroft (note 231) at 249.

¹⁰³⁹ See Sussman (note 613) at 38.

¹⁰⁴⁰ See Sussman (note 613) at 38.

arrangements. As has been pointed out, any form of mediation protection must recognise the limits imposed on confidentiality by the nature of the process itself, and must establish a context for compelling mediator testimony that adequately protects the mediator's neutrality.¹⁰⁴¹

The adoption of the Model Law on International Commercial Conciliation in the form discussed above would adopt a middle path by promulgating a process that protects mediation confidentiality but allows evidence about the mediation to be admitted in limited circumstances to be specified by the court on a case by case basis. When adopting the Model Law confidentiality provisions, it would be sensible for the South African legislature to provide that communications in the course of the mediation are privileged to the same extent and on the same basis as without-prejudice negotiations between the parties.

Similarly documents produced by a party for the purposes of a mediation would be privileged to the same extent that documents produced for the purposes of actual or contemplated litigation are privileged. As discussed in respect of the draft Irish legislation, these more generalised formulations are preferable to the limited exceptions contained in statutes such as the UMA, and also avoid the danger of an over-reaching statute such as that found in California. Such provisions would also be necessarily subject to the common-law 'fraud' exception. Such wording would give clear protection to virtually all mediation communications while on the occasional circumstance when the veil of privilege needs to be dislodged, it would allow South African courts greater latitude than the prescriptive circumstances detailed in the alternative legislation discussed.

¹⁰⁴¹ John S Murray, Alan Scott Rau and Edward F Sherman *Process of Dispute Resolution: The Role of Lawyers* at 406; see also Note 'Protecting Confidentiality in Mediation' (1984) 98 *Harvard Law Review* 441 at 452-453. Similarly, with regard to the UMA, some states and jurisdictions have resisted implementing it on the basis that they have already established that privileges belong to parties rather than mediators and that courts should maintain the right to circumvent the privilege where the interests of justice require it, while some have also suggested that the provisions in the UMA go too far in protecting mediators against legitimate state interests, see Hughes (note 946) at 9. It has also been suggested that some of the provisions in the UMA are hostile to the areas of practice that made mediation the popular process in the USA that it has become today, see Birke and Teitz (note 287) at 387. While it is reasonable to expect some consistency when participating in the mediation process, mediation must adapt to the needs of the parties and the parameters of the dispute being mediated, see Deason (note 777) at 86. As has been pointed out, mediation flourished due to the diversity and adaptability of the process, and these qualities are inconsistent with uniform laws, see Birke and Teitz (note 287) at 388.

Competitive advantage

Parties in a mediation are frequently unaware of the true scope of the protection to which they are entitled. In international disputes, parties frequently overlook the effects of the procedural rules that will govern follow-up proceedings in the event that the mediation fails. It has been pointed out that if these rules include wide-ranging discovery rules, the parties are less likely to glean information from documents during the mediation process that they would not otherwise get access to at a later stage. Conversely, if no discovery or only limited discovery will be available in subsequent proceedings, maintaining strict confidentiality on facts disclosed during mediation is more likely to be as important.¹⁰⁴²

In international commercial disputes, mediating in a jurisdiction offering the highest level of confidentiality protection has been used as a successful argument in persuading reluctant parties to engage in the process.¹⁰⁴³ In one arbitration proceeding that had commenced under the Swiss rules, which do not include discovery¹⁰⁴⁴ so that there was no access or only limited access to documents that were not voluntarily disclosed by the parties, the confidentiality of the mediation was decisive, due to the fear that information disclosed during the mediation could be used in subsequent proceedings or to get an unfair competitive commercial advantage. This confidentiality protection also assisted the parties to speak openly about their difficulties and share their concerns with the other party rather than to hide behind legal rights.¹⁰⁴⁵ If this had not happened, the commercial mediation would not have produced optimum results.¹⁰⁴⁶

If South Africa adopts the confidentiality provisions as proposed above, it would be in a more advantageous position to hold itself out as a venue to mediate international commercial disputes, particularly in the SADC area.¹⁰⁴⁷ This would be particularly

¹⁰⁴² Fiechter (note 725) at 46.

¹⁰⁴³ Fiechter (note 725) at 46.

¹⁰⁴⁴ Peter Burckhardt 'Legal Professional, Secrecy and Privilege in Switzerland' *IBA International Litigation News* October 2004: 'Note 31: For example, the court may allow that documents containing business secrets or information of otherwise sensitive nature are made available only to the court, or an expert witness appointed by the court, but not the other party who may abuse such information. The grant of protective measures in this sense may be ordered, at the discretion of the court, if "legitimate interests" so demand, see, for example, para 145 of the Zurich Code on Civil Procedure. However, the protection granted will not normally amount to a privilege, and does not prevent the use as evidence information.' See also Fiechter (note 725) at 46.

¹⁰⁴⁵ See Fiechter (note 725) at 46.

¹⁰⁴⁶ York (note 907) at 83. See also Fiechter (note 725) at 46.

¹⁰⁴⁷ While it is not within the scope of this thesis to discuss the expansion of commercial mediation throughout the SADC region, see generally Pretorius (note 136).

alluring to disputing parties whose country of domicile offers weak mediation confidentiality protection or no protection at all.

CHAPTER SEVEN: CONDUCT AND COSTS

Costs are a significant issue for commercial disputants, and are often the primary reason that parties are looking to alternative forms of dispute resolution, in particular mediation, in order to resolve their disputes in a cost-effective manner. However, unless both parties are willing to engage in the process, mediation will not achieve that objective, and it is often in a defendant's interests to be as obstructive as possible, resulting in higher costs and prolonged litigation. It is in these circumstances that assistance is required from the relevant court or tribunal, which needs to be equipped with the powers and authority to use mediation as a costs-containment device in order to bring often reluctant and unwilling parties together.¹⁰⁴⁸

While Australia provides relatively few examples of cases where costs sanctions have been imposed for a refusal to mediate,¹⁰⁴⁹ it has been suggested that this is because of the wide discretion given to the courts to order parties to mediate, and their willingness to exercise that discretion.¹⁰⁵⁰ Changes to the Civil Procedure Rules in England have revolutionised the approach of the judiciary in dealing with case management and in encouraging parties to mediate through the use of costs sanctions.

The Woolf reforms

The review conducted by the Lord Chief Justice of England and Wales, Lord Woolf, in his report *Access to Justice* which was finalised in 1996, dramatically changed the culture and mindset of those who litigate civil cases in England. In the introduction to the Civil Procedure Rules ('CPR') the Lord Chancellor states that 'we should see litigation as the last and not the first resort in the attempt to settle a dispute', and he confirms the intention of the CPR by noting that 'the changes introduced in April 1999 are as much changes in culture as they are changes to the Rules themselves'.

¹⁰⁴⁸ See Antony Dutton and Daniel Perera 'Mediation as a Cost-containment Device in the English Courts: Litigation becomes the 'Last Resort' in Dispute Resolution' IBA Legal Practice Division *Mediation Committee Newsletter* September 2006 at 32.

¹⁰⁴⁹ However, see *Simon Richard Lane v The Commonwealth Bank of Australia* [2001] NSWIR Comm 57 (3 April 2001), where there were cost consequences for a respondent for refusing to mediate in accordance with the express terms of the contract. See also Dreadon (note 479) at 16.

¹⁰⁵⁰ Dreadon (note 479) at 16.

Part 1 of the CPR defines the over-riding objective of the civil justice system in England as ‘enabling the court to deal with cases justly’, which includes (a) ensuring that the parties are on an equal footing, (b) saving expense, (c) dealing with cases proportionate to the amount involved and the importance, complexity and financial position of each party, (d) ensuring that a case is dealt with expeditiously and fairly, and (e) apportioning an appropriate share of the court’s resources to the case.

The court must seek to give effect to the over-riding objective when exercising any power under the rules or interpreting any rule, and the parties are required to assist the court in doing this. Specifically, the court is required to engage in active case management, by identifying the issues, managing the court timetable and running cases efficiently. One significant requirement involves ‘encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate, and facilitating the use of such procedure’.¹⁰⁵¹

The impact of Woolf

The culture change desired by Lord Woolf came quite quickly, as even lawyers who had no faith in or respect for mediation found themselves engaged in the process. As one commentator points out, many lawyers who had been ‘dragged kicking and screaming’ into mediation, whether by court order for a stay or at their client’s insistence, have ‘come away singing its praises.’¹⁰⁵²

The courts in England have traditionally had a system where the legal costs of conducting litigation are subject to a court order in addition to an award or refusal of damages and any other court orders. The CPR have extended this costs jurisdiction to enable judges to make orders regarding costs that reflect the court’s view of any party’s conduct during the litigation process, whether before or after the actual start of court proceedings. If a party behaved unreasonably, however legally correct that party’s case, a costs sanction or penalty might be applied so that a party might win entirely on the law and the evidence, but forfeit their costs or even have to pay the unsuccessful party’s costs because of the unreasonable way in which the successful party conducted the

¹⁰⁵¹ For a full text of the Civil Procedure Rules and Practice Directions for civil litigation in England see www.justice.gov.uk/civil/procrules_fin/index.htm (last visited 4 August 2008).

¹⁰⁵² Hence, despite the element of compulsion to mediate from the formal legal system, experience from other jurisdictions suggests that once the benefits of mediation are realised, parties (on the advice of their lawyers) voluntarily chose mediation as the process to resolve their dispute. See Kallipetis (note 509) at 2.

litigation. Pre-action conduct has for the first time been opened to judicial scrutiny, and a number of pre-action protocols, drafted in consultation with experienced practising lawyers, define how parties should clarify their claims and exchange information and views in cases before they are issued at court. A party's failure to do so could result in costs penalties.

The jurisprudence from England has been quite extensive. This is in no small part due to the introduction of the CPR. While the CPR jurisprudence will have greater precedent value should there eventually be an equivalent South African statute that explicitly empowers the courts to impose costs sanctions on parties that are unreasonably unwilling to mediate, it may none the less prove influential in the absence of such a law. The South African Supreme Court of Appeal has indicated, albeit *obiter*, its willingness to look to foreign legislation for guidance, even in the absence of a similar domestic statute.¹⁰⁵³

As noted above, much has been done by the English courts in the past few years to encourage the use of mediation. In *Cowl v Plymouth City Council*¹⁰⁵⁴ Lord Woolf said that today enough should be known about ADR to make the failure to adopt it indefensible, particularly when public money is involved. The following year in *Dunnett v Railtrack PLC*,¹⁰⁵⁵ regarding the grant of permission to appeal, it had been strongly suggested that the parties should attempt to resolve the dispute by arbitration or mediation, but it appeared that Railtrack had refused to pursue such a route. The Court of Appeal said that skilled mediators could achieve results that went far beyond the court's powers, and that lawyers who dismissed the opportunity for arbitration or mediation out of hand would suffer uncomfortable consequences. The consequence was that the party that refused to take advantage of the option of mediation or arbitration would be refused costs, despite being successful in the appeal.¹⁰⁵⁶ Consequently, the

¹⁰⁵³ See *Johannesburg Country Club v Scott* 2004 (5) SA 511 (SCA), a case that looked at whether an exemption from liability for negligently causing a person's death would be contrary to public policy. While the court found that it was unnecessary to decide the question, Harms JA, referring to *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA), said that the latter case leaves scope for such a conclusion, which would coincide with s 2(1) of the English Unfair Contract Terms Act 1977. See also Christie (note 465) at 186. A judge of the Irish High Court has similarly suggested that there may be costs implications for parties in certain circumstances where those parties refuse to even consider mediation, despite the absence of a statute facilitating this, see Mr. Justice Peter Kelly, as quoted by Michael Tyrrell and Patrick Walshe in 'New Mediation Provisions Enacted' IBA Legal Practice Division *Mediation Committee Newsletter* April 2005 at 21.

¹⁰⁵⁴ [2001] EWCA and CIV 1935.

¹⁰⁵⁵ [2002] 2 All ER 850.

¹⁰⁵⁶ See also Kallipetis (note 509) at 3.

court declined to award costs against Dunnett, due to Railtrack's refusal to consider arbitration or mediation in the face of a recommendation to do so by the court.

The objective test and the prospect of success

In *Hurst v Leeming*,¹⁰⁵⁷ the English courts clarified the circumstances in which costs sanctions would be justified. The case involved a dispute between Hurst and his former partners in a solicitors' practice. Having initially represented himself, Hurst eventually hired solicitors and through them instructed Mr Leeming QC. As his claims failed at first instance, the Court of Appeal and the House of Lords, a costs order was made against him and he was declared bankrupt. Having subsequently failed in his efforts to sue his solicitors for negligence, he finally pursued an action against Leeming.¹⁰⁵⁸

Hurst withdrew his claim following the intervention of Lightman J, the presiding judge, who convinced him that the claim was hopeless. Hurst then claimed that Leeming was not entitled to his costs as he had asked Leeming to proceed to mediation over their dispute and Leeming had refused, and that if Leeming had agreed to mediate, a mediator could have convinced Hurst to withdraw his claim and consequently avoid the costs of the court action.

When Hurst suggested mediation, Leeming had written a response citing a number of reasons for refusing mediation. Lightman J looked at each of these reasons which were based on the following:

- The legal costs already incurred in dealing with the allegations and the threat of proceedings;
- The serious nature of the professional negligence allegations;
- The lack of substance in the claims made;
- The lack of any real prospect of a successful outcome to the mediation, particularly in light of Hurst's objective of obtaining a large financial payment from Leeming on the back of a meritless claim; and

¹⁰⁵⁷ [2002] LLPN 508.

¹⁰⁵⁸ This was subsequent to the House of Lords decision in *Arthur J.S. Hall & Co v Simons* (2000) 3 AER 673, which removed the immunity from suit for negligence from counsel. For a more detailed discussion of this case see Juliet Blanch 'A tHurst for Mediation?' Resolution | Norton Rose, available at www.nortonrose.com/publications/pubslst.asp (last visited 21 June 2007).

- The character of Hurst, as revealed by his numerous prior claims and his actions, as a man obsessed with the belief that he was the victim of injustice.

Lightman J did not agree that the first three arguments should cause any barrier to considering mediation, and that the critical factor was whether, objectively viewed, a mediation had any real prospect of success, but he added that there is a high risk accompanying the refusal. He commented that in making the objective assessment of the prospects of mediation, the starting point must be the fact that the mediation process can and often succeeds in bringing about a more sensible and more conciliatory attitude on the part of the parties than might otherwise be expected to prevail before the mediation. It follows that this may cause each party to recognise the strengths and weaknesses of their case and their opponent's case, and to develop a willingness to accept the compromise essential to a successful mediation. He concluded that a dispute may appear to be incapable of mediation before the mediation process begins but may ultimately prove capable of satisfactory resolution. Leeming's decision to refuse to mediate was, in his view the correct one, as there was no real prospect of success in pursuing mediation, and Leeming should not suffer any cost consequences.

This case highlights the importance the court places on parties considering mediation while also providing lawyers in England with valuable clarification on the objective criteria that should be considered when analysing the suitability of the process in a particular context. It has also been suggested that disputing parties should be aware, however, that if a refusal to mediate is decided on the wrong criteria, or if the objective test is applied but the court reaches a different conclusion, adverse cost consequences may follow.¹⁰⁵⁹

The English courts' determination to sanction a party with costs, where they unreasonably refuse to attempt mediation, was illustrated in *Leicester Circuits Limited v Coates Brothers plc*,¹⁰⁶⁰ where the Court of Appeal penalised a successful appellant in costs for withdrawing from an agreed mediation at the last minute without any explanation other than expressing that it was at the insistence of their insurers. In two other Court of Appeal decisions, *Neal v Jones*¹⁰⁶¹ and *McCook v Lobo and Others*,¹⁰⁶²

¹⁰⁵⁹ Juliet Blanch 'A tHurst for Mediation?' Resolution | Norton Rose, available at www.nortonrose.com/publications/publist.asp (last visited 21 June 2007).

¹⁰⁶⁰ [2003] EWCA Civ 333, 5 March 2003.

¹⁰⁶¹ [2002] EWCA Civ 1730, 31 October 2002.

¹⁰⁶² [2002] EWCA 2002.

the Court made further observations regarding the potential impact of ignoring a request for mediation. In *Neal v Jones*¹⁰⁶³ the court reduced the successful respondent's costs by £5,000, because their insurers refused mediation, while in *McCook v Lobo and Others*¹⁰⁶⁴ the court decided that the failure to respond to a suggestion of mediation did not in the circumstances of that case merit any penalty in costs.¹⁰⁶⁵

The Court of Appeal subsequently gave further guidance on when cost sanctions are appropriate. In *Valentine v Allen & Ors*,¹⁰⁶⁶ it distinguished *Dunnett*¹⁰⁶⁷ on the basis that, where a party can show it has made real efforts to reach a compromise on the dispute, for example, by making reasonable and generous settlement offers that were rejected by the other side; it would not be punished in costs for refusing to mediate.¹⁰⁶⁸

In the conjoined cases of *Halsey v Milton Keynes NHS Trust and Steel v Joy and Halliday*,¹⁰⁶⁹ the Court of Appeal dismissed the two appeals against costs awarded in favour of successful claimants who had refused to mediate. Dyson LJ held that the burden was on the unsuccessful party seeking a costs sanction against the successful litigant to show why there should be a departure from the general rule that costs should follow the event, and that such a departure was not justified unless it was shown that the successful party had acted unreasonably in refusing to mediate. The Court of Appeal gave a non-exhaustive checklist of factors that may be relevant to the issue of whether a party unreasonably refused to mediate, as follows:¹⁰⁷⁰

- the nature of the dispute;
- the merits of the case;
- the extent to which other settlement methods were attempted;
- whether the costs involved in the mediation would have been disproportionately high;
- whether any delay in setting up and attending the mediation would have been prejudicial; and

¹⁰⁶³ [2002] EWCA Civ 1730.

¹⁰⁶⁴ [2002] EWCA 2002.

¹⁰⁶⁵ See also *Kallipetis* (note 509) at 4.

¹⁰⁶⁶ [2003] EWCA Civ 915.

¹⁰⁶⁷ [2002] 2 All ER 850.

¹⁰⁶⁸ See also *Dreadon* (note 479) at 15.

¹⁰⁶⁹ [2004] EWCA (Civ) 576.

¹⁰⁷⁰ See also *Dreadon* (note 479) at 16. See also the decision in *P4 Ltd v Unite Integrated Solutions plc* [2006] EWHC TCC 2924, where the court was careful to apply the *Halsey* framework to the issues in that case.

- whether the mediation had a reasonable prospect of success.

*Halsey*¹⁰⁷¹ was initially criticised for not going far enough in encouraging parties to mediate and that as a result of *Halsey*,¹⁰⁷² courts in England would be more reluctant to impose costs sanctions.¹⁰⁷³ Subsequent cases have proven otherwise.

Post-*Halsey* era

The *Halsey*¹⁰⁷⁴ approach was subsequently followed in *Reed Executive plc and another v Reed Business Information Ltd and others*,¹⁰⁷⁵ which involved an alleged trademark infringement and passing off. While Reed Executive plc ('RE') was successful at first instance, Reed Business Information Ltd ('RBI') appealed to the Court of Appeal and declined an offer by RE to use the Court of Appeal's mediation scheme.

While RBI was largely successful in the appeal, RE argued for a departure from the normal rules as to costs¹⁰⁷⁶ on the basis that RBI had rejected the offer to mediate, and that RE had discharged its burden of persuasion in line with the *Halsey*¹⁰⁷⁷ guidelines, in showing that such conduct by RBI was unreasonable.

The court disagreed with RE, primarily for the following reasons:¹⁰⁷⁸

- RE would have been negotiating from a position of considerable strength when it suggested mediation;
- RE's offer to mediate came very late;
- RBI had a reasonable and ultimately justified belief in its prospects of success;
- there were ongoing disputes in other jurisdictions;
- there was a wide disparity between the parties; and
- the case contained numerous novel points of law that would have made it much more difficult to reach settlement.

¹⁰⁷¹ [2004] EWCA (Civ) 576.

¹⁰⁷² [2004] EWCA (Civ) 576.

¹⁰⁷³ Dutton and Perera (note 1048) at 32.

¹⁰⁷⁴ [2004] EWCA (Civ) 576.

¹⁰⁷⁵ [2004] EWCA Civ 887 (14 July 2004).

¹⁰⁷⁶ Set out in CPR r 44.3(2)(a).

¹⁰⁷⁷ [2004] EWCA (Civ) 576.

¹⁰⁷⁸ For a more detailed discussion of this case see Lara Clarke 'Mediation in the Post-Halsey Era' IBA Legal Practice Division Mediation Committee Newsletter August 2005 at 17-18.

The continuation of the *Halsey* approach

The *Halsey*¹⁰⁷⁹ guidelines were also applied in the subsequent case of *Re Midland Linen Service Ltd sub nom Chaudry v Yap and others*,¹⁰⁸⁰ which involved a petition brought by the claimant, a former director and minority shareholder in Midland Linen Services Ltd ('MLS'), under the relevant provision¹⁰⁸¹ of the English Companies Act.

The claimant accepted a payment into court, made under part 36 of the CPR, which deals with offers to settle and payments into court, less than 21 days before trial, and consequently, in accordance with part 36.11 of the CPR, the parties applied to the court for an order as to costs. The claimant argued that the costs should follow the event and that the conduct of the litigation should not be taken into account by the court, while conversely, MLS argued that the claimant should be penalised for rejecting an alleged oral offer to settle and offers to mediate.

The court held that part 44.3 of the CPR, which deals with the court's discretion and the circumstances to be taken into account when exercising its discretion with regard to costs, was of general application whenever a court was exercising its discretion regarding costs, and that it applied where the court was exercising such discretion under Part 36 of the CPR. The court found that MLS had not engaged sufficiently in the process of mediation to justify a finding that the claimant should be deprived of his costs, and that MLS had failed to give sufficient evidence to support its argument that the claimant's refusal to engage in mediation had been unreasonable. It also doubted whether the atmosphere generated between the parties was conducive to a successful mediation and that consequently the claimant should be awarded his costs of the proceedings up to the time of the notice of acceptance.¹⁰⁸²

The development of *Halsey*

The case of *Couwenbergh v Valkova*¹⁰⁸³ involved a dispute relating to the validity of a will in addition to allegations of fraud. The Court of Appeal held that this should not prohibit the dispute from being suitable for settlement through mediation, and that this

¹⁰⁷⁹ [2004] EWCA (Civ) 576.

¹⁰⁸⁰ [2004] All ER (D) 406 (Oct) (28 October 2004).

¹⁰⁸¹ Section 459 of the Companies Act 1985.

¹⁰⁸² For a more detailed discussion of this case see Clarke (note 1078) at 18.

¹⁰⁸³ [2005] All ER (D) 98.

particular case was perfectly suited to mediation. The issue of potential cost implications for ignoring a court's strong suggestion to mediate was similarly directly addressed by Ward LJ when he remarked that when costs are finally allocated, the observations outlined above should be borne in mind when the court comes to apply the guidelines in *Halsey*,¹⁰⁸⁴ on how to deal with failures to mediate despite the encouragement to do so.

It has been remarked that this case is a good example of the English courts taking active steps to control the costs of dispute resolution. In cases where there is a genuine prospect of an early, cost-effective settlement, every opportunity should be given to resolve the dispute prior to litigation, and a party refusing to co-operate without good reason will be dealt with accordingly when the issue of costs is decided.¹⁰⁸⁵

The case of *Burchell v Bullard and others*¹⁰⁸⁶ is seen as one of the most important and meaningful judgments to have been handed down since *Halsey*.¹⁰⁸⁷ While the Court of Appeal declined to make an adverse costs order, due to the fact that the offer to mediate pre-dated the decisions in *Dunnett v Railtrack*¹⁰⁸⁸ and *Halsey*,¹⁰⁸⁹ Ward LJ confirmed that if this matter were to arise now, there would be no hesitation in making an adverse costs order. Similar to the conjoined appeals of *Halsey and Steel v Joy*,¹⁰⁹⁰ *Burchell v Bullard*¹⁰⁹¹ only involved inter-party offers to mediate.

This was a small building dispute involving a builder, Mr Burchell and Mr and Mrs Bullard. In May 2001, before commencing proceedings, Mr Burchell's solicitor wrote to the Bullards suggesting that the dispute be referred to mediation. The Bullards' building surveyor replied that the issues in dispute were technically complex and therefore that mediation was not an appropriate means of resolving them.

In February 2002, Mr Burchell issued proceedings against the Bullards claiming £18,318.45, and the Bullards counterclaimed for more than £100,000. In May 2003, Mr

¹⁰⁸⁴ [2004] EWCA (Civ) 576.

¹⁰⁸⁵ See Dutton and Perera (note 1048) at 32-33.

¹⁰⁸⁶ [2005] EWCA Civ 358. For a more detailed discussion of this case see Clarke (note 1078) at 18-19.

¹⁰⁸⁷ [2004] EWCA (Civ) 576.

¹⁰⁸⁸ [2002] 2 All ER 850.

¹⁰⁸⁹ [2004] EWCA (Civ) 576.

¹⁰⁹⁰ [2004] EWCA (Civ) 576.

¹⁰⁹¹ [2005] EWCA Civ 358.

Burchell commenced another claim against the roofing subcontractor.¹⁰⁹² There were no payments made into court and no offers were made under Part 36 of the CPR.

Judgment was handed down in favour of Mr Burchell on his claim for the amount of £18,327.04 plus costs, and the Bullards received £14,373.15 plus costs on their counterclaim. The Bullards effectively had to pay Mr Burchell the difference plus interest and VAT, equalling £5,025.63. Mr Burchell was also awarded £79.50 on his counterclaim against the roofing subcontractor, but was ordered to pay the roofing subcontractor's costs as the roofing subcontractor only had £79.50 awarded against him and had made offers to settle from the beginning.

Prior to appealing the costs award, Mr Burchell's offer to mediate the issue of costs under the Court of Appeal scheme was declined.¹⁰⁹³ On the issue of costs, the Court of Appeal found that the judge's approach was flawed in that he did not consider the alternatives available to him to the general rule that costs follow the event, and the Court also expressed horror at the disproportionate level of costs relative to the damages.

The following factors influenced the Court of Appeal's judgment:¹⁰⁹⁴

- Mr Burchell's honest and unexaggerated claim;
- the Bullards' expert's conduct and the exaggerated 'kitchen sink' type counterclaim;¹⁰⁹⁵
- the unreasonable behaviour of the Bullards during the litigation; and
- the failure of the Bullards to make an offer to settle or make a payment into court.

However, it was the Bullards' refusal to mediate that was most strongly criticised by the Court of Appeal.¹⁰⁹⁶ Taking the *Halsey*¹⁰⁹⁷ approach, Ward LJ accepted

¹⁰⁹² Under Part 20 of the CPR which deals with counterclaims and other additional claims.

¹⁰⁹³ At no stage did a judge order or recommend that mediation be attempted, even at the appeal permission stage, and the principal offer of mediation was made before issue, when judges in England have no jurisdiction to make an ADR order at all. See Clarke (note 1078) at 19.

¹⁰⁹⁴ See also Clarke (note 1078) at 19.

¹⁰⁹⁵ Under part 44.3(5)(d) of the CPR, this is a relevant consideration when exercising discretion regarding costs.

¹⁰⁹⁶ As noted above, parties who refuse to mediate or negotiate and then effectively lose are usually penalised now in England by being ordered to pay indemnity costs, see *Virani v Manuel Revert and Painting v Oxford University* [2005] EWCA Civ 161. See also Clarke (note 1078) at 19.

¹⁰⁹⁷ [2004] EWCA (Civ) 576.

that the onus, stated by Dyson LJ in *Halsey*¹⁰⁹⁸ to be ‘not an unduly onerous burden to discharge,’¹⁰⁹⁹ is on the party seeking a sanction to show that it should be imposed, and considered the Bullards’ conduct in light of the *Halsey*¹¹⁰⁰ guidelines as follows:¹¹⁰¹

- The nature of the dispute:

‘A small building dispute is par excellence the kind of dispute which...lends itself to ADR.’¹¹⁰²

- The merits of the case:

‘The merits of the case favoured mediation. The defendants behaved unreasonably in believing, if they did, that their case was so watertight that they need not engage in attempts to settle...The stated reason for refusing mediation that the matter was too complex for mediation is plain nonsense.’¹¹⁰³

- Whether the costs of ADR would be disproportionately high:

‘The costs of ADR would have been a drop in the ocean compared with the fortune that has been spent on this litigation.’¹¹⁰⁴

- Whether the ADR had a reasonable prospect of success:

‘The way in which the claimant modestly presented his claim and readily admitted many of the defects, allied with the finding that he was transparently honest and more than ready to admit where he was wrong and to shoulder responsibility for it augured well for mediation. The claimant has satisfied me that mediation would have had a reasonable prospect of success. The defendants cannot rely on their own obstinacy to assert that mediation had no reasonable prospect of success.’¹¹⁰⁵

As mentioned, despite the fact that Mr Burchell discharged his burden of persuasion in showing the court that the Bullards’ refusal to mediate was unreasonable, the offer to mediate was made in May 2001, prior to the decisions in *Dunnett v Railtrack*¹¹⁰⁶ and *Halsey*,¹¹⁰⁷ and the Court of Appeal therefore felt that the

¹⁰⁹⁸ [2004] EWCA (Civ) 576.

¹⁰⁹⁹ [2004] EWCA (Civ) 576 at para 28.

¹¹⁰⁰ [2004] EWCA (Civ) 576.

¹¹⁰¹ See also Clarke (note 1078) at 19.

¹¹⁰² [2005] EWCA Civ 358 at para 41.

¹¹⁰³ [2005] EWCA Civ 358 at para 41.

¹¹⁰⁴ [2005] EWCA Civ 358 at para 41. See also the comments of the court in the recent English case *Egan v Motor Services (Bath) Ltd* [2007] EWCA Civ 1002, where £100,000 was spent in costs on a claim worth £6,000, and the judge described the parties as “‘completely cuckoo” to have engaged in such expensive litigation with so little at stake,’ and proceeded to say that it was a ‘case that cries out for mediation,’ Ward LJ at par 53.

¹¹⁰⁵ [2005] EWCA Civ 358 at para 41. See also the more recent case of *Palfrey v Wilson* [2007] EWCA Civ 94, where the Court of Appeal refused to give costs relief to an intransigent litigant (who had suggested mediation but) who failed to have a realistic assessment of success.

¹¹⁰⁶ [2002] 2 All ER 850.

reasonableness of the Bullards' actions had to be judged against the background of practice at the time the offer was made. While the Court of Appeal did not impose any additional sanction on the Bullards for their refusal to mediate, the appeal decision was still quite severe.

Mr Burchell was awarded 60 per cent of the global costs of his claim and the counterclaim and the Bullards were ordered to pay to Mr Burchell 60 per cent of the costs that Mr Burchell was liable to pay to the roofing subcontractor. The global costs were £185,000, described by the court, in view of the fact that the original judgement amounted to just over £5,000, as 'an horrific picture'.¹¹⁰⁸ As the Bullards' net loss was more than £130,000 and Mr Burchell's loss was about £30,000, the net outcomes were almost exactly reversed by the appeal, even without any sanction for the refusal to mediate.¹¹⁰⁹

The Court of Appeal stressed that the legal profession in England must now take note of *Halsey*¹¹¹⁰ and can no longer dismiss reasonable requests to mediate with impunity:

Halsey has made plain not only the high rate of a successful outcome being achieved by mediation but it is now the legal profession which must become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediate. The parties cannot ignore a proper request to mediate simply because it was made before the claim was issued. With court fees escalating, it may be folly to do so These defendants have escaped the imposition of a costs sanction in this case but defendants in a like position in the future can expect little sympathy if they blithely battle on regardless of the alternatives.¹¹¹¹

It has been remarked that *Burchell v Bullard*¹¹¹² has illustrated that *Halsey*¹¹¹³ should not be viewed as a step back from the *Dunnett*¹¹¹⁴ principles, and through applying the *Halsey*¹¹¹⁵ guidelines, the courts in England have further endorsed the use

¹¹⁰⁷ [2004] EWCA (Civ) 576.

¹¹⁰⁸ [2005] EWCA Civ 358, Ward LJ at para 23.

¹¹⁰⁹ See also Clarke (note 1078) at 19.

¹¹¹⁰ [2004] EWCA (Civ) 576.

¹¹¹¹ [2005] EWCA Civ 358, Ward LJ at para 43. The Court also stated that it 'is entitled to take an unreasonable refusal into account, even when it occurs before the start of formal proceedings; see rule 44.3(5)(a) of the Civil Procedure Rules 1998,' Rix LJ at para 50. Rule 44.3(5) states that the conduct of the parties includes conduct before, as well as during, the proceedings (and in particular the extent to which the parties followed any relevant pre-action protocol).

¹¹¹² [2005] EWCA Civ 358.

¹¹¹³ [2004] EWCA (Civ) 576.

¹¹¹⁴ [2002] 2 All ER 850.

¹¹¹⁵ [2004] EWCA (Civ) 576.

of mediation and ensured that all members of the legal profession who conduct litigation should now routinely discuss with their clients whether their disputes are suitable for mediation.¹¹¹⁶

Conduct, confidentiality and costs

Formal attempts to encourage parties to settle, such as the changes to the CPR in England, raise the issue of the extent to which the courts should go when examining the conduct of parties at a mediation. The question has been asked as to whether only superficial behaviour should be considered, or whether the courts should lift the curtain on mediations to determine whether a party behaved reasonably.¹¹¹⁷

An inevitable difficulty that can emerge in a mediation context is that some parties participate in the process solely because they fear the costs sanction. The extent to which such a recalcitrant party may be held accountable in contract for the wasted costs depends on the privileged and confidential status of the mediation. Confidentiality clearly creates a conundrum for a litigant of limited means who believes that the other party is only participating in the mediation in order to avoid a costs sanction at the end of the case. The other party's obstructive behaviour is concealed by the cloak of privilege, and, to make matters worse, the costs that the unsuccessful party has to pay at the end of the case includes the costs of a mediation which was bound to fail due to the successful party's refusal to negotiate in a meaningful way. Even if the agreement to mediate includes an express term that the parties agree to negotiate in good faith, the question remains as to who is to decide whether or not the term has been breached, and how is such a determination to be made.¹¹¹⁸

Examinations at mediation admissible on question of costs

Regardless of the inclusion of a confidentiality clause in an agreement to mediate requiring settlement proposals made during the process to be privileged and prohibited from being tendered as evidence in any proceeding relevant to the dispute, courts have admitted such evidence in determining the issue of costs. The applicants in the

¹¹¹⁶ See Clarke (note 1078) at 19.

¹¹¹⁷ Tristan Jones 'Using Costs to Encourage Mediation: Cautionary Tales on the Limits of Good Intentions' IBA Legal Practice Division *Mediation Committee Newsletter* September 2006 at 35.

¹¹¹⁸ See Kallipetis (note 509) at 13.

Australian case *Silver Fox Co Pty Ltd (as trustee for the Baker Family Trust) v Lenard's Pty Ltd (No 3)*¹¹¹⁹ attempted to rely on an affidavit from their solicitor that referred to the final proposals put forward by both parties at the stage when the mediation broke down. Mansfield J confirmed that the public interest often requires adherence to the principle that evidence of a communication made when attempting to negotiate a settlement of a dispute will not be used,¹¹²⁰ in order for negotiations to be conducted 'genuinely and realistically' and without the 'risk of such negotiations influencing the outcome on those primary issues'.¹¹²¹

However, Mansfield J concluded that no such public interest exists to prevent a communication being admitted when only cost issues are being determined, and noted that the admissibility of the affidavit would not represent improperly or illegally obtained evidence to justify exclusion,¹¹²² so that the affidavit referring to the mediation information was admitted into evidence.¹¹²³ Similarly, the disclosure of the terms of the mediation agreement would not be unfairly prejudicial to the respondents.¹¹²⁴ However, Mansfield J confirmed that circumstances could arise where the exposure of mediation communications could be unfairly prejudicial to a party.¹¹²⁵

The absolute position

In another Australian case *Tracy v Bifield*,¹¹²⁶ the plaintiff alleged that the defendant offered a settlement figure at a pre-trial mediation conference that could have had implications for the costs order. The court did not allow the disclosure in costs

¹¹¹⁹ [2004] FCA 1570. See also Oscar Shub 'Evidence Act Trumps Confidentiality Clause of Mediation Agreement' IBA Legal Practice Division *Mediation Committee Newsletter* April 2005 at 8.

¹¹²⁰ Section 131 (1) of the Evidence Act 1995 (Cth) ingrained the long-standing principle confirmed in *Field v Commissioner for Railways for New South Wales* (1957) 99 CLR 285 at 291-292 that evidence of a communication made in connection with an attempt to negotiate a settlement of a dispute will not be admitted.

¹¹²¹ *Silver Fox Co Pty Ltd (as trustee for the Baker Family Trust) v Lenard's Pty Ltd (No 3)* [2004] FCA 1570, Mansfield J at para 36.

¹¹²² Section 138 of the Evidence Act 1995 (Cth).

¹¹²³ Section 131 (2)(h) the Evidence Act 1995 (Cth) applied to the mediation agreement and removes the prohibition of section 131 (1) where offers made during mediation are relevant to determining only the liability for costs.

¹¹²⁴ Section 135 of the Evidence Act 1995 (Cth).

¹¹²⁵ For a more detailed discussion of this case and the relevant provisions of the Evidence Act 1995 (Cth), see Oscar Shub 'Evidence Act Trumps Confidentiality Clause of Mediation Agreement' IBA Legal Practice Division *Mediation Committee Newsletter* April 2005 at 8.

¹¹²⁶ Supreme Court of Western Australia, BC 9801948, 19 May 1998 as cited by Boule (note 263) at 563.

proceedings that an offer had been made during the mediation, despite a statute¹¹²⁷ providing that a mediator could admit a report to be used in deciding the costs issue, so that confidentiality was upheld despite legislative policy to the contrary.¹¹²⁸

The English courts have indicated that they will not look inside a mediation to determine whether a party's conduct was reasonable when determining the issue of costs. In *Reed Executive plc v Reed Business Information Ltd*,¹¹²⁹ the Court of Appeal refused to consider 'without prejudice' negotiations that the claimant said would have shown that the defendant's refusal to mediate was unreasonable, for the purpose of assessing the question of costs.¹¹³⁰ The court held that there was an established principle that disclosure of without prejudice negotiations could only take place with the consent of the parties, and it refused to draw an adverse inference from the fact that one party had refused to allow disclosure of without prejudice communications. The court was emphatic that it could not make such an order and that if the parties wanted to admit such evidence, it was open to them to avoid the restrictions on its use by making a 'without prejudice except as to costs', Calderbank-style offer. The court proceeded to say that the requirement, under the CPR,¹¹³¹ that it should consider 'all the circumstances' in deciding whether or not a party had acted unreasonably in refusing mediation was a reference to all admissible circumstances. It also acknowledged that this would mean that it would not always be able to determine whether one side or the other was unreasonable in refusing mediation.¹¹³²

The English court was similarly unequivocal in *Halsey*¹¹³³ when it commented:

We make it clear at the outset that it was common ground before us (and we accept) that parties are entitled in an ADR to adopt whatever position they wish, and if as a result the dispute is not settled, that is not a matter for the court. As is submitted by the Law Society, if the integrity and confidentiality of the process is to be respected, the court should not know, and therefore should not investigate, why the process did not result in agreement.¹¹³⁴

¹¹²⁷ Order 29 r 3(2) of the Rules of the Western Australian Supreme Court as cited by Boulle (note 263) at 563.

¹¹²⁸ Boulle (note 263) at 563.

¹¹²⁹ [2004] EWCA Civ 887.

¹¹³⁰ See also Jones (note 1117) at 35.

¹¹³¹ CPR r 44.3.

¹¹³² See Clarke (note 1078) at 18.

¹¹³³ [2004] EWCA (Civ) 576.

¹¹³⁴ [2004] EWCA (Civ) 576, Dyson LJ at para 14.

The recent English case of *Cumbria Waste Management Ltd and Lakeland Waste Management Ltd v Baines Wilson*¹¹³⁵, discussed above,¹¹³⁶ confirms this position. The court declined to order disclosure of mediation documentation against one party's wishes, and saw this as an exception to the general rule that confidentiality is not a bar to disclosure of material to a court. This case seems to reinforce the security of what goes on at mediations, which, it has been suggested, has been under investigation in recent decisions such as *Chantrey Vellacott v Convergence Group plc and others*,¹¹³⁷ discussed above, where the judge received evidence regarding offers exchanged at the mediation from the parties in determining the award of costs, albeit with the consent of both parties.

It will be interesting to see whether the English courts will maintain the stance of not admitting evidence where there is an objection from one party, for example, when faced with a difficult case, such as where one party has manipulated the CPR in order to claim costs while concealing its unreasonable conduct behind the veil of confidentiality.¹¹³⁸ The main case on negotiation confidentiality, *Walford v Miles*,¹¹³⁹ pre-dates the CPR and adopts a view of negotiation that a duty of good faith would be inherently repugnant to the adversarial position of the parties, which, it has been suggested might be argued to be incompatible with the spirit of the 'new procedural code',¹¹⁴⁰ and consequently this issue may well be revisited in English courts.¹¹⁴¹

Rules

In the event that costs sanctions become the norm, South African courts will also have to wrestle with the conundrum of how far to look inside a mediation in order to assess a party's conduct. While there is no commonly accepted definition of what constitutes

¹¹³⁵ [2008] EWHC 786 (QB). See also the discussion by Tony Allen 'Mediation: protection by privilege and confidentiality? A review of *Cumbria Waste Management Ltd and Lakeland Waste Management Ltd v Baines Wilson*' available at www.cedr.co.uk/index.php?location=/library/articles/20080701_241.htm (last visited 19 July 2008).

¹¹³⁶ See chapter 6 at 153.

¹¹³⁷ [2008] EWHC 786 (QB). See chapter 6 at 152. See also the discussion by Tony Allen 'Mediation: protection by privilege and confidentiality? A review of *Cumbria Waste Management Ltd and Lakeland Waste Management Ltd v Baines Wilson*' available at www.cedr.co.uk/index.php?location=/library/articles/20080701_241.htm (last visited 19 July 2008).

¹¹³⁸ See Jones (note 1117) at 36.

¹¹³⁹ *Walford v Miles* [1992] 2 AC 128.

¹¹⁴⁰ CPR 1.1(1): 'These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.'

¹¹⁴¹ See Jones (note 1117) at 36.

‘good faith’ conduct in a mediation, various rules have been proposed, and it has been suggested that these rules can be divided into two main categories; ‘narrow’ and ‘broad’, with each raising their own difficulties.¹¹⁴²

Narrow rules involve simple requirements from parties including:

- attendance at the mediation;
- attendance for a fixed period of time;¹¹⁴³
- agreement on a position paper before the mediation;
- the parties make an offer to settle; or
- they have sufficient settlement authority in order to reach agreement.

Experience from the USA suggests that the common feature of such rules is that it is easy for the court to establish non-compliance, as the mediator simply hands a checklist to the court without further comment.¹¹⁴⁴ However, the courts in the USA have encountered two main difficulties with narrow rules. The first is that the behaviour they require may be inappropriate. For example, in *Nick v Morgan’s Foods, Inc*¹¹⁴⁵ a Missouri court had ordered the parties to participate in a mediation, requiring that they send a representative with settlement authority. The defendant knowingly failed to comply and insisted that any settlement above \$500 would have to be confirmed by telephone. The court emphasised the importance of the settlement authority requirement, and said that the parties must be capable of being persuaded to change their views in order for ADR to work effectively.¹¹⁴⁶

However, the settlement authority requirement is not always the best solution. In *Re: United States*,¹¹⁴⁷ the Fifth Circuit Court of Appeals specifically recommended that courts should always consider ordering that someone with settlement authority should

¹¹⁴² Jones (note 1117) at 36.

¹¹⁴³ J Lande ‘Why a Good-Faith Requirement is a Bad Idea for Mediation’ (2005) 23 *Alternatives to High Cost Litigation* 1. See also Jones (note 1117) at 36.

¹¹⁴⁴ Jones (note 1117) at 36.

¹¹⁴⁵ 99 F Supp.2d 1056. See also Jones (note 1117) at 36.

¹¹⁴⁶ 99 F Supp.2d 1056 at para 10. It has been pointed out that there are numerous other equally good reasons why it makes sense to send a representative to a mediation with adequate settlement authority, see J R van Winkle *The Solution to Ensuring Good Faith in Court Connected Mediation: Self Interest* (2004) located at www.mediate.com/articles/vanwinkleJ.cfm?nl=67 (last visited 21 June 2007). See also Jones (note 1117) at 36.

¹¹⁴⁷ *Re: United States* 149 F 3d 332. See also Jones (note 1117) at 36.

be available by telephone during the mediation, effectively adopting the position that was characterised as bad faith in *Nick v Morgan's Foods, Inc.*¹¹⁴⁸

It has been suggested that a common way of addressing this problem is to design a narrow rule and provide that parties can decline to abide by it where it is reasonable to do so.¹¹⁴⁹ For example, in *Hunt v Woods*,¹¹⁵⁰ the Court of Appeals acknowledged that while one of the four hallmarks of 'making a good faith offer to settle' under Ohio law was to make a settlement offer or counter-offer, it held that the defendant's failure to make a counter-offer resulted from advice given by the mediator, and was consequently reasonable. As discussed, a similar approach has been taken by the English courts regarding the rule that parties can be sanctioned for an unreasonable failure to attend a mediation. However, this simply raises the obvious issue of the usefulness of a rule where it cannot be proved whether a party's belief was 'objectively reasonable' or whether their behaviour was 'unreasonable.'¹¹⁵¹

The second difficulty with the narrow rules is that it is relatively easy to comply with the letter of the law without paying any attention to its spirit, and a line of cases from Texas illustrates how even the most basic requirement, that the parties must attend the mediation, can be of very limited assistance.¹¹⁵²

The position in Texas is that parties can be required to attend a mediation but they cannot be forced to make good faith efforts at the mediation.¹¹⁵³ There is little doubt that parties could take advantage of such a rule, for example, by exploiting the length of time requirement in order to satisfy attendance at a mediation.¹¹⁵⁴ Similarly, the issue arises as to what should happen when a party attends a mediation but refuses to participate, which is what a party did in *Texas Department of Transportation v Pirtle*,¹¹⁵⁵ on the basis that it did not settle cases when liability was contested for policy reasons. The court held that the Department was obligated to participate in the

¹¹⁴⁸ 99 F Supp.2d 1056. See also Jones (note 1117) at 36.

¹¹⁴⁹ Jones (note 1117) at 36.

¹¹⁵⁰ *Hunt v Woods* 74 F 3d 1240. The court cited *Kalain v Smith* 25 Ohio St 3d 157 in support. See also Jones (note 1117) at 36.

¹¹⁵¹ See Jones (note 1117) at 36.

¹¹⁵² See Jones (note 1117) at 36.

¹¹⁵³ *Decker v Lindsay* 824 SW 2d 247. See also Jones (note 1117) at 36.

¹¹⁵⁴ In *Re Daley* 29 SW 3d 915 the Texas Court of Appeals permitted a lower court to investigate if a participant in a mediation left a mediation at a particular time in order to catch a flight, leaving other representatives at the mediation who had authority to settle. The court did not challenge the underlying assumption that if the participant did leave at that time, it would amount to a violation of the requirement not to leave before the mediator concluded the mediation. See also Jones (note 1117) at 36.

¹¹⁵⁵ *Texas Department of Transportation v Pirtle* 977 SW2d 657. See also Jones (note 1117) at 36.

mediation as it had not objected to the mediation order. In *Texas Parks and Wildlife Dept v Davis*¹¹⁵⁶ the court commented, albeit apparently *obiter*,¹¹⁵⁷ that ‘participation’ in a mediation requires attendance and the making of any offer, which if unrealistic may prove to be no more helpful to the process than making no offer at all, and is probably the reason why the Texas Court of Appeals subsequently refused to elaborate on the basic attendance rule.¹¹⁵⁸

As a result of the inadequacies of focusing on a party’s compliance with narrow rules, some commentators and courts have adopted ‘broad’ rules, which focus on a party’s general course of conduct, and the court is invited to look beyond superficial behaviour in an effort to determine motivation.¹¹⁵⁹ Examples of broad rules include insisting that parties prepare adequately for the mediation,¹¹⁶⁰ that they participate in meaningful discussions,¹¹⁶¹ that they evaluate their case rationally,¹¹⁶² that they do not delay proceedings unnecessarily,¹¹⁶³ or that they generally act in good faith in all of the circumstances.¹¹⁶⁴ However there are numerous problems with such broad rules, many of which flow from the difficulty in gleaning evidence of bad faith from a confidential process.

As discussed above, for a brief period, the courts in California adopted an approach that favoured breaking that confidence. In *Foxgate Homeowners’ Association v Bramalea California Inc*,¹¹⁶⁵ the mediator had filed a report to the court stating that the defence attorney had spent most of his time at the mediations trying to frustrate

¹¹⁵⁶ *Texas Parks and Wildlife Dept v Davis* 988 SW 2d 370. See also Jones (note 1117) at 36.

¹¹⁵⁷ The court distinguished the rule in *Pirtle* on the basis that in *Davis* the department had in fact filed a written objection to the mediation, but was nonetheless ordered to mediate. It has been pointed out that the implication seems to be that the requirement that parties actually participate in a mediation, rather than simply attend, is confined only to situations that are factually very close to *Pirtle*, see Jones (note 1117) at 36.

¹¹⁵⁸ *In re Acceptance Insurance Co*, 33 SW 3d 443, it was confirmed that the court can ask whether a party attended a mediation but not if they were prepared, see also the limited scope of *Pirtle* discussed in note 1157 and Jones (note 1117) at 36.

¹¹⁵⁹ See Jones (note 1117) at 36.

¹¹⁶⁰ Lande (note 1143) at 1. See also Jones (note 1117) at 36.

¹¹⁶¹ For a comprehensive list of good faith rules, see K Kovach ‘Good Faith in Mediation – Requested, Recommended or Required? A New Ethic’ (1997) 38 *S Tex Law Review* 575. See also Jones (note 1117) at 36.

¹¹⁶² This was one of the four rules cited by the court in *Hunt v Woods* 74 F 3d 1240. See also Jones (note 1117) at 36.

¹¹⁶³ This was also one of the four rules cited by the court in *Hunt v Woods* 74 F 3d 1240. See also Jones (note 1117) at 36.

¹¹⁶⁴ For a broad ‘Totality-of-the-Circumstances Test’, see M Weston ‘Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy and Confidentiality’ (2001) 76 *Indiana Law Journal* at 591. See also Jones (note 1117) at 36.

¹¹⁶⁵ 92 Cal Rptr 2d 916. See also Jones (note 1117) at 37.

them, and in particular, failed to bring his experts to a mediation session specifically designed for them, and recommended that he be sanctioned for his conduct. The Court of Appeals¹¹⁶⁶ concluded that such a sanction was permitted,¹¹⁶⁷ stressing the need for good faith participation and concluding that a party that intentionally frustrated the mediation process should not subsequently be permitted to conceal their behaviour behind the veil of confidentiality. That decision was subsequently overturned the following year by California's Supreme Court,¹¹⁶⁸ which quoted with approval a report that stated that the purpose of mediation confidentiality was to promote 'a candid and informal exchange regarding events in the past This frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.'¹¹⁶⁹

Since then, and as discussed in detail above, the Californian Court of Appeals has further recognised the importance of mediation confidentiality by extending legal privilege to cover documents prepared for mediation, if they disclose any of the substance of the mediation.¹¹⁷⁰

It is primarily in an effort to protect mediation confidentiality that broad rules are no longer favoured. For example, in a policy statement, the American Bar Association said that broad rules were too difficult to define and that sanctions should only be used in order to enforce narrow rules.¹¹⁷¹ Similarly US courts have also tended to not enforce broad rules. A recent study of US cases carried out by Professor John Lande, has found that bad faith allegations were upheld in all cases dealing with a failure to attend the mediation (two cases) and a failure to provide a premediation memorandum (two cases), that the courts were split on the cases dealing with settlement authority (seven cases), and that almost all of the rest (20 out of 22), which could be categorised as case involving broad rules, were rejected.¹¹⁷²

¹¹⁶⁶ *Foxgate Homeowners' Association v Bramalea California Inc* 92 Cal Rptr 2d 916.

¹¹⁶⁷ Although the court reversed the order on other grounds.

¹¹⁶⁸ *Foxgate Homeowners' Association v Bramalea California Inc* 26 Cal 4th 1.

¹¹⁶⁹ National Conference of Commissioners on Uniform State Laws, Uniform Mediation Act, May 2001, para 2, Reporter's working notes, quoted verbatim in the *Foxgate* judgment, see also (note 771) above. See also Jones (note 1117) at 37.

¹¹⁷⁰ In *Rojas v Superior Court of Los Angeles* 126 Cal Rptr 2d 97. See also chapter 6 at 177. See also Jones (note 1117) at 37.

¹¹⁷¹ ABA Section of Dispute Resolution 'Resolution on Good Faith Requirements for Mediators and Mediation Advocated in Court Mandated Mediation Programs,' approved by Section Council on 7 August 2004. See also Jones (note 1117) at 37.

¹¹⁷² J Lande 'Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs' (2002) 50 *UCLA Law Review* 69 at 78. See also Jones (note 1117) at 37.

From the above discussion it would be tempting to conclude that good faith rules in the USA have proved ineffective, and that the lesson for South African courts and legislators is to avoid them entirely. However, despite all the difficulties, there is still considerable enthusiasm in the USA for narrow rules, largely in view of the fact that they have helped make mediation a central mechanism of the US justice system.¹¹⁷³

The speed of the cultural change in the USA in favour of mediation has been quite dramatic, particularly in light of the fact that lawyers in the USA were pioneers in this area, and could not benefit from reviewing the experience in other countries.¹¹⁷⁴ Texas mediator Jeffrey S Abrams remarks that twenty years ago, most attorneys in Texas viewed mediation as being confined to community, family or personal injury cases,¹¹⁷⁵ and many believed that participating in a mediation would be wasteful of client resources since many cases could not be settled, or that agreeing to mediate was a sign of weakness.

Abrams believes that the increased use of mediation has changed such views and that exposure to the benefits of the process, has led lawyers in Texas to embrace it as an essential alternative to litigation. This also seems to have been the attitude of the judiciary,¹¹⁷⁶ which has taken the view that parties sometimes need to be told what is best for them. In *Re Atlantic Pipe Corp*¹¹⁷⁷ the Court of Appeals for the First Circuit stated that:

When mediation is forced upon unwilling litigants, it stands to reason that the likelihood of settlement is diminished ... The fact remains, however, that none of these considerations establishes that ... mediation is always inappropriate... This is particularly true in complex cases involving multiple claims and parties. The fair and expeditious resolution of such cases often is helped along by creative solutions, solutions that simply are not available in the binary framework of traditional adversarial litigation.¹¹⁷⁸

¹¹⁷³ See Jones (note 1117) at 37.

¹¹⁷⁴ See Jones (note 1117) at 37.

¹¹⁷⁵ J Abrams 'Compulsory Mediation: The Texas Experience' located at www.internationalmediator.com/TexasExperience.shtml (last visited 20 June 2007). See also Jones (note 1117) at 37.

¹¹⁷⁶ See K M Blankley 'Confidentiality or Control: Which will Prevail as Confidentiality and "Good Faith" Negotiation Statutes Collide in Court-Annexed Mediations?' (2004) located at www.abanet.org/dispute/essay/confidentialitycontrol.pdf (last visited 7 August 2008). See also Jones (note 1117) at 37.

¹¹⁷⁷ *Re Atlantic Pipe Corp* 304 F 3d 135. See also Jones (note 1117) at 37.

¹¹⁷⁸ Circuit Judge Selya, at 144-145. See also Jones (note 1117) at 37.

This approach can be contrasted with the position taken by the English courts in *Halsey*,¹¹⁷⁹ where Dyson LJ stated that:

If the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process ... if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it.¹¹⁸⁰

The difficulty with the approach taken by the English courts in trying to assess retrospectively whether a refusal to attend was reasonable, is that it provides very limited protection given the evidential limits of what can be considered.¹¹⁸¹ In this context it may seem sensible for South African legal advisors to cautiously advise their clients of the potential risks of non-engagement in mediation prior to entering into a mediation agreement, where costs sanctions for a refusal to mediate are a possibility. However, where a party is reluctant to engage in the process due to fears of unreasonable behaviour by the party on the other side, experience from England would seem to suggest that few inherently unreasonable parties restrain their unreasonableness to circumstances where mediation confidentiality restricts judicial access to what transpired at the mediation.¹¹⁸² Consequently, there may be sufficient evidence of unreasonable conduct available to a court without the need to intrude into the confidentiality of the mediation.

This would seem to be consistent with the US experience, which seems to suggest that only the narrowest of requirements proves workable in practice, and that the *Halsey*¹¹⁸³ approach of not looking inside the mediation process is the correct one for the South African courts to follow. On the other hand, it has also been argued that

¹¹⁷⁹ [2004] EWCA (Civ) 576. See also Jones (note 1117) at 37.

¹¹⁸⁰ [2004] EWCA (Civ) 576, Dyson LJ at para 10. See also Jones (note 1117) at 37. However, this element of the judgement has since been criticised by numerous English judges, most notably the head of the judiciary in England and Wales, Lord Chief Justice Phillips, who referred specifically to Dyson LJ's judgement in *Halsey* and proceeded to say that 'Parties should be given strong encouragement to attempt mediation before resorting to litigation. And if they commence litigation, there should be built into the process a stage at which the court can require them to attempt mediation.' See Speech by Lord Phillips of Worth Matraves, Lord Chief Justice of England and Wales 'Alternative Dispute Resolution: An English Viewpoint' India 29 March 2008, available at www.judiciary.gov.uk/docs/speeches/lcj_adr_india_290308.pdf (last visited 7 August 2008).

¹¹⁸¹ See Jones (note 1117) at 37.

¹¹⁸² See Tony Allen 'Peering behind the veil of mediation confidentiality, a new judicial move in *Mulmesbury v Strutt and Parker*' available at www.cedr.com/index.php?location=/library/articles/20080421_234.htm (last visited 19 July 2008).

¹¹⁸³ [2004] EWCA (Civ) 576. See also Jones (note 1117) at 38.

the policy of insisting on a minimal attendance requirement has proved so effective in building a culture of mediation in the USA that it should be more firmly embraced by courts in other jurisdictions.¹¹⁸⁴

It has also been suggested that if any aspect of a country's mediation laws should be altered in view of the US experience, it should be to require the parties to attend mediations, except in exceptional circumstances and with prior excusal of the court.¹¹⁸⁵ The difficulty with this suggestion arises in circumstances where parties attempt to mediate their dispute prior to proceedings being issued, so that the dispute has not come before a court. In the event that mediation clauses become a standard provision in commercial contracts in South Africa, this will become a critical issue that disputing parties and the courts that may ultimately determine the dispute will have to consider.

While it is suggested that the *Halsey*¹¹⁸⁶ approach is the correct one, for a party in a dispute that is subject to an existing agreement to mediate, it is critical that the court in a subsequent action dealing with the dispute is equipped with the necessary power to excuse them if they can show that mediation would have been unreasonable in the circumstances. Such a rule would give some assistance to parties who have a genuine reason to avoid mediation, for example, where a party needs to have a legal point determined, or where unreasonable behaviour by the other side can be shown, but would otherwise assist in developing a mediation culture.

The principle established

The National Credit Act¹¹⁸⁷ was introduced in order to protect consumers from undue risk and to create a fair and non-discriminatory lending market in South Africa. The Act provides that as an alternative to filing a complaint with the National Credit Regulator regarding a complaint concerning an alleged contravention, a person may refer the matter to mediation, provided the credit provider is not a financial institution, in which

¹¹⁸⁴ See Jones (note 1117) at 38, where the author refers to the approach that the English courts should follow.

¹¹⁸⁵ See Jones (note 1117) at 38, where the author refers to the approach that should be followed in England.

¹¹⁸⁶ [2004] EWCA (Civ) 576.

¹¹⁸⁷ Act 34 of 2005.

case it would go to the relevant Ombud, and does not object.¹¹⁸⁸ If the respondent objects to mediation, the Tribunal, following consideration of the matter, may make an exceptional order as to costs against the respondent if it considers that the matter could have been resolved by mediation.¹¹⁸⁹

It is clear from this legislation that the South African legislature has effectively adopted the principle of a costs sanction, where a party unreasonably refuses to mediate, it may be penalised by the Tribunal with an exceptional costs order. Having established the concept of a potential costs sanction in the National Credit Act, it is submitted that this principle should be extended by the legislature to cover commercial disputes where the parties have voluntarily agreed to mediate, and one party subsequently unreasonably refuses.

Costs jurisprudence

If South Africa is to follow the same path as other jurisdictions with regard to mediation, it is likely that commercial mediation will only become a prominent form of dispute resolution when heavy costs penalties are deployed by the courts. In circumstances where there is a significant risk of onerous costs orders being imposed on recalcitrant parties, it is likely that there will be a significant rise in the number of disputes being mediated. As noted above, this has been the reason for the growth of commercial mediation elsewhere.

Our attention then turns to whether or not a basis currently exists under which the South African courts could make such an order. Similar to other jurisdictions, the general rule in South Africa is that costs follow the event, so that the successful party should be awarded their costs.¹¹⁹⁰ This rule is only departed from where good grounds exist for doing so,¹¹⁹¹ and in the absence of special circumstances, successful litigants are entitled to their costs.¹¹⁹²

¹¹⁸⁸ Sections 134(1) and 134(2).

¹¹⁸⁹ Section 134(3).

¹¹⁹⁰ *Pelser v Levy* 1905 TS 466 469.

¹¹⁹¹ *Abbott v Von Theleman* 1997 (2) SA 848 (C).

¹¹⁹² *Kathrada v Arbitration Tribunal* 1975 (2) SA 673 (A) at 679-681.

The basic rule¹¹⁹³ is that, subject to express enactments to the contrary,¹¹⁹⁴ all costs are to be determined at the court's discretion.¹¹⁹⁵ This principle even takes precedence over the general rule that costs follow the event.¹¹⁹⁶ It is well established that this discretion must be exercised judicially¹¹⁹⁷ after considering the facts of relevant cases. It is essentially seen as a matter of fairness to both sides,¹¹⁹⁸ where 'judicially' means 'not arbitrarily'.¹¹⁹⁹ While the court's discretion is wide, it is not unfettered.¹²⁰⁰ It is also established law that where parties reach an agreement to limit issues during a trial, they are bound by the terms of that agreement.¹²⁰¹

The Supreme Court of Appeal succinctly stated that '[i]t is beyond question that the circumstances of a case may warrant an order, in the exercise of the Court's discretion, depriving a successful party of costs partially or entirely, and even warrant an order requiring the successful party to pay the unsuccessful party's costs, again, partially or entirely.'¹²⁰² Hence, a successful party may under certain circumstances be ordered to pay the costs of the proceedings, but this is an unusual order and is not very common.¹²⁰³ In *Palley v Knight*¹²⁰⁴ it was stressed that it is unusual for a court to order that a successful party would pay the costs of an unsuccessful party. The cases in which such orders are made are in circumstances where the court disapproves of the actions of the successful party, as in *Berkowitz v Berkowitz*,¹²⁰⁵ where it was held that the extreme course of making the successful party bear all of the costs was only justifiable where that party brought about and was responsible for the litigation in question.

¹¹⁹³ See W A Joubert *The Law of South Africa* Volume 3 Part 2 at 206. For a more detailed discussion of costs issues in South Africa, see AC Cilliers, *Law of Costs*.

¹¹⁹⁴ See *Kruger Bros & Wasserman v Ruskin* 1918 AD 63 69, or the more recent case, *Blue Circle Ltd v Valuation Appeal Board, Lichtenburg* 1991 (2) SA 772 (A) at 796.

¹¹⁹⁵ For example, Section 48(d) of the Magistrates' Courts Act 32 of 1944 provides that the court may, 'as a result of the trial of an action, grant such judgement as to costs (including costs between an attorney and a client) as may be just.'

¹¹⁹⁶ See *Abbott v Von Theleman* 1997 (2) SA 848 (C) at 854B.

¹¹⁹⁷ *Gelb v Hawkins* 1960 (3) SA 687 (A) at 694.

¹¹⁹⁸ *Gelb v Hawkins* 1960 (3) SA 687 (A) at 694.

¹¹⁹⁹ *Merber v Merber* 1948 (1) SA 446 (A).

¹²⁰⁰ *Moller v Erasmus* 1959 (2) SA 465 (T) at 467.

¹²⁰¹ *F & I Advisors (Edms) Bpk v Eerste Nasionale Bank van SA Bpk* 1999 (1) SA 515 (A) at 524E-F

¹²⁰² *Michael v Linksfield Park Clinic (Pty) Ltd* 2001 (3) SA 1188 (SCA) at 1204, where the conduct of the successful second defendant was deemed to be reprehensible, by deliberately putting up a defence in the knowledge that it was false.

¹²⁰³ *Kent v Bevern & Co* 1907 TS 395 at 400-401. See also *Palley v Knight* 1961 (4) SA 633 (SR) at 639; *Treatment Action Campaign v Minister of Health* 2005 (6) SA 363 (T) at 371 H. See also *City of Cape Town v Unlawful Occupiers, Erf 1800, Capricorn (Vrygrond Development)* 2003 (6) SA 140 (C) at 153-154, where the applicants were partially successful, but ordered to pay half of the respondents' costs.

¹²⁰⁴ *Palley v Knight* 1961 (4) SA 633 (SR) at 639.

¹²⁰⁵ *Berkowitz v Berkowitz* 1956 (3) SA 522 (SR) at 527.

However, South African courts have ordered the successful party to bear the costs of both sides in circumstances where the misleading conduct or statements of the successful party were the cause of all of the costs of the proceedings.¹²⁰⁶ The basis of an award of costs against a successful party has to date been based on the fact that that party either misled another party into litigating, or caused unnecessary litigation or procedural steps to be taken.¹²⁰⁷ In *Chetty v Louis Joss Motors*¹²⁰⁸ the defendant had misled the plaintiff to institute proceedings for the recovery of an amount not due by the defendant. The court on appeal refused to interfere with the magistrate's unusual order requiring the successful defendant to pay the plaintiff's costs.

*Bester v Van Niekerk*¹²⁰⁹ provides an example of unnecessary litigation, where it was held that a litigant in seeking urgent interim relief under an ex parte application acted at his peril. The court held¹²¹⁰ that the plaintiff's rashness caused the legal proceedings which would not have been necessary had a measure of prudence been employed. It was therefore held, on appeal, that the plaintiff should have been ordered to pay the costs of the proceedings.

The view could be taken that unnecessary litigation could be the result of an unreasonable refusal to mediate where a dispute could have benefited from mediation. This conclusion would depend upon an analysis of the specific circumstances of individual cases. While there is no case law in South Africa dealing with an unreasonable refusal to mediate a commercial dispute, the above cases, by analogy, could prove helpful in establishing a costs principle.¹²¹¹

¹²⁰⁶ *Krook v Zaltzman* 1930 OPD 108 at 111.

¹²⁰⁷ *Kent v Bevern & Co* 1907 TS 395 at 401-402; *Rhodes v Coatzee* (1865) 1 R 288; *Bosch v Titley* 1908 ORC 27; *Chenille Industries v Vorster* 1953 (2) SA 691 (O) at 702; *De Villiers v Soetsane* 1975 (1) SA 360 (E) at 363; *Nxumalo v Mavundla* 2000 (4) SA 349 (D) at 354D-E.

¹²⁰⁸ 1948 (3) SA 329 (T). See also *Ritter v Godfrey* [1920] 2 KB 47 (CA) at 60.

¹²⁰⁹ 1960 (2) SA 363 (E) at 366.

¹²¹⁰ *Bester v Van Niekerk* 1960 (2) SA 363 (E) 366 at 368.

¹²¹¹ In correspondence between former Chief Justice Arthur Chaskalson and the author, Justice Chaskalson commented that ADR options (such as mediation) are important options for potential litigants to choose and, in some circumstances, the best option. Email to the author dated 20 April 2007. It is to be hoped that the judiciary takes a proactive approach to encouraging mediation. One initiative proposed in England that would prove helpful in South Africa, is to train and educate all judges about the mediation process and how and why it can achieve workable settlements for many commercial disputants. See Carroll (note 319) at 401. See also Mr Justice Lighman 'In my opinion...CEDR mediation training for a judge' available at www.cedr.com/index.php?location=/library/articles/20071127_225.htm (last visited 7 August 2008), where the English High Court judge remarks that the more he learned about mediation, the more enthusiastic an advocate he became of the process.

Statutory basis

At the beginning of this chapter the potential influence of the CPR jurisprudence in South Africa was discussed. As there is not currently an equivalent to the CPR, we saw how the Supreme Court of Appeal has suggested that foreign statutes may prove influential despite the absence of an equivalent domestic statute. It may however be the case that a legislative basis already exists to penalise a party who refuses to mediate a dispute that is deemed appropriate for mediation.

Rule 39(24) of the Uniform Rules¹²¹² provides that where the court considers that the proceedings have been unduly prolonged by the successful party by the calling of unnecessary witnesses or by excessive examination or cross-examination, or by over elaboration in argument, it may penalise such party in the matter of costs.¹²¹³ The Court has in the past exercised its discretion under this rule.¹²¹⁴

It is at least arguable that a party to an agreement to mediate, who refuses to engage in the process and consequently denies the possibility of resolving many of the issues in dispute, causes the proceedings to be unduly prolonged. With a willing judiciary, it might be the case that costs sanctions could be awarded under this provision against a party who is successful at trial, but unreasonably refused an offer to mediate the dispute. It remains to be seen whether the judiciary proves sufficiently proactive to make such a ruling when an appropriate case arises.

¹²¹² Supreme Court Act 59 of 1959.

¹²¹³ See also the general provision in the Magistrates' Court Rules r 33(1), which states 'The court in giving judgment or making any order, including any adjournment or amendment, may award such costs as may be just.'

¹²¹⁴ *Van der Schyff en 'n ander v Gemeenskapsontwikkelingsraad* 1984 (2) SA 497 (W).

CHAPTER EIGHT: THE MEDIATOR

Qualities and role of the mediator

Many commentators have speculated as to what makes the successful mediator. In a light-hearted spirit Simkin offers the following long list.¹²¹⁵

- the patience of Job;
- the sincerity and bull-dog characteristics of the English;
- the wit of the Irish;
- the physical endurance of the marathon runner;
- the broken-field dodging abilities of a half-back;
- the guile of a Machiavelli;
- the personality-probing skills of a good psychiatrist;
- the confidence-retaining characteristic of a mute;
- the hide of a rhinoceros;
- the wisdom of a Solomon.

In a more reflective mood important attributes seem to include honesty, integrity, impartiality, politeness, tact, a sympathetic nature, a commitment to the process and the parties, an even-temperedness, patience, good listening skills, self-confidence and the ability to communicate.¹²¹⁶

It is suggested that these qualities should be real as well as perceived, must be demonstrated, and should be accompanied by a fundamental belief in human values and potential, balanced with an ability to assess personal weaknesses and strengths. Personal drive and ego are also essential, but have to be qualified by a willingness to be self-effacing. Risk-taking, a belief in the process and the possibility of seeking out mutual interests are critical, as is a hard-nosed ability to analyse what is available in contrast to what might be desirable to either party and to bring this reality to bear between the parties.¹²¹⁷

Very few mediators could honestly claim to have all of these desirable characteristics and talents. Broadly speaking, it has been suggested that a mediator's

¹²¹⁵ William E Simkin *Mediation and the Dynamics of Collective Bargaining* at 53. See also Trollip (note 77) at 41.

¹²¹⁶ Trollip (note 77) at 41.

¹²¹⁷ Trollip (note 77) at 41.

acceptability derives from being perceived as independent and impartial by the parties and as having the necessary skills to facilitate agreements. An understanding or insight into the issues that form the dispute is advantageous, but expertise on these issues is not generally required.¹²¹⁸ Mediators would also need to have process skills, in order to assess the best way to design and drive the process in a way that is most likely to produce a mutually acceptable outcome.¹²¹⁹

As mediation or ‘to mediate’ means ‘to go between’ or ‘to be in the middle’, the mediator’s role is neither as judge nor legal advisor, counsellor or therapist. The mediator’s sole function is to bring the parties together to help them find a solution of their own making.¹²²⁰ In this spirit, the mediator should motivate without manipulating, cajole without coercing and create doubt in each party’s mind so that they can see the weaknesses in their own position and open themselves to compromise.¹²²¹

Fuller believes that ‘the central quality of mediation’ exists in ‘its capacity to re-orientate the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes toward one another.’ In assisting this process ‘the primary quality of the mediator ... is not to propose rules to the parties and to secure their acceptance of them, but to induce mutual trust and understanding that will enable the parties to work out their own rules.’¹²²² Fuller sees mediation as evoking in each party recognition and acknowledgement of, and some degree of understanding and empathy for, the other party’s situation, despite the fact that their interests and positions may remain opposed. Baruch Bush elaborates on this central feature of the mediator’s role, by pointing out that even where such mutual recognition does not produce compromise and an ultimate agreement, evoking recognition is itself an accomplishment of enormous value.¹²²³

¹²¹⁸ Nupen (note 22) at 41.

¹²¹⁹ Nupen (note 22) at 41.

¹²²⁰ Lovenheim (note 7) at 35.

¹²²¹ Lovenheim (note 7) at 36.

¹²²² Lon Fuller ‘Mediation: its Forms and Functions’ (1971) 44 *Southern California Law Review* at 305-339.

¹²²³ R A B Bush ‘Efficiency and Protection, or Empowerment and Recognition?: The Mediator’s Role and Ethical Standards in Mediation’ (1989) 41 *Florida Law Review* 253 at 266-270.

Education, training, accreditation and standards

Issues of education, training, accreditation and standards will become increasingly important as mediation advances into the commercial realm in South Africa. Under mediation's contemporary re-institutionalisation in Europe, North America and Australia, mediators often appear as specialists, authoritative professionals who have been taught how to mediate, hold certificates of competence and subscribe to codes of practice.¹²²⁴

It is critical that mediation is offered as a service by appropriately qualified individuals and, akin to many other countries, considerable efforts must be taken to develop quality, standards and accountability in mediation.¹²²⁵ South African mediators must be well positioned to improve their competence and ethical behaviour and display a willingness to offer process safeguards so that the mediation option can be presented in the best light to potential users.¹²²⁶

South Africa has no national or provincial statutes regulating the practice of mediation or conferring legal status on mediators, and private mediation is regulated by market forces and a number of private 'accreditors', so that subject to laws on deceptive or misleading conduct, anyone can act as a mediator, regardless of training, experience or membership of professional associations.¹²²⁷

Education

There have been an increasing number of dispute resolution and conflict management courses being offered to students at all levels of tertiary education in the USA. The CPR Institute of Dispute Resolution has developed an excellence award that is conferred annually on educators who have designed and taught ADR courses. Advanced degrees at the master's level and numerous mediator training programmes for lawyers, judges and others have developed, as well as peer mediation education and training in elementary and secondary schools across the USA. There is a mediation programme on most college campuses, run by students, for students, and the concept of mediation as an

¹²²⁴ See Roberts and Palmer (note 302).

¹²²⁵ See H Herman, N Hollett, D Eaker, J Gale, M Goster 'Supporting Accountability in the Field of Mediation' (2002) 18 *Negotiation Journal* 30 as cited by Boule (note 263) at 460.

¹²²⁶ Boule and Rycroft (note 231) at 199.

¹²²⁷ Boule and Rycroft (note 231) at 200.

integral aspect of education has been promoted and integrated into the education systems at all levels.¹²²⁸

While academic qualifications have not featured as a criterion for admission to mediator panels, South African universities have developed courses in mediation and other dispute resolution subjects.¹²²⁹ Some programmes are exclusively ‘academic’ dealing with theory, principle and developments in the literature, while others include competency-based training and practical skills development.¹²³⁰ Assessment is generally assignment based, with examinations, tutorial or seminar performance, and competence in experiential situations forming part of some courses.¹²³¹

The University of Stellenbosch Business School recently launched a centre for conflict management, dispute resolution and negotiation.¹²³² The purpose of the centre is to develop advanced conflict management and negotiation learning practice in the business and organisational context in Africa, through academic programmes at masters and doctoral level, research, staff development and curriculum development.¹²³³ There are also plans to run shorter courses such as management development programmes. It is the first centre of education in South Africa to have a specific focus on the resolution of commercial disputes. It is to be hoped that this initiative will serve as an example to other South African tertiary institutions on the importance of commercial mediation as an essential module in their business and law courses.

Mediator training

As there is no national system of accreditation in South Africa, no training is formally required of anyone who wants to practise as a mediator.¹²³⁴ However, for admission to mediator panels organised by mediation service providers, certain training is generally

¹²²⁸ See Creo (note 40) at 312.

¹²²⁹ For example, the law schools at the Universities of KwaZuluNatal, Cape Town and Witwatersrand offer elective courses in ADR, see Boulle and Rycroft (note 231) at 204. The University of Cape Town recently included a module on commercial mediation as part of the commercial arbitration programme at LLM level.

¹²³⁰ Boulle and Rycroft (note 231) at 204.

¹²³¹ Boulle and Rycroft (note 231) at 204.

¹²³² Under article 1 of the Centre’s constitution, it is currently referred to as ‘The Africa Centre for Dispute Settlement.’ See also www.usb.ac.za/disputesettlement (last visited 8 August 2008).

¹²³³ Interview with Professor Barney Jordaan at the Graduate School of Business of Stellenbosch University on 1 June 2007, update interview 29 February 2008.

¹²³⁴ For a discussion on the merits and demerits of training, see Boulle and Rycroft (note 231) at 200-201.

required and mediator standards also refer to training obligations.¹²³⁵ Greater control is exercised over mediators in other jurisdictions such as New South Wales, Australia, where one of the compulsory provisions in the New South Wales Law Society's Guidelines for Mediators requires that solicitors can only act as sole mediators when they complete an approved training course and have gained the requisite mediation experience,¹²³⁶ while continuing mediation education is also a requirement.¹²³⁷

The consensus among academics and practitioners is that some form of training is an essential prerequisite to effective mediation practice.¹²³⁸ Conflict Dynamics, a South African-based company which has traditionally organised training courses and workshops in the labour field,¹²³⁹ organised and hosted three CEDR Mediator Skills Training courses¹²⁴⁰ over the past two years in Johannesburg.¹²⁴¹

Through a five day programme of comprehensive tuition in effective dispute resolution, participants are trained in the skills required for effective mediation of commercial disputes and assessed for CEDR accreditation. The Mediator Handbook, case studies and role-play instructions are despatched one month prior to the training course. A minimum of 16 hours pre-reading is suggested. CEDR has over 30 trainers from legal and business backgrounds, all of whom are practising mediators with considerable experience.¹²⁴²

Under the guidance of the trainers participants are taught how to:

- settle disputes effectively in days rather than months, which it is believed, will save vital management time;

¹²³⁵ Boulle and Rycroft (note 231) at 201.

¹²³⁶ An 'approved course' requires that at least 50 per cent of the course involves skills training, including a minimum of two simulated mediations where the applicant acts as mediator. 'Satisfactory completion' means completion of a formal assessment confirming that the solicitor is competent to act as a sole mediator. See Boulle and Rycroft (note 231) at 201 note 3.

¹²³⁷ Boulle and Rycroft (note 231) at 201. This may be contrasted with the Queensland Law Society Standards for Mediators, which contain the unimposing obligations that mediators be 'adequately trained' and 'committed to' the concept of further mediation education and training, see Boulle and Rycroft (note 231) at 201.

¹²³⁸ Pretorius (note 136) at 9.

¹²³⁹ See www.conflictdynamics.co.za (last visited 8 August 2008).

¹²⁴⁰ See www.cedr.com/training/incompany/mst.php (last visited 8 August 2008).

¹²⁴¹ Correspondence between John Brand and the author, dated 2 July 2008.

¹²⁴² The author gives an overview of the CEDR Mediator Skills Training Programme that leads to accreditation for successful candidates, as this is the training course that is currently being organised for the emerging commercial mediation industry in South Africa. For more detailed information on this course, and other training courses offered by CEDR, see www.cedr.com/training/incompany/mst.php (last visited 8 August 2008).

- add value to commercial disputes by finding commercial solutions to commercial problems;
- manage the mediation process and facilitate advanced negotiation;
- advise others on the features and uses of other effective dispute resolution techniques; and
- transform the way they communicate.

Equipping participants with a broad perspective on conflict management, the programme focuses specifically on the mediation process and the skills required, including:

- a review of dispute resolution methods;
- a comparison of negotiation, arbitration and mediation;
- instruction and practice in mediation skills including the structure and phases of that process and the necessary communication skills; and
- assessment of participants' mediation skills.

Through demonstration and practice, participants are taken through the phases of education, while skills and process are highlighted and attempted in practical exercises. Case studies based on actual mediations are used throughout the course and participants experience the role of mediator, adviser and mediation party.

As part of the programme, there is a 'practice day' of shared learning, which is devoted to a single detailed case study and participants practise the skills required at each stage of a mediation. The trainers coach small groups of participants through the case study and provide personal feedback, and the mediation sessions are interspersed with group discussions covering the key issues encountered by the mediator. Participants mediate one simulated case on each day and a trainer observes each session and assesses performance against a set of competencies. Individual feedback, group learning and discussion continue alongside this assessment.

Each delegate is required to complete three written assignments for a deadline two weeks after the course ends and two of these are assessed:

- a written settlement agreement based on the case study undertaken during the course; and

- a written self-assessment of the participant's mediation skills, including the strengths they bring to mediation and the areas they feel they need to work on.

The third assignment is to write a brief action plan about how the participant hopes to take mediation forward in their career. The purpose of this assignment is to assist participants to put their plans into action and give CEDR the opportunity to support them where appropriate.

One of the advantages of mediation training such as the CEDR course is that it can deal in context with some of the grey areas found in mediator standards and guidelines, so that in circumstances where a mediator is faced with an imminent settlement that seems grossly unfair or inequitable, there are a number of strategic interventions that can be explored to deal with it. It has been suggested that most of these interventions can be justified in process terms, and that a judgment is required regarding their suitability and effectiveness. Experience suggests that training and simulated experience can provide a more practical way of appreciating the subtleties of process responses to ethical dilemmas than the abstract and often woolly articulation of standards and codes of conduct.¹²⁴³

Accreditation

In South Africa there is no national system of accreditation for mediators and very little transferability of training credentials. Issues of training and accreditation have been left to mediation agencies who have also acted as 'accreditors'.¹²⁴⁴ While accreditation is not an absolute indication of competence or a guarantee for those who have become accredited that they will have a career in mediation, it does ensure the observance of certain standards.¹²⁴⁵

CEDR accreditation is based on assessments during the course, and as previously mentioned, participants must also complete a three part written assignment within two weeks of completing the programme. The Certificate of Accreditation is

¹²⁴³ See G Walker 'Training Mediators: Teaching About Ethical Concerns and Obligations' (1988) 19 *Mediation Quarterly* 33. See also H Astor and C Chinkin 'Mediation Training and Ethics' (1991) 2 *ADRJ* 205-23, as cited by Boulle and Rycroft (note 231) at 203.

¹²⁴⁴ Boulle and Rycroft (note 231) at 205.

¹²⁴⁵ Loukas A Mistelis 'ADR in England and Wales: A Successful Case of Public Private Partnership' in Alexander (note 49) at 171.

awarded to participants who demonstrate the required level of competence to achieve the status of CEDR Accredited Mediator. Approximately 70 per cent of participants achieve accreditation, and for those who do not, the Foundation Course in Mediation Skills Certificate is awarded to acknowledge their participation, and an opportunity to be reassessed may be available for some participants.¹²⁴⁶

CEDR accreditation is recognised by a number of professional bodies, for example, it satisfies the Law Society's training standards for civil and commercial mediation in England. Accredited mediators are eligible to become registered with CEDR's continuing professional development scheme, which provides a framework for individual development, and registered mediators are recognised internationally as offering a service of quality and integrity.¹²⁴⁷

No specific qualifications or experience are needed to undertake the Mediator Skills Training course in order to become assessed for accreditation, and participants from different professions and backgrounds are encouraged.¹²⁴⁸ In addition to the five day Mediator Skills Training course, CEDR offers Continuing Professional Development events for mediators.

Through its system of intensive, practical training and assessment CEDR accreditation is recognised as an international benchmark of mediation excellence.¹²⁴⁹ From the three CEDR courses organised by Conflict Dynamics,¹²⁵⁰ 54 commercial mediators have received CEDR accreditation to date in South Africa.¹²⁵¹ By choosing CEDR as the training and accreditation service provider, South African commercial mediators will be best placed to offer disputing parties the benefit of world class training in this field.¹²⁵²

¹²⁴⁶ For more detailed information on CEDR Accreditation, see www.cedr.com/training/incompany/mst.php (last visited 8 August 2008).

¹²⁴⁷ See Mistelis (note 1245) at 170.

¹²⁴⁸ Mistelis (note 1245) at 170.

¹²⁴⁹ See Mistelis (note 1245) at 170.

¹²⁵⁰ See www.conflictdynamics.co.za (last visited 8 August 2008).

¹²⁵¹ Correspondence between John Brand and the author, dated 2 July 2008.

¹²⁵² In the interviews with practising commercial mediators conducted in Cape Town and Johannesburg between 21 May and 20 June 2007, it emerged that four of the ten interviewed are CEDR-accredited mediators, four have a background in labour law and trained with IMSSA or TOKISO or both, and the remaining two have extensive experience as commercial law practitioners.

Standards

It has been suggested that the advantages of mediation over the adversarial system, with its private and informal nature, can also create potential risks, and given the absence of due process safeguards, opportunities can exist for manipulative and oppressive behaviour both between the parties themselves and by the mediator.¹²⁵³ Safeguarding a fair process must go beyond the trust that should underscore the relationship between the mediator and the parties,¹²⁵⁴ and this is where standards play a central role.

Standards guide mediators towards a sense of their basic commitments and professional responsibilities, and in turn establish basic expectations of the parties and create norms against which conduct can be assessed regarding discipline and liability.¹²⁵⁵ As Boule sensibly points out, a balance is required when drawing up standards and codes of conduct so that that they are not imposed at the expense of process flexibility, responsiveness and diversity.¹²⁵⁶

Some countries have developed umbrella standards for all mediators that provide a general framework for all mediation practice areas, and aspire to have the flexibility to evolve over time.¹²⁵⁷ Many South African organisations have developed their own standards that are similar to each other, and have been generated through deliberative processes where there was an absence of widespread practical experience with the process, giving them a tentative and contingent nature.¹²⁵⁸ A code of conduct should be seen as an organic instrument, periodically changing to reflect the requirements of the process it is drafted to protect as the needs of that process evolve.

The status of mediator standards

While there are variations regarding the status of professional codes of conduct, the three general options are; a code of rules that bind practitioners where a deviation could

¹²⁵³ Marian Roberts 'Family Mediation: The Development of the Regulatory Framework in the United Kingdom' (2005) 22 *Conflict Resolution Quarterly* 4 at 509-526.

¹²⁵⁴ Roberts (note 1253) at 509-526.

¹²⁵⁵ Boule and Rycroft (note 231) at 205.

¹²⁵⁶ See Boule (note 263) at 460-461.

¹²⁵⁷ Boule and Rycroft (note 231) at 205.

¹²⁵⁸ Boule and Rycroft (note 231) at 206.

amount to professional misconduct, a set of guidelines that provide guiding principles only, or hybrid systems that contain both binding and guiding provisions.¹²⁵⁹

The content of mediator standards

The provisions in codes of conduct for mediators generally deal with ethical duties and other practices and standards, and the distinction between these two groups can be a difficult one.¹²⁶⁰ Folberg and Taylor describe ethical limitations as the ‘do nots’ of the process (e.g. the impartiality requirement), as a breach could result in the mediated settlement agreement being set aside, while standards are generally a positive statement of what is expected from the process from a moral and social perspective (e.g. ground rules of the process), and a breach would not invalidate an agreement.¹²⁶¹ It has been suggested that this approach could encourage parties who have doubts about their mediated settlement agreements to challenge the agreement on the basis of the conduct of their mediator, while an alternative approach would view mediators’ breaches of ethical duties the same as those of lawyers, so that the work they have done is not necessarily undone.¹²⁶² Mediator standards can also deal with mediator qualifications and competence, usually expressing them in general terms.¹²⁶³

Mediator functions and skills

Some standards attempt to describe the process and list the mediator functions including assessing whether the dispute is suitable for mediation, arranging the mediation, explaining the nature and purpose of the process, providing structure and control throughout the process, promoting constructive informed negotiations, encouraging the settlement to be reduced to writing¹²⁶⁴ and where appropriate, ending the mediation.¹²⁶⁵

¹²⁵⁹ Boulle and Rycroft (note 231) at 206.

¹²⁶⁰ Boulle and Rycroft (note 231) at 206.

¹²⁶¹ See Folberg and Taylor (note 236) at 250; G Sammon ‘The Ethical Duties of Lawyers Who Act for Parties to a Mediation’ (1993) 4 *ADRJ* 190-191 as cited by Boulle and Rycroft (note 231) at 206.

¹²⁶² They may nonetheless be sued for negligence, see Boulle and Rycroft (note 231) at 206-207.

¹²⁶³ Boulle and Rycroft (note 231) at 207.

¹²⁶⁴ Section 6.2 of the guidelines of the Law Institute of Victoria require that a mediator prepares a written summary of any agreement reached by the participants, which is unusual when parties have legal representatives present, see Boulle and Rycroft (note 231) at 207.

¹²⁶⁵ Boulle and Rycroft (note 231) at 207.

It seems that mediator functions are often drafted in general terms and do not provide clear direction on their own.¹²⁶⁶

Some standards dealing with mediator functions deal with objective features of the process such as explaining the nature and purpose of the process, while other functions are less objective and more difficult to define, such as the requirement to act as ‘agent of reality’.¹²⁶⁷ Standards generally don’t deal with the specific interventions that mediators can make or the subjective judgments that mediators are obliged to make.¹²⁶⁸

Some functions imply specific interventions such as promoting interest based bargaining functions that require interventions necessary to move disputing parties away from positions and towards interests.¹²⁶⁹ Such interventions depend on the model of mediation being pursued, the stage of the process and the attributes of the mediator, so that even where standards imply specific interventions they are unlikely to lead to consistency in mediation practice.¹²⁷⁰

The US Model Standards and the European Code of Conduct

The US Model Standards of Conduct for mediators (‘Model Standards’) were drafted in the early 1990s to provide a source of ethical guidelines for mediators, including attorneys and non-attorneys. In response to the exponential growth in mediation and the enactment of numerous statutory references on the use of mediation, such as the Uniform Mediation Act, the Model Standards were revised in 2005 by a joint committee, comprising two representatives from the American Arbitration Association (‘AAA’), the American Bar Association (‘ABA’) and the Association for Conflict Resolution (‘ACR’). Following extensive public debate, the current draft was completed and approved by the three participating organisations.¹²⁷¹

While the Model Standards are only binding when adopted by a court or other regulatory authority, the preamble to the standards states that even in the absence of

¹²⁶⁶ Boulle and Rycroft (note 231) at 207.

¹²⁶⁷ Boulle and Rycroft (note 231) at 207.

¹²⁶⁸ Boulle and Rycroft (note 231) at 207.

¹²⁶⁹ Boulle and Rycroft (note 231) at 207-8.

¹²⁷⁰ Boulle and Rycroft (note 231) at 208.

¹²⁷¹ Eric Tuchmann ‘Revisions to the Model Standards of Conduct for Mediators’ IBA Legal Practice Division *Mediation Committee Newsletter* August 2005 at 55.

such adoption, the fact that they have been adopted by the various sponsoring entities may mean that they will be viewed as establishing a standard of care for mediators in the USA. They are also the most widely adopted national standards of conduct for mediators in the USA.¹²⁷²

The open nature of the review of the Model Standards was seen as indicative of the emerging character of mediation as a dispute resolution process that is used in different areas, such as commercial, family and even some criminal law areas, by mediators with varied backgrounds. While the joint committee believed that the original Model Standards had served their purpose well and that the basic structure should be kept, there was an appreciation that revisions in the areas regarding guidance and formatting, as well as certain substantive changes, would improve the Model Standards in view of the evolution of the mediation process since the original draft.¹²⁷³

In July 2004 the European Commission launched a European Code of Conduct for mediators, which was developed by a working group comprising mediation service providers, the legal profession and industry specialists across the European Union, supported by the European Commission. The code is voluntary and sets out various principles to which mediators can commit themselves. The preamble to the code states that adherence to the code is subject to national legislation and rules governing specific professions, and also envisages that service providers may want to develop more detailed codes for the type of services that they offer.¹²⁷⁴

The European Commission publishes a list on its website of the organisations that have committed to requesting that mediators appointed through them respect the code. It is the only code of conduct for mediators that seeks to have Europe wide effect, and essentially reflects principles contained in codes already developed by ADR organisations, such as the ADR Group and CEDR in the UK, and in the mediation

¹²⁷² In addition to being used by members of the AAA, ABA and ACR, the Model Standards are used for mediations with the US Air Force, see www.adr.af.mil/general/ethics.htm (last visited 21 June 2007) and the US Navy, and many of the US state and national organisations use standards that are largely based on them. See generally, Max Factor III 'Thirty FAQ's for California Mediators on Ethical Minefields involving Business, Construction, Employment and Real Estate Mediations' at www.mediate.com/articles/factorm2.cfm (last visited 8 August 2008).

¹²⁷³ Tuchmann (note 1271) at 55.

¹²⁷⁴ Rosalind Reston and Saira Singh 'The Proposed EU Mediation Directive: A Common Approach to Mediation?' IBA Legal Practice Division *Mediation Committee Newsletter* April 2005 at 44.

procedures advocated by other organisations, such as the ICC, the AAA/ICDR and the CPR Institute for Dispute Resolution.¹²⁷⁵

The standard issues

Most mediation service providers require that the mediators on their panels operate under codes of professional responsibility which cover issues such as honesty, integrity, impartiality and competence.¹²⁷⁶ We now turn to the issues that are generally covered by mediation standards, with particular reference to the European Code and the Model Standards.

Self-determination

This standard generally underscores the voluntary nature of the process which results in an uncoerced decision in which each party makes free and informed choices as to process and outcome.¹²⁷⁷ Self-determination applies at any stage of the mediation process, including mediator selection, process design, participation in or withdrawal from the process, or outcomes. However, the Model Standards acknowledge that a mediator may need to balance such party self-determination with the duty to conduct a quality process in accordance with the other standards. Where there is a doubt about a party's ability to make free and informed choices, a mediator should make the parties aware of the importance of consulting other professionals to assist them in making informed choices. Mediators cannot undermine the mediation process by imposing their own perceptions of a fair settlement for reasons such as outside pressures or a desire to receive higher settlement rates.¹²⁷⁸

Where neutrality and impartiality fit in

Simmel believes that a defining characteristic of the mediator is that he or she is not a partisan, either because the mediator remains outside the interests of the parties, or

¹²⁷⁵ Reston and Singh (note 1274) at 44.

¹²⁷⁶ See Nupen (note 22) at 50.

¹²⁷⁷ Standard I of the Model Standards covers this.

¹²⁷⁸ See also Tuchmann (note 1271) at 55.

because, although engaged, the mediator is in a structurally intermediate position.¹²⁷⁹ While there is a strong stereotype of the mediator as impartial, even ‘neutral’, an intervener carefully distanced from the interests of either party,¹²⁸⁰ it seems that such a claim is usually not advanced by mediators themselves, and is often put forward by commentators in order to knock it down.¹²⁸¹

While many use the terms ‘neutrality’ and ‘impartiality’ interchangeably to refer to the idea that mediators should be free from bias,¹²⁸² some have suggested distinctions between the two terms.¹²⁸³ It has been suggested that neutrality refers to the prior knowledge or interest mediators have in the outcome of disputes, while impartiality relates to the way they conduct the process and deal with the parties.¹²⁸⁴ Frequently described as ‘third party neutrals,’ Salem remarks that mediators are not always neutral.¹²⁸⁵ Gulliver attempts to put claims of ‘neutrality’ into perspective, concluding that mediators often lean towards one of the parties, or may have a significant interest in the resolution of a dispute, so that the ‘truly disinterested, impartial mediator is rather rare.’¹²⁸⁶ Similarly Creo remarks that it is not possible for a mediator to be purely impartial in a way that gives equal weight to every idea and recognises all voices.¹²⁸⁷ However, effective mediators are aware of their bias and try to ensure that it does not interfere with their role in the process, as they must be perceived as trustworthy and balanced in their dealings with the parties.¹²⁸⁸

Unlike neutrality, it seems inconceivable that disputing parties in mediation could waive the impartiality requirement without fundamentally changing the nature of the process.¹²⁸⁹ Simply put, a mediator need not be neutral; he or she must, however, act with strict impartiality.¹²⁹⁰ In this context, neutrality is not indispensable, while impartiality is and this distinction is reflected in some standards, while other standards

¹²⁷⁹ G Simmel *The Sociology of Georg Simmel* (ed K Wolff) at 149-150.

¹²⁸⁰ P Gulliver *Disputes and Negotiations: A Cross-Cultural Perspective* at 212.

¹²⁸¹ See for example R Dingwall and D Greatbach ‘Who is in charge? Rhetoric and Evidence in the Study of Mediation’ (1993) 15 *Journal of Social Welfare and Family Law* at 367-387.

¹²⁸² K K Kovach ‘Mediation’ in Michael L Moffitt and Robert C Bordone (eds) *The Handbook of Dispute Resolution: A Publication of the Programme on Negotiation at Harvard Law School* at 311.

¹²⁸³ See, for example, L Cooks and C Hale ‘The Construction of Ethics in Mediation’ (1994) 12 *Mediation Quarterly* 55-76.

¹²⁸⁴ Boule and Rycroft (note 231) at 208.

¹²⁸⁵ Salem, Unpublished Notes (1991) quoted by Nupen (note 22) at 41.

¹²⁸⁶ P Gulliver *Disputes and Negotiations: A Cross-Cultural Perspective* at 214-217.

¹²⁸⁷ Creo (note 40) at 324.

¹²⁸⁸ See Nupen (note 22) at 41.

¹²⁸⁹ Boule and Rycroft (note 231) at 209.

¹²⁹⁰ Nupen (note 22) at 41.

use the terms interchangeably.¹²⁹¹ Given the obvious distinction it is critical to deal with each separately.

Impartiality

It has been suggested that the impartiality of a mediator should rest on the fact that the mediator is open to any outcome, and not one preconceived or specific outcome.¹²⁹² This assists the mediator in recognising any dynamic between the parties and in assessing the agendas, ethics and values of the participants, and arguments and positions advanced by their advisors, so that the accurate processing of this information can facilitate the mediator in responding with a strategy that moves the parties closer to a resolution, either through a ‘macro’ strategy, or a series of ‘micro’ steps.¹²⁹³

Similar to judges and arbitrators, objective standards of impartiality are clearly crucial to the development of trust and reliability in the mediator who assists parties in dispute, with any display of partiality being considered a breach of basic ethics.¹²⁹⁴

In light of confidentiality protection, there are practical difficulties regarding the impartiality requirement in mediator standards as there may be little objective evidence on which to assess the alleged partiality of mediators’ conduct.¹²⁹⁵ Standards covering this area generally provide that mediators must conduct the process in an impartial manner and avoid conduct that gives the appearance of partiality. Some standards are quite specific, for example, the revised Model Standards state that mediators should not accept gifts or loans that raise questions of impartiality, but provides latitude for the acceptance of gifts where it facilitates the mediation or respect for cultural norms.¹²⁹⁶

While it has been suggested that allegations of a lack of impartiality in mediation are likely to result from the unreasonable expectations of one party, or their subjective analysis of events, impartiality remains a prominent feature in most mediator standards, and raises practical problems in dealing with partiality allegations.¹²⁹⁷

¹²⁹¹ Boulle and Rycroft (note 231) at 208.

¹²⁹² Creo (note 40) at 322.

¹²⁹³ Creo (note 40) at 322.

¹²⁹⁴ Boulle and Rycroft (note 231) at 209.

¹²⁹⁵ Boulle and Rycroft (note 231) at 210.

¹²⁹⁶ Standard II of the Model Standards and Part 2.2 of the European Code covers these issues. See also

Tuchmann (note 1271) at 55.

¹²⁹⁷ Boulle and Rycroft (note 231) at 210.

Neutrality and conflicts of interest

Traditionally, mediator standards in South Africa have not required mediators to disclose to the parties any strong views they may have on the issues to be mediated, as it was not perceived as a disqualifying factor for mediators.¹²⁹⁸ Most standards contain a requirement that there is disclosure of information by mediators to parties regarding prior professional or personal relationships between the mediator and any of the parties, or any actual or potential conflict of interests that the mediator should reasonably be aware of.¹²⁹⁹ The revised Model Standards place an added duty on the mediator to make a reasonable inquiry as to whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest.¹³⁰⁰

While the disclosure obligation is a continuing one,¹³⁰¹ the extent of disclosure is often not apparent,¹³⁰² but it would be consistent with the approach in other areas of law and professional practice to take a broad approach.¹³⁰³ The European Code specifies circumstances where disclosure would be required. These 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 if the mediator or a member of his or her firm have acted in any capacity other than as mediator for one of the parties. Once such a disclosure has been made, the consent of the parties should be sought before the mediation proceeds.¹³⁰⁴

While a Code of Conduct can give some guidance in this area, experience from comparable areas such as arbitration has shown that the extent of the duty of disclosure is difficult to determine in practice.¹³⁰⁵ Practical experience with the mediation process

¹²⁹⁸ See Boule and Rycroft (note 231) at 209.

¹²⁹⁹ See Boule and Rycroft (note 231) at 208.

¹³⁰⁰ See also Tuchmann (note 1271) at 56.

¹³⁰¹ Standard III of the Model Standards and Part 2.1 of the European Code covers this.

¹³⁰² For example, Article 5(5) of the Model Law on International Commercial Conciliation requires disclosure by the mediator of circumstances that may give rise to 'justifiable doubts' about his impartiality or independence, which seems quite vague. It is submitted that if the Model Law is to act as a framework for a mediation statute in South Africa, this provision should be omitted. Issues such as independence and impartiality are best dealt with by way of a Code of Conduct which can adapt as the needs of the process, the parties and the industry evolve over time. See also Sanders (note 66) at 114.

¹³⁰³ There is a concern where the mediator's fee is paid by one of the parties rather than shared by both, for example an insurer, or where bulk users of mediation services use the same mediators repeatedly. See H Astor and C Chinkin (note 236) at 227 as cited by Boule and Rycroft (note 231) at 209.

¹³⁰⁴ See Boule and Rycroft (note 231) at 208.

¹³⁰⁵ See the International Bar Association's *Guidelines on Conflicts of Interest in International Arbitration* (2004), available at www.ibanet.org/images/downloads/guidelines%20text.pdf (last visited 21 February 2008).

should, over time, assist in giving greater clarity to this provision in the Code of Conduct.

Competence

It is generally accepted that a mediator should decline appointment, withdraw or request technical assistance when the issues raised in a mediation are beyond his or her competence.¹³⁰⁶ This standard generally provides that a mediator will only mediate where he or she has the necessary competence to satisfy the reasonable expectations of the parties. Both the European Code and the Model Standards specify that mediators must be properly trained and must update their education and practice in mediation skills.¹³⁰⁷

Confidentiality

Most standards, such as the European Code, reflect the fact that mediators are under a duty to maintain confidentiality in the separate meetings, and with regard to the overall process,¹³⁰⁸ and contain possible exceptions such as where mediators can disclose information, or where they must for legal or public policy reasons.¹³⁰⁹ Despite pressure on confidentiality in some jurisdictions from the compulsion to report to courts in subsequent actions, coupled with the requirement that mediators make subjective judgments on events during the mediation, a mediator's duty to maintain confidentiality remains and has been aptly described as the 'ethical corner stone of the process.'¹³¹⁰

As a result of common misunderstandings among mediation participants regarding the extent of protection offered by mediation confidentiality, the revised Model Standards clarify that a mediator must keep the confidentiality of all information obtained by the mediator in a mediation, unless otherwise agreed to by the parties or required by applicable law. A mediator must also keep confidential any information obtained in a private caucus and mediators are encouraged to promote an understanding

¹³⁰⁶ Nupen (note 22) at 50.

¹³⁰⁷ Standard IV of the Model Standards and Part 1.1 of the European Code covers this.

¹³⁰⁸ Standard V of the Model Standards covers this.

¹³⁰⁹ See Boule and Rycroft (note 231) at 210.

¹³¹⁰ Boule and Rycroft (note 231) at 210.

among mediation participants about how confidentiality may apply in each particular case.¹³¹¹

The quality of the process

This standard generally requires a mediator to conduct the process so that it promotes diligence, party participation, procedural fairness, party competency and mutual respect. It can also deal with a mediator's availability, advising against mixing a mediator's role with other roles, including the role of a lawyer, and the steps a mediator should take in order to avoid using the mediation process to further criminal conduct as well as other issues that may negatively impact the quality of the mediation process.¹³¹²

Advertising and solicitation, fees and other charges

This standard generally states that mediators must be truthful and not misleading in the way that they advertise and solicit work, and charge fees.¹³¹³

Advancement of mediation practice

This standard generally provides that mediators should act in a way that advances mediation practice. The Model Standards provide the example of assisting new mediators through training, mentoring and networking.¹³¹⁴

Implications of standardisation

The preamble to the US Mediation Standards states that the standards serve three primary goals, which should be the goals of mediator codes of conduct. They guide the conduct of mediators, they inform mediating parties and they promote public confidence in mediation as a process for resolving disputes.

¹³¹¹ See Tuchmann (note 1271) at 56.

¹³¹² Standard VI of the Model Standards and Parts 3.1-3.3 of the European Code covers this. See Tuchmann (note 1271) at 56.

¹³¹³ Standards VII and VIII of the Model Standards and Part 1.3 and 3.4 of the European Code covers this. See Tuchmann (note 1271) at 56.

¹³¹⁴ Standard IX of the Model Standards covers this.

It has been suggested that mediator codes of conduct have internal functions in promoting consistency, competence and quality, and external functions in providing clients, professional associations and potential users with performance criteria, and lawyers who refer matters to mediation with competence standards.¹³¹⁵

Broadly speaking, there would seem to be two potential implications to the establishment of mediation standards.¹³¹⁶ As standards provide a basis for making and assessing complaints by mediation consumers, procedures are required by the relevant service provider to investigate and discipline mediators who engage in unprofessional conduct or professional misconduct. This is particularly important as South Africa has no statutory mechanisms to investigate and discipline mediators, and only limited self-regulation mechanisms exist for dealing with complaints.¹³¹⁷

The second implication relates to the legal liability of mediators and recourse for parties that claim to be aggrieved, which is dealt with below. In respect of both of these issues standards contain a potential tension in promoting confidentiality, while the enforcement of it restricts the extent to which mediator conduct can be examined, which in turn affects consumer complaints, investigative procedures, malpractice actions and market choices.¹³¹⁸ As Boule and Rycroft point out, this is part of the contradictory duality of codes of conduct. While they are promoted as serving the interests of clients and society, confidentiality requirements can restrict accountability and enhance professional power and self-control through the vague language used.¹³¹⁹

While it is suggested that the above outline of mediation standards resulting from the combined review of the European Code and the Model Standards should act as a guide for the establishment of commercial mediator standards in South Africa, the practical implication of mediator standards is that they leave some issues unresolved. These issues result from the problematic definitions, subtle distinctions and subjective judgments that reflect mediation practice, and while standards can reduce uncertainty,

¹³¹⁵ See Boule and Rycroft (note 231) at 211.

¹³¹⁶ See generally Astor and Chinkin (note 236) at 237-40 as cited by Boule and Rycroft (note 231) at 211.

¹³¹⁷ Boule and Rycroft (note 231) at 212.

¹³¹⁸ Boule and Rycroft (note 231) at 212.

¹³¹⁹ On this theme in relation to professions generally see R Abel *The Legal Profession in England and Wales* at 29-31 as cited by Boule and Rycroft (note 231) at 212.

they cannot eliminate it regarding issues such as professional competence and ethical behaviour.¹³²⁰

Empirical practice is likely to drive theoretical principles in this area, and as mentioned above, mediator training can deal with some of the unresolved subjective ethical issues in codes of practice.¹³²¹ Ethical standards currently in existence provide the basis for attitudinal training,¹³²² and are designed to influence appropriate mediator behaviours in difficult areas, and this training can in turn result in clearer statements in codes of conduct on issues of fairness, impartiality, confidentiality and the use of mediator power.¹³²³ Similarly, the method employed in the mediation can itself be used in defining and considering responses to ethical issues.¹³²⁴ Over time, some standards are likely to be judicially defined which will give more precision to their scope and extent for legal purposes.¹³²⁵

Similar to the approach taken by the drafters of the Model Standards, it is important to view an emerging set of South African commercial mediation standards as an organic entity. As mentioned, they will require revision at regular intervals as the needs and requirements of the process, the parties and mediator evolve over time.

Legal liability of mediators

The possibility that legal proceedings might be brought against mediators is a significant form of accountability,¹³²⁶ despite the fact that there are no known cases in which a mediator has been successfully sued in South Africa.¹³²⁷ It has been suggested that this may have resulted from the flexible and confidential nature of mediation which reduces the risk of liability for mediators, or the fact that mediators are not decision-

¹³²⁰ See Walker (note 1243) at 33 as cited by Boule and Rycroft (note 231) at 210.

¹³²¹ See Boule (note 263) at 495.

¹³²² Walker (note 1243) at 38; see also Astor and Chinkin (note 1243) at 205; Sid Wellik 'Ethical Standards for Mediation: Embracing Philosophical Method' (1999) 10 *ADRJ* 257 at 263 as cited by Boule (note 263) at 495.

¹³²³ Boule (note 263) at 495.

¹³²⁴ See S Grebe, K Irvin and M Lang 'A Model for Ethical Decision-Making in Mediation (1989) 7 *Mediation Quarterly* at 133 as cited by Boule (note 263) at 495.

¹³²⁵ Boule and Rycroft (note 231) at 211.

¹³²⁶ See A A Chaykin 'Mediator Liability: A New Role for Fiduciary Duties?' (1984) 53 *University of Cincinnati Law Review* 731; A A Chaykin 'The Sultans of Swap: Defining the Duties and Liabilities of American Mediators' (1986) 99 *Harvard Law Review* 1876; A A Chaykin 'The Liabilities and Immunities of Mediators: A Hostile Environment for Model Legislation' (1986-1987) 2 *Ohio State Journal on Dispute Resolution* 47; A Lynch "'Can I Sue My Mediator?'" – Finding the Key to Mediator Liability' (1995) 6 *ADRJ* 113 as cited by Boule and Rycroft (note 231) at 212.

¹³²⁷ Boule and Rycroft (note 231) at 212.

makers themselves so that it is difficult to forge a link between any ‘damage’ and the mediator’s conduct.¹³²⁸

It does seem likely that proceedings will eventually be taken against mediators by aggrieved disputants or third parties.¹³²⁹ When this occurs, courts will be engaged in a balancing act between shielding mediators in order to encourage mediators and parties to use the process, and holding mediators liable in order to influence their behaviour, ensure quality in mediation services, and positively influence the development of standards.¹³³⁰

Three situations have been identified where parties could seek to hold mediators liable.¹³³¹ Firstly, where parties feel they could have settled on substantially better terms than they did, secondly, where they feel that they could have achieved more had they not settled at all, and thirdly, oblivious of the outcome, they feel aggrieved about some aspect of the procedure. It seems that it is notionally easier to find a basis for liability regarding procedural matters than substantive matters, particularly where a clear process/content distinction is drawn by the mediator and there are legal advisers involved.¹³³² A number of difficulties arise when attempting to develop a basis for mediator liability, and as Boule comments, ‘the immunity tail wags the liability dog in this area’.¹³³³

Liability in contract

An agreement to mediate can be written, verbal or implied,¹³³⁴ and liability can potentially result where a mediator is a party to this agreement and breaches it.¹³³⁵ Mediation service providers usually have standard-form contracts¹³³⁶ that detail or incorporate by reference the procedures to be followed, the roles and responsibilities of the mediator and the disputants, fees and costs arrangements, methods of terminating

¹³²⁸ See Lynch (note 1326) at 124 as cited by Boule and Rycroft (note 231) at 212.

¹³²⁹ See Boule and Rycroft (note 231) at 212.

¹³³⁰ See Boule and Rycroft (note 231) at 213.

¹³³¹ Boule and Nestic (note 426) at 512.

¹³³² Boule and Nestic (note 426) at 512.

¹³³³ Boule (note 263) at 506.

¹³³⁴ See *Goldblatt v Freemantle* 1920 AD 123, *Timoney and King v King* 1920 AD 133 and *Ally v Dinath* 1984 (2) SA 451 (T).

¹³³⁵ Boule and Nestic (note 426) at 513. See generally, Christie (note 465) Chapter 13.

¹³³⁶ On agreements to mediate, see chapter 5 above at 115.

the agreement, matters of privacy and confidentiality and may also incorporate by reference mediation standards or codes of conduct.¹³³⁷

As mediation service providers generally draw up mediation agreements with their own protection in mind,¹³³⁸ together with the fact that agreements to mediate have traditionally been vague,¹³³⁹ it has been suggested that contractual relief for breaching an express term would be difficult to achieve. However, the availability of legal advice to parties¹³⁴⁰ coupled with the increasing use of mediation as an alternative form of dispute resolution in South Africa, is likely to diminish such traditional roadblocks.¹³⁴¹

Mediation contracts can contain implied terms if:¹³⁴²

- it is required in order to give business efficacy to the agreement;
- it is so apparent that it does not need to be stated;
- it can be clearly expressed; and
- it is not inconsistent with an express term.

An example of an implied term is where the mediator has a duty to perform with reasonable care, skill and diligence, and it is difficult to determine the standard that a mediator must reach in order to perform such a role.¹³⁴³ Traditionally, the standard implied is reasonable skill and care, with reasonableness being assessed by examining the standard of care considered the norm in that area,¹³⁴⁴ which is difficult to determine at this stage in the development of commercial mediation in South Africa, particularly given the flexible nature of the process and the influence that an individual mediator's style has on the process.¹³⁴⁵ As discussed above, mediator codes of conduct assist in identifying what is regarded as reasonable skill and care in other countries, such as adherence to the Codes of Mediator Practice recommended by the Law Society in the England, which is likely to be considered as evidence of good practice where complaints are made against solicitor mediators.¹³⁴⁶ As in other jurisdictions, as

¹³³⁷ Boulle and Nesic (note 426) at 513.

¹³³⁸ Chaykin 'Mediator Liability' (note 1326) at 738 as cited by Boulle and Nesic (note 426) at 513.

¹³³⁹ Chaykin 'Mediator Liability' (note 1326) at 737 as cited by Boulle and Nesic (note 426) at 513.

¹³⁴⁰ Lynch (note 1326) at 113 as cited by Boulle and Nesic (note 426) at 513.

¹³⁴¹ Lynch (note 1326) at 114 as cited by Boulle and Nesic (note 426) at 513.

¹³⁴² Boulle and Nesic (note 426) at 513. See also Christie (note 465) at 158-174.

¹³⁴³ Boulle and Nesic (note 426) at 513.

¹³⁴⁴ For example, *Bolan v Friern Hospital Management Committee* [1957] 1 WLR 582 as cited by Boulle and Nesic (note 426) at 513.

¹³⁴⁵ See Boulle and Nesic (note 426) at 513.

¹³⁴⁶ See Boulle and Nesic (note 426) at 513.

commercial mediation emerges as a prominent form of ADR in South Africa, it is likely that organisations such as the Law Society will develop such codes.

The determination of what is reasonable under contract law depends on the standard of care expected in the relevant industry, which is currently difficult to assess regarding commercial mediation,¹³⁴⁷ but following an industry norm does not offer immunity if the standards followed by the industry are deemed inadequate.¹³⁴⁸

A contractual breach will result where a mediator's performance is inconsistent with the applicable standard of care, and mediators should not make representations as to the likely outcome of a trial as this could result in the breach of a contractual promise if the outcome does not materialise.¹³⁴⁹ A cautionary approach could be adopted by providing in agreements to mediate that no promises regarding the outcome of the mediation or litigation are implied.¹³⁵⁰ Where there is a breach, the party concerned must prove actual loss or damage and establish that it was caused by the mediator's conduct, and provided the damage is not too remote (i.e. where it did not arise naturally out of the breach or it was not in the contemplation of the parties), then compensatory (rather than punitive) damages, which can include expenses and consequential losses, can be attained.¹³⁵¹

There would be numerous difficulties in successfully claiming damages for a mediator's breach of contract.¹³⁵² While establishing a breach would not be as difficult regarding confidentiality or conflict of interest provisions, it would be difficult in circumstances where there is an allegation of negligence regarding the mediator's performance under the contract. While the development of mediator standards will assist, it also remains difficult to define reasonable standards of behaviour. As the parties and the mediator make the decisions, it would also be difficult to establish that the mediator's breach (e.g. negligence) was the cause of the damage that occurred.¹³⁵³

Calculating damages would involve assessing what the outcome of the mediation would have been had the breach not occurred, and would be highly

¹³⁴⁷ Boulle and Rycroft (note 231) at 213.

¹³⁴⁸ *Edward Wong Finance Co Ltd v Johnson, Stokes & Master* [1984] AC 296 as cited by Boulle and Nestic (note 426) at 514.

¹³⁴⁹ See Boulle and Nestic (note 426) at 514.

¹³⁵⁰ Folberg and Taylor (note 236) at 281-2 as cited by Boulle and Nestic (note 426) at 514.

¹³⁵¹ Boulle and Rycroft (note 231) at 214.

¹³⁵² See Boulle and Rycroft (note 231) at 214.

¹³⁵³ See Boulle and Rycroft (note 231) at 214. On causation generally, see *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) 700E-701. See also Christie (note 465) at 542-543.

speculative in light of the uncertainty of the settlement terms or whether an agreement would have resulted.¹³⁵⁴ Mediators could also argue that the party did not mitigate their damages, for example, in not acting to reduce the losses resulting from failing to reach a mediated settlement agreement.¹³⁵⁵

Immunity clauses, excluding mediators from liability in discharging their obligations are included in many agreements to mediate and could prove an additional burden in holding mediators liable.¹³⁵⁶ It has been suggested that a general clause excluding liability would be construed strictly against the mediator, so that the exclusion would fall away where the mediator's conduct goes outside the scope of the agreement to mediate.¹³⁵⁷ However, this would be a matter of evidence and could still be difficult to prove.

Liability in delict

Actions in negligence can be based on a negligent act or omission regarding the professional standard expected of lawyers, or on a negligent misstatement that results in economic loss.¹³⁵⁸ In the mediation context, a party could take a negligence action on the basis that there is dissatisfaction subsequent to a mediated settlement and claims that the mediator's negligence resulted in their loss.¹³⁵⁹ The basic elements of negligence would have to be established:¹³⁶⁰

- that a duty of care was owed to the injured party by the mediator;
- that there was a breach of this duty resulting from failing to meet the standard of care required of a mediator;
- that actual loss or damage was endured by the party; and
- that there is a causal connection between the negligent act and the loss suffered.

¹³⁵⁴ See Boule and Rycroft (note 231) at 214.

¹³⁵⁵ Boule (note 263) at 509.

¹³⁵⁶ See Boule and Rycroft (note 231) at 214.

¹³⁵⁷ Boule and Rycroft (note 231) at 214.

¹³⁵⁸ Boule and Rycroft (note 231) at 214.

¹³⁵⁹ See D Jesser 'Mediator, Not Legal Advisor' (2003) *ADRJ* 211 at 217 as cited by Boule (note 263) at 509.

¹³⁶⁰ See generally J Burchell *Principles of Delict* at 86-91 as cited by Boule and Rycroft (note 231) at 214. See also J Neethling, J M Potgieter, P J Visser *Law of Delict* at 116-141.

Boulle and Rycroft point out that approaches to liability in delict regarding professional negligence generally reflect the realities of economic and social forces, and seem to respond to the nature of the client/professional relationship.¹³⁶¹ Courts would look for a relationship of proximity between the mediator and client on which to base a duty of care in order to avoid foreseeable injury.¹³⁶² The first consideration is whether the mediator owes a duty of care to the parties, having regard to proximity, reasonable foresight of damage and whether the imposition of a duty of care is just and reasonable.¹³⁶³ Proximity may exist where advice is given, and a mediator should recommend that the parties seek independent legal advice as a mediator may expose himself or herself to liability if advice is provided, whether actually or inadvertently, or where the mediator drafts a settlement agreement or heads of terms.¹³⁶⁴ Courts will assess if a reasonable person would foresee that negligence could result in damage, if policy reasons exist as to why a duty of care should not exist, if there is evidence of the party's reliance on the mediator,¹³⁶⁵ the social and policy considerations regarding where the loss should fall, and the fact that mediation is emerging as a profession.¹³⁶⁶

Reasonableness in the circumstances is the standard of care test, and mediator standards, agreements to mediate, legal writings and statutes are influential in determining the relevant standards of reasonable service.¹³⁶⁷ If mediators claim to have expertise in particular areas and express their views on those subject matters, they may be held to a higher standard of care.¹³⁶⁸ The reasonableness assessment will be influenced by the circumstances of the parties, such as their level of education or lack of legal representation. There is not a universally accepted standard of what a competent mediator should or should not do as the practice of commercial mediation is still developing in South Africa.¹³⁶⁹

¹³⁶¹ Boulle and Rycroft (note 231) at 215.

¹³⁶² Boulle and Nestic (note 426) at 515.

¹³⁶³ Lord Bridge in *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 617-19 as cited by Boulle and Nestic (note 426) at 515.

¹³⁶⁴ Boulle and Nestic (note 426) at 515.

¹³⁶⁵ Boulle remarks that since the Australian case *Perre v Apand* (1999) 198 CLR 180 courts are also likely to consider whether there was vulnerability in the relationship, whether the mediator was in a position of control, and the relevance of the mediator's knowledge at the time. See Boulle (note 263) at 510.

¹³⁶⁶ See Boulle and Rycroft (note 231) at 215.

¹³⁶⁷ Boulle and Rycroft (note 231) at 215.

¹³⁶⁸ Boulle and Rycroft (note 231) at 215.

¹³⁶⁹ See Boulle and Rycroft (note 231) at 215. See also Boulle (note 263) at 511.

The requirement that the mediator's conduct caused or materially contributed to the actual damage that otherwise would not have occurred is difficult to prove, as it is impossible to know what the party or parties would have done, or failed to do, had the mediator acted differently than the way alleged.¹³⁷⁰ As Boulle and Rycroft point out, parties in a mediation are not passive victims like those injured in a motor vehicle accident, but active participants in a dynamic process where causation is highly complex.¹³⁷¹ Even if a party can show that they only settled on particular terms because of the mediator's conduct, it would be very difficult to prove that the other party would have agreed to an alternative settlement had the mediator discharged their obligations.¹³⁷² As Lynch remarks: '[u]ntangling the causative link is an extremely complex and perhaps unachievable process'.¹³⁷³ It would also be difficult to establish causative responsibility where parties are legally represented, or where the alleged damages are incurred after the mediator advised the parties to seek independent legal advice.¹³⁷⁴

As damages are awarded to put plaintiffs in the position they would have been in had the delict not occurred, the nature of the mediation process makes such an assessment highly speculative, as it would be difficult for a party to establish his or her actual loss by referring to what a court or arbitration may have decided.¹³⁷⁵ The basis for a claim in damages is likely to be an alleged negligent misstatement that caused a party economic loss, such as where the contract they engaged in was less profitable than the contract they would have entered into had the misstatement not occurred.¹³⁷⁶

¹³⁷⁰ Boulle and Rycroft (note 231) at 215.

¹³⁷¹ Boulle and Rycroft (note 231) at 215.

¹³⁷² Boulle and Nestic (note 426) at 516.

¹³⁷³ Lynch (note 1326) at 123 as cited by Boulle and Nestic (note 426) at 516.

¹³⁷⁴ In the American case of *Lange v Marshall* 622 SW 2d 237 Mo Ct App (1981) a party to a mediated settlement subsequently sought legal assistance and obtained a more favourable outcome. She claimed damages for negligence against the mediator claiming that he failed to inquire about and advise her on the financial state of the other party. Having succeeded at trial, the appeal court found no evidence that the mediator's negligence actually caused the damages she claimed to have suffered in preparing to litigate for a better settlement after she repudiated the original agreement, see Boulle and Rycroft (note 231) at 215 (note 42). However, where a mediator drafts a settlement agreement at the end of the mediation, he or she could be subject to the requirement that the draft accurately reflects what was agreed. In the Australian case *Taphoohi v Lewenberg* (No. 2) [2003] VSC (21 October 2003), the mediator dictated the terms of the settlement agreement but omitted an important provision regarding tax advice, see Boulle (note 263) at 518-524.

¹³⁷⁵ Boulle and Nestic (note 426) at 516.

¹³⁷⁶ This is in accordance with the line of cases from *Hedley Byrne v Heller* [1964] AC 465 as cited by Boulle and Nestic (note 426) at 516.

Liability on this basis is more restrictive than liability for other acts or omissions,¹³⁷⁷ as evidence would have to be provided that a party relied on the mediator, and that the mediator was aware or should have been aware that his or her words would cause the reliance.¹³⁷⁸ It would theoretically be easier to make a claim where a party specifically requested information and advice and their reliance was reasonable in that context, or where a special relationship existed between the mediator and the parties that resulted in the reliance.¹³⁷⁹ Where a mediator knowingly makes a false statement with the intention that a party in the mediation will act on it, and a loss results because of the party's reliance, it amounts to fraudulent misrepresentation.¹³⁸⁰ A mediator can guard against such allegations by expressly disclaiming responsibility for the accuracy of a particular statement and recommending that the parties seek independent advice.¹³⁸¹

Clearly, negligent malpractice presents a number of practical difficulties in making a liability claim against mediators where a client is dissatisfied with a mediated settlement.¹³⁸² This is in part because of the fact that the 'exact contours of the relationship between the mediator and client are highly individualised and variable, depending upon the dispute involved and the services that the mediator has agreed to provide'.¹³⁸³ In order for liability to arise a mediator's role would need to be redefined as controlling both the process and the outcome.¹³⁸⁴

Fiduciary obligations

Fiduciary obligations towards the parties represent another possible way that mediators could be held liable.¹³⁸⁵ A fiduciary relationship is based on the fiduciary's power 'to influence the affairs of the principal for good or ill and the trust which the principal

¹³⁷⁷ See for example *ABSA Bank Ltd v Fouche* 2003 (1) SA 176 (SCA) 180 H; see L Steyn 'Damages for negligent non-disclosure by one party to the other: the requirements for liability' (2003) *SALJ* 465.

¹³⁷⁸ Boulle and Nestic (note 426) at 517.

¹³⁷⁹ *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A).

¹³⁸⁰ *Bradford Third Equitable Building Society v Borders* [1941] 2 All ER 205; *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501; and *Barton v County NatWest Ltd* [1999] Lloyd's Rep Bank 408 as cited by Boulle and Nestic (note 426) at 517.

¹³⁸¹ Boulle and Nestic (note 426) at 517.

¹³⁸² See Boulle and Nestic (note 426) at 517.

¹³⁸³ Chaykin 'The Liabilities and Immunities of Mediators' (note 1326) at 63 as cited by Boulle and Rycroft (note 231) at 216.

¹³⁸⁴ Boulle and Rycroft (note 231) at 216.

¹³⁸⁵ Boulle and Rycroft (note 231) at 217.

places in the fiduciary to use that power for the principal's benefit'.¹³⁸⁶ Fiduciary obligations do not require the existence of a predefined legal standard, as is the case with negligence, nor is a formal contract required, and they are 'flexible enough to cover many of the almost unimaginable number of contexts in which clients need protection'.¹³⁸⁷ A party can sue without having to prove that loss occurred and there are no problems with causation and remoteness as a strict liability is imposed, and the fact that the client suffered no loss or detriment or that the mediator acted in good faith is not a defence.¹³⁸⁸

The existence of a fiduciary relationship is a question of fact in each case, and the close relationship of trust between the mediator and the parties could arguably amount to a fiduciary relationship¹³⁸⁹ with the obligation not to abuse that trust.¹³⁹⁰ Even-handedness and lack of bias, trustworthiness and diligence are three general fiduciary obligations that mediators owe parties and they may be breached where a mediator fails to provide influential information regarding the parties' decision to agree to a settlement, creates an atmosphere of coercion during the mediation, communicates secretly with one party, or was dishonest with the parties regarding his or her qualifications.¹³⁹¹ The confidential nature of the mediator/client relationship would also produce an equitable duty of confidence requiring that the mediator not use information given by one party in confidence without that party's consent.¹³⁹²

However, as the mediator is not appointed to act in the best interests of either or both parties in any direct and immediate sense, but to act as a neutral, this is incompatible with the traditional status of a fiduciary.¹³⁹³ Another issue is how much mediators exercise influence regarding the disclosure of information, the conduct of negotiations and the operation of the mediation. Unlike the traditional model of attorney and client, a fiduciary cannot act for two beneficiaries in the same transaction,¹³⁹⁴ as it would require simultaneously fulfilling fiduciary obligations to parties who have

¹³⁸⁶ *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 96; see also R P Meagher, W M C Gummow and J R F Leane *Equity: Doctrines and Remedies* at 130-60 as cited by Boulle and Rycroft (note 231) at 217.

¹³⁸⁷ Chaykin 'Mediator Liability' (note 1326) at 736 as cited by Boulle and Rycroft (note 231) at 217.

¹³⁸⁸ Boulle and Rycroft (note 231) at 217.

¹³⁸⁹ Boulle and Rycroft (note 231) at 217.

¹³⁹⁰ Boulle (note 263) at 514.

¹³⁹¹ Chaykin 'Mediator Liability' (note 1326) at 731 as cited by Boulle and Rycroft (note 231) at 217.

¹³⁹² Boulle and Rycroft (note 231) at 217.

¹³⁹³ Boulle (note 263) at 514.

¹³⁹⁴ See Lynch (note 1326) at 117 as cited by Boulle and Rycroft (note 231) at 218.

conflicting interests.¹³⁹⁵ It has been suggested that if mediators do not have fiduciary obligations towards the parties, they may owe a duty to prevent abuses of the mediation process by the parties regarding issues such as impartiality, non-coerciveness and dealing with the issues thoroughly.¹³⁹⁶ It seems unlikely that courts would apply the fiduciary relationship to the mediation context, as the suggestion that all mediators, regardless of expertise, remuneration, training or accreditation, are fiduciaries, is likely to deter people from becoming mediators or encourage those who currently work as mediators to only accept mediations with lucrative fees.¹³⁹⁷

Steps to limit exposure

In light of an Australian decision¹³⁹⁸ the following practical points should be considered in avoiding liability claims:¹³⁹⁹

- Agreements to mediate should contain clauses exonerating mediator liability;
- Parties should be informed by the mediator that they should seek their own legal and taxation advice;¹⁴⁰⁰
- Settlement agreements should provide that the parties have not relied on any legal or drafting advice from the mediator,¹⁴⁰¹ and
- A cooling-off clause could be included to provide for subsequent withdrawal from settlements within a stated period of time.¹⁴⁰²

¹³⁹⁵ Thus, the CEDR *Model Mediation Procedure*, for example, provides that the mediator and the Centre are not agents of, or acting in any capacity for, any of the parties, as cited by Boule and Nestic (note 426) at 519.

¹³⁹⁶ See Lynch (note 1326) at 118 as cited by Boule and Rycroft (note 231) at 218.

¹³⁹⁷ Boule and Rycroft (note 231) at 218.

¹³⁹⁸ *Taphoohi v Lewenberg* (No. 2) [2003] VSC (21 October 2003) as cited by Boule (note 263) at 523-524. The decision was given in interlocutory proceedings. See Boule (note 263) at 518-524 for a discussion of this case.

¹³⁹⁹ Boule (note 263) at 523-524.

¹⁴⁰⁰ Although this may not break the chain of causation where there is a domineering and experienced mediator and inexperienced junior advisers, see D Jesser (note 1359) at 217 as cited by Boule (note 263) at 524.

¹⁴⁰¹ See also J Wade 'Liability of Mediators for Pressure, Drafting and Advice' (2003) 6(7) *ADR Bulletin* 131, 133 as cited by Boule (note 263) at 524.

¹⁴⁰² See also P Davenport 'What is Wrong with Mediation' (1997) 8 *ADRJ* 133 as cited by Boule (note 263) at 524.

Other forms of liability and accountability

Consumer protection liability

It has been suggested that mediators could be liable under fair trading and other consumer legislation such as liability for false advertising, misleading statements about the service and other unconscionable behaviour.¹⁴⁰³ Such laws are designed to supplement professional controls over service-providers in various fields and the specific statutory definitions will determine the applicability of this legislation to mediators.¹⁴⁰⁴

Liability for breaching other professional standards

When professionals such as lawyers act as mediators, they remain liable for breaches of their professional standards as lawyers. Similarly, mediators could be exposed to liability if they stray into professional areas during the mediation in which they are not qualified. In a US case a mediator was successfully sued by the local bar association on the basis that his mediation practice caused him to engage in the unauthorised practice of law.¹⁴⁰⁵ In 1993, for similar reasons, a South African court granted an interdict against a family mediator.¹⁴⁰⁶

Liability to third parties

The issue arises as to the potential liability of a mediator where a party to the mediation harms an outside party where the mediator could have attempted to prevent the injury.¹⁴⁰⁷ While the law in Australia is clear that a person cannot be responsible for the delictual acts of another committed against a third party, the US position seems to be more open-ended. In one US case a psychotherapist was deemed negligent for failing to

¹⁴⁰³ See Boule and Rycroft (note 231) at 218. Section 49(1) of the Consumer Protection Bill may have implications in this regard in the event that it is enacted in its current form. It makes void any provision or condition in a contract that attempts to limit or exempt a service provider from liability for any loss directly or indirectly attributable to the gross negligence of the service provider. Section 49(2) makes it clear that any mediator liability exemption clause would have to be specifically drawn to the parties' attention in order to be valid.

¹⁴⁰⁴ Boule and Rycroft (note 231) at 218.

¹⁴⁰⁵ *Werle v Rhode Island Bar Association* 755 F 2d 195 (1st Cir 1985) as cited by Boule and Rycroft (note 231) at 218.

¹⁴⁰⁶ Unreported decision *S v Posthumous* as cited by Boule and Rycroft (note 231) at 218.

¹⁴⁰⁷ Boule and Rycroft (note 231) at 219.

warn a female student of the threats of his patient to murder her.¹⁴⁰⁸ It seems unlikely that this principle could be applied in the mediation context, as the relationship between mediators and parties is very different to that between psychotherapists and their patients, the latter requiring some responsibility to control their patient's conduct.¹⁴⁰⁹

Freedom of information

Mediation services provided by government agencies under legislation can be subject to the constitutional provisions of freedom of information ('FOI').¹⁴¹⁰ Consequently, as previously mentioned, mediators should avoid making sweeping claims about the confidential nature of the process, although even documents that could be accessed under FOI laws could be inadmissible in legal proceedings due to professional privilege or legal professional privilege.¹⁴¹¹ This is largely irrelevant however in the case of private commercial mediation.

Judicial review of mediators' actions

People affected by the decisions of administrative bodies can seek to judicially review them in court at common law and under the Constitution in order to have such decisions set aside, because they were not made consistent with law or procedural standards of fairness.¹⁴¹² This form of review is designed to ensure accountability in administrative bodies and from officials and while it is potentially applicable where mediation is provided by a government agency, it is not available in respect of private commercial mediation.¹⁴¹³

¹⁴⁰⁸ *Tarasoff v Regents of the University of California* 17 Cal 3d 425, 551 P 2d 334 (1976) as cited by Boule and Rycroft (note 231) at 219.

¹⁴⁰⁹ Boule and Rycroft (note 231) at 219.

¹⁴¹⁰ Article 32(1) of the Constitution provides that 'Everyone has the right of access to – (a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any rights.'

¹⁴¹¹ Boule and Rycroft (note 231) at 250.

¹⁴¹² Boule and Rycroft (note 231) at 250.

¹⁴¹³ Boule and Rycroft (note 231) at 250.

Criminal liability

Mediators could potentially be held criminally liable where their conduct makes them parties to fraud or the commission of a statutory offence, or where they collude with the parties to commit a crime.¹⁴¹⁴ The general principles of criminal law would determine the mediator's liability.¹⁴¹⁵

Mediator immunity

Contractual exclusions

Agreements to mediate generally contain an exclusion clause that can exclude all liability,¹⁴¹⁶ or a more limited exclusion for mediators.¹⁴¹⁷ Whether such a clause is effective in South Africa is unclear, as it has not even been tested in the UK. Exclusion clauses are likely to be ineffective where a mediator acts outside the scope of the agreement to mediate.¹⁴¹⁸

Similar to other types of exclusion clauses it is likely that:¹⁴¹⁹

- the clause must be clear and unambiguous;
- the mediator must discharge the burden of showing that the true construction of the clause covers the obligation or liability that it is alleged to exclude;
- a lack of clarity in the clause will be interpreted such that the parties to an agreement to mediate did not intend that an exemption clause should apply to the consequences of a mediator's negligence; and
- doubts or ambiguities would be construed against a mediator attempting to rely on it.

Those in favour of statutory immunities for mediators argue that they operate under the control of a service providing institution, which provides some guarantee of

¹⁴¹⁴ Boule and Rycroft (note 231) at 219.

¹⁴¹⁵ Boule and Rycroft (note 231) at 219.

¹⁴¹⁶ The UK Academy of Experts *Guidelines for Mediation* provides that the mediator will not be liable for any act or omission arising out of the mediation, as cited by Boule and Nestic (note 426) at 520.

¹⁴¹⁷ The CEDR *Model Mediation Procedure* provides that the mediator will not be liable for any act or omission unless done in bad faith, as cited by Boule and Nestic (note 426) at 520.

¹⁴¹⁸ Boule and Nestic (note 426) at 520. See for example *Hall-Thermotank Natal (Pty) Ltd v Hardman* 1968 (4) SA 818 (D). See also Christie (note 465) at 190.

¹⁴¹⁹ Boule and Nestic (note 426) at 520. See for example Scott JA in *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 (1) SA 982 (SCA) at 989.

standards, quality and accountability, reducing the likelihood of liability actions and that such immunities assist in the development and promotion of the process.¹⁴²⁰ Those against, claim that such immunities deny recourse to parties injured by the mediator's negligence and that parties would be better served where there are no immunities, with mediators holding insurance coverage and being indemnified by the service providing institution through which they provide their services.¹⁴²¹

Mediators who purport to possess particular mediation proficiency or expertise in a particular dispute are likely to be held to a higher standard of care and skill, and as previously noted, a cautious approach would need to be taken in order to avoid exposure.¹⁴²² As Boule points out, there is an obvious tension within a process that facilitates party self-determination and encourages parties to settle, and such tensions make it difficult to define clearly the interface between liability and immunity which will most likely ultimately require judicial direction.¹⁴²³

The propensity towards mediator immunity is based on the assumption that the judicial immunity, which is necessary in order to administer the law independently, and the arbitral immunity, which is a partial extension of this immunity to arbitrators, should be extended to mediators.¹⁴²⁴ Arbitrators currently enjoy the same immunity enjoyed by judges.¹⁴²⁵ It has been suggested that since mediators are not involved in adjudication or decision-making no immunity should exist, and that it may be necessary to establish 'a modest threat of liability'¹⁴²⁶ that strikes a balance between too much licence being given to the mediator and over-regulation of the process.¹⁴²⁷

Statutory immunity for mediators

Statutory immunities against civil liability for mediators are unusual, and discussions on this issue in Australia have considered whether immunity, if granted, should be

¹⁴²⁰ See Boule and Rycroft (note 231) at 219.

¹⁴²¹ Boule and Rycroft (note 231) at 219.

¹⁴²² See D Jesser (note 1359) at 211 as cited by Boule (note 263) at 534.

¹⁴²³ Boule (note 263) at 534.

¹⁴²⁴ Boule and Rycroft (note 231) at 219-220.

¹⁴²⁵ *Hoffman v Meyer* 1956 (2) SA 752 (C) at 756A-B as cited by Boule and Rycroft (note 231) at 220.

¹⁴²⁶ See Chaykin 'The Sultans of Swap' (note 1326) at 1876 as cited by Boule and Rycroft (note 231) at 220.

¹⁴²⁷ Boule and Rycroft (note 231) at 220.

restricted, for example, to mediators that are formally accredited.¹⁴²⁸ If statutory immunity is extended to mediators, it would seem reasonable, as Boule suggests, that it should at least be qualified by a good faith requirement, and in appropriate cases it should not be available for mediator bias, coercion or inaccurate legal advice where they result in recognised legal causes of action.¹⁴²⁹

Mediation and the practice of law

Similar to South Africa, as ethics codes emerged in other jurisdictions, they did not explicitly cover mediation, and lawyer's codes of professional responsibility also failed to provide any guidance on mediation for a profession steeped in a partisan tradition.¹⁴³⁰

It has been suggested that if mediation is the practice of law then we should refer to lawyer's ethics codes. However, the difficulty is that they often lack information on issues previously discussed such as confidentiality, conflicts of interests, fees, and unauthorised practice. It seems reasonable that if mediation is defined broadly, in its 'pure' form of facilitation, it does not involve the practice of law, but communication and other skills.¹⁴³¹

One of the more popular approaches is to treat the absence of a lawyer-client relationship as the governing test,¹⁴³² and jurisprudence from the USA has attempted to define the practice of law as applying legal principles to concrete facts. In *Dauphin County Bar Association v Mazzacaro*,¹⁴³³ for example, a court defined the practice of law as skills that included the ability to evaluate the strengths and weaknesses of the client's case vis-à-vis that of an adversary.

¹⁴²⁸ New South Wales Law Reform Commission 'Discussion Paper: Alternative Dispute Resolution-Training and Accreditation of Mediators'. The Commission had concluded that there should not be a general immunity from civil liability and that mediators acting unethically or incompetently should be held liable, as cited by Boule and Nestic (note 426) at 522.

¹⁴²⁹ Boule (note 263) at 536. Where grounds exist for mediator liability and there is no general immunity, mediators may obtain professional indemnity insurance in order to limit the negative financial impact of such exposure. Such cover is often a requirement in mediator codes of practice and may be provided by the service provider for mediators acting under its direction, e.g. CEDR in the UK; see Boule and Nestic (note 426) at 522.

¹⁴³⁰ Carrie Menkel-Meadow 'Is Mediation the Practice of Law?' (1996) 14 *Alternatives to the High Costs of Litigation* 5 at 60-61.

¹⁴³¹ See Menkel-Meadow (note 1430) at 60-61.

¹⁴³² Menkel-Meadow (note 1430) at 60-61.

¹⁴³³ *Dauphin County Bar Association v Mazzacaro* 456 Pa 545 (1976).

While some ADR experts focus their analysis on ‘client representation’, others look at reliance, and where there is increased liability imposed on lawyers for reliance by third-party beneficiaries on legal opinions or advice given to others, the privity of the lawyer-client relationship may not be seen as determinative.¹⁴³⁴

It has been suggested that when mediators engage in some prediction or application of legal standards to concrete facts, particularly when they draft settlement agreements, they are practising law.¹⁴³⁵ It is reasonable to conclude that giving legal predictions and evaluations is the work of a lawyer, whether or not there is a lawyer-client relationship. It has been suggested that mediators are more likely to ‘deserve’ immunity when all parties to a dispute are receiving independent legal advice.¹⁴³⁶ The obvious lesson from the above discussion is that a lawyer acting as a mediator must clearly differentiate his or her role as a lawyer from that of a mediator.¹⁴³⁷

¹⁴³⁴ Menkel-Meadow (note 1430) at 60-61.

¹⁴³⁵ Menkel-Meadow (note 1430) at 60-61.

¹⁴³⁶ Menkel-Meadow (note 1430) at 60-61.

¹⁴³⁷ See Sandra Purnell ‘Comment: The Attorney As Mediator: Inherent Conflict of Interest?’ (1985) 32 *UCLA Law Review* at 986; Andrew Pirie ‘The Lawyer As Mediator: Professional Responsibility Problems or Profession Problems?’ (1985) 63 *Canadian Bar Review* at 378.

CHAPTER NINE: THE LAWYER

Core values

In considering the involvement of lawyer representatives in mediation, it has been suggested that is necessary to consider the core values of lawyers, which are more aligned with the core values of the courts, so that the core values of lawyer advocates in mediation are often in tension or in conflict, with the core values of mediation as an alternative process.¹⁴³⁸ Experience from the USA suggests that one of the dynamics that is emerging from the recent evolution of mediation is the way in which the attitudes and behaviour of lawyers, with their core values, is influencing the mediators and the mediation process.¹⁴³⁹

Adjudicatory procedures

As the core values of lawyers, and in turn judges and courts, involve linear thinking and linear systems such as rules, ethical codes, adversarial orientation, consistent predictable procedures and compartmentalisation of issues within the law, they are not aligned with the traditional core values of the mediation process.¹⁴⁴⁰ This mindset seems to be solidified in legal education which focuses on recognising issues and a ‘scientific’ application of the law to the facts, disregarding elements such as culture, politics and values, and embedding at a very early stage in legal education that emotions are not attached to the law.¹⁴⁴¹

Rules of evidence and ethical codes

The rules of evidence seem to work against providing a voice for the disputants, so that only lawyers can tell the story, and these rules prescribe that it is inherently part of the lawyer’s role to be the only voice for disputing parties.¹⁴⁴² Similarly, the ethical codes to which lawyers subscribe are designed for a judicial dispute resolution system, not an

¹⁴³⁸ See Creo (note 40) at 320.

¹⁴³⁹ Creo (note 40) at 320-321.

¹⁴⁴⁰ Creo (note 40) at 321.

¹⁴⁴¹ Creo (note 40) at 321.

¹⁴⁴² Creo (note 40) at 321.

alternative one like mediation, and seem to contribute to the unhealthy tension created in the process as many lawyers ignore their role as advisor outside of a strict legal application.¹⁴⁴³

Differing core values among the players

A power struggle can occur between the various participants in a mediation, with lawyers attempting to be the exclusive spokespeople for their clients, who may also want to express their views, and the mediator attempting to ensure that there is a balanced approach to the various parties. As more parties and lawyers become involved, there can be attempts to legalise the process by creating rules, as lawyers value consistency and predictability, the process may start to look more like litigation than mediation.¹⁴⁴⁴

Mediation practice can be fundamentally affected by the mismatch between the approach taken by some in the process, and the type of approach required in order for the process to operate effectively. The education and training of lawyers, together with centuries of legal precedent and practice, stresses the presence of rules and formalised processes, and enforces a theory of impartiality about the rule of law. When lawyers then engage in the mediation process, they often view it as functioning like a court and believe that impartiality is fundamental to the mediation process.¹⁴⁴⁵

The gladiator and the counsellor

As a lawyer is hired by a client to be the gladiator in the emerging legal battle, suggesting the possibility of compromise before the battle had been fought has traditionally been seen as a sign of weakness, despite the fact that a lawyer owes a professional duty to a client to provide objective advice that is in the client's best interests.¹⁴⁴⁶ As US Supreme Court Justice O'Connor put it: 'courts should not be the places where the resolution of

¹⁴⁴³ Creo (note 40) at 321.

¹⁴⁴⁴ For example, as lawyers and organisations such as the ABA in the USA become more and more involved in the formalisation of mediation, it is believed that this trend will intensify, see Creo (note 40) at 321-322.

¹⁴⁴⁵ Creo (note 40) at 322.

¹⁴⁴⁶ Trollip (note 77) at 14.

disputes begins. They should be the place where disputes end, after alternative methods of resolving disputes have been considered and tried.¹⁴⁴⁷

A lawyer should be seen as playing the two distinct roles of gladiator and counsellor. As a gladiator, a lawyer fights relentlessly for his or her client's interests and ultimate success in court, and as a counsellor, a lawyer is obliged to review dispassionately the strengths and weaknesses of the client's case, and recommend various approaches for resolving the dispute including settlement where appropriate.¹⁴⁴⁸

One of the difficulties with proposing mediation in the past is the fear that it may be viewed as capitulation, the perennial problem of 'who blinks first', despite the fact that mediation can serve as a low-key, non-capitulating way of exploring the possibility of settlement, even in the most acrimonious of circumstances.¹⁴⁴⁹ Regrettably, disputing parties tend to wait until shortly before trial to commence serious negotiations, despite the fact that mediation can save time, money and emotional wear and tear, and can also enable parties to appreciate the practical possibilities and limitations of a case, as well as offering the opportunity of preserving ongoing relationships.¹⁴⁵⁰

The role of the lawyer

While legal disputes often arise in an atmosphere of disillusionment and distrust with disappointed or angry clients wanting justice or retribution, many of these cases ultimately settle despite the fact that a party may initially remark that they do not care how much it costs, it is a matter of principle, and they want to take it all the way.¹⁴⁵¹

Parties sometimes employ the services of lawyers that are perceived as the most adversarial in order to punish their adversaries. However, as parties' attitudes change after passions have cooled and legal expenses have mounted with little result, parties then settle, often unprepared for settlement, at the doors of the court while legal costs have mounted to serious proportions.¹⁴⁵² As practitioners are aware, the hidden costs of litigation are often greater than lawyers' fees, as contentious cases damage business

¹⁴⁴⁷ American Supreme Court Justice O'Connor 'Dispute Resolution Texas Style' at 1, as quoted by Trollip (note 77) at 14.

¹⁴⁴⁸ Trollip (note 77) at 14.

¹⁴⁴⁹ Trollip (note 77) at 15.

¹⁴⁵⁰ Trollip (note 77) at 15.

¹⁴⁵¹ Trollip (note 77) at 13.

¹⁴⁵² Trollip (note 77) at 13.

relations, result in unfavourable publicity, require numerous hours of management time and result in judgments which often owe more, as Trollip puts it, to ‘logic chopping’ than to commercial sense.¹⁴⁵³

It has been suggested that a lawyer’s role in a mediation is to advise the client about the availability of the process, to provide pre-mediation advice necessary for participation in the process, to participate in the process in good faith to the extent that lawyer participation is required, and to protect the party’s legal interests in connection with any agreement reached.¹⁴⁵⁴ The advice should be given at the earliest appropriate stage, for example, when contracts are being drafted, and at every stage after that where mediation might be a reasonable alternative to litigation. It is suggested that a lawyer must walk a thin line between adequately advising the party about legal aspects, and not preconditioning the party that creative and useful approaches to settlement are impossible.¹⁴⁵⁵

Mediation and the duties of lawyers

While the legal duties of lawyers in relation to mediation have not been comprehensively determined in South Africa,¹⁴⁵⁶ in light of the above, it would seem to make commercial sense for a lawyer to recommend mediation in appropriate cases. In South Africa, this matter is in part regulated by the normal professional requirements of lawyers towards their clients,¹⁴⁵⁷ and the position seems to be that there is a duty to inform clients about the settlement option even where the attorney believes the offer should be rejected.¹⁴⁵⁸

It has been suggested that where a client’s case can be reasonably settled, clients should be advised and encouraged to settle rather than to commence or continue proceedings.¹⁴⁵⁹ There is currently no formal duty on lawyers to advise on mediation as

¹⁴⁵³ Trollip (note 77) at 14.

¹⁴⁵⁴ Murray, Rau and Sherman (note 1041) at 367-378.

¹⁴⁵⁵ Murray, Rau and Sherman (note 1041) at 371.

¹⁴⁵⁶ See G Sammon ‘The Ethical Duties of Lawyers Who Act for Parties to a Mediation’ (1993) (4) 3 *ADRJ* 190 as cited by Boulle and Rycroft (note 231) at 252.

¹⁴⁵⁷ Boulle and Rycroft (note 231) at 252.

¹⁴⁵⁸ E A L Lewis *Legal Ethics: A Guide for Professional Conduct for South African Attorneys* at 162 as cited by Boulle and Rycroft (note 231) at 252.

¹⁴⁵⁹ Lewis (note 1458) at 161 as cited by Boulle and Rycroft (note 231) at 252.

a means of settlement,¹⁴⁶⁰ and it seems that only a small proportion of South African commercial lawyers routinely advise clients on the mediation option.¹⁴⁶¹

Legal advisers at mediation

The presence of legal advisers at a mediation of commercial disputes in South Africa seems to depend on the size and nature of the dispute. The larger the corporate party involved and the larger the amount in dispute, the more likely it is that legal advisers will be present. The presence of lawyers at mediation has drawn a mixed response from mediators. Generally, lawyers can prove helpful in identifying and distilling the issues in dispute where they engage in the process. Where there is a lack of understanding of the rationale for the mediation, lawyers can prove obstructive.¹⁴⁶²

As mediation is an informal meeting between parties in a non-legal context, the parties should be free to exchange views regarding the issues and possible solutions, and legal advisers should take such part in the process as their clients wish.¹⁴⁶³ Lawyers in a mediation are not present as advocates, but as legal *advisers* rather than legal *representatives*, and lawyers who do not understand and appreciate this distinction can prove to be a direct impediment to the mediation process.¹⁴⁶⁴ The role of legal advisers can be seen as threefold:¹⁴⁶⁵

- (i) to advise and assist their clients during the mediation;
- (ii) to discuss with the mediator, with each other and with their respective clients the legal, evidentiary or practical matters that arise; and
- (iii) to prepare the mediated settlement agreement or heads of agreement recording the agreement reached at the end of the mediation.

¹⁴⁶⁰ Boulle and Rycroft (note 231) at 252.

¹⁴⁶¹ See Boulle and Rycroft (note 231) at 252. In the interviews with practising commercial mediators conducted in Cape Town and Johannesburg between 21 May and 20 June 2007, with the exception of the group of four small- to medium-sized firms in Cape Town noted in chapter 4 at 84, none of those interviewed could name or was aware of any law firm that routinely advised commercial parties on the mediation option.

¹⁴⁶² Interviews conducted with practising commercial mediators in Cape Town and Johannesburg between 21 May and 20 June 2007. It is submitted that as mediation becomes more popular and lawyers become more familiar with it, this is likely to become less of a problem.

¹⁴⁶³ Street (note 95) at 367.

¹⁴⁶⁴ Street (note 95) at 367.

¹⁴⁶⁵ Street (note 95) at 367.

Legal liability of lawyer representatives in mediation

An obligation to advise of the mediation option

Commentators have remarked for some time that it would be foolish to exclude the possibility of lawyers being sued in negligence for failing to advise clients on the mediation option.¹⁴⁶⁶ Ross, in a book on legal ethics leaves the question of whether a lawyer is obliged to advise clients about alternative dispute resolution options unanswered.¹⁴⁶⁷ Lawyers would not seem to be responsible for mere errors of judgment regarding issues of law and discretion, unless no reasonably informed and competent member of the profession should have made them.¹⁴⁶⁸ It has also been suggested that as people became more informed about mediation, the likelihood would increase that a lawyer who failed to advise about it would be held liable.¹⁴⁶⁹

If mediation amounts to a ‘remedy’, then lawyers could be negligent if they fail to advise on the option.¹⁴⁷⁰ It is arguable in circumstances where a lawyer, well acquainted with ADR processes, believes that mediation is the most appropriate form of conflict management, that their client should be comprehensively advised about this option, even where there is initial client reluctance.¹⁴⁷¹ While judicial policy seems to be changing in other jurisdictions,¹⁴⁷² it is premature to predict the extent of a lawyer’s legal duties regarding mediation in South Africa.¹⁴⁷³

The Woolf at the door

Recent case law from England offers a word of warning for practitioners in light of the growth of mediation. The current view among many practitioners in England, particularly at the bar, is that a failure to advise or at least explore with clients the

¹⁴⁶⁶ See Sammon (note 1456); see also G Robertson ‘The Lawyer’s Role in Commercial ADR’ (1987) 61 *ILJ* 1148, who remarked over twenty years ago ‘It is now incumbent on the lawyer to stop shopping just in the corner shop where only litigation is available, and to take clients through the shopping centres, where a whole range of ADR techniques is available,’ as cited by Boule and Rycroft (note 231) at 252.

¹⁴⁶⁷ S Ross *Ethics in Law – Lawyers’ Responsibility and Accountability in Australia* at 343-4 as cited by Boule and Rycroft (note 231) at 253.

¹⁴⁶⁸ Ross (note 1467) at 194-5 as cited by Boule and Rycroft (note 231) at 253.

¹⁴⁶⁹ Boule and Rycroft (note 231) at 253.

¹⁴⁷⁰ Boule and Rycroft (note 231) at 253.

¹⁴⁷¹ Boule and Rycroft (note 231) at 253.

¹⁴⁷² In the Australian case *Caboolture Park Shopping Centre Pty Ltd (in liq) v White Industries (Qld) Pty Ltd* (1994) 117 ALR 25, the Full Court of the Federal Court said it could order a solicitors’ firm to cover the other side’s costs after advising their client to pursue litigation as a delaying tactic, aware of the fact that there was little prospect of success, as cited by Boule and Rycroft (note 231) at 253.

¹⁴⁷³ Boule and Rycroft (note 231) at 253.

option to refer a dispute to mediation could amount to professional negligence. While that may not reflect the current legal position in South Africa, as commercial mediation grows as a viable alternative, practitioners who routinely reject requests to mediate on behalf of clients without clearly discussing the option with them or taking their detailed instructions may, at best, be open to uncomfortable questions from their clients if adverse costs orders are made in the case.

It has been suggested that in light of recent case law from England, two dicta about mediation should now be on every litigator's desk.¹⁴⁷⁴ The first is that '[a]ll members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR,'¹⁴⁷⁵ and the second warns that '[t]he profession can no longer with impunity shrug aside reasonable requests to mediate.'¹⁴⁷⁶

Negligence

There would seem to be two grounds on which claims of negligence in a mediation settlement context may be made against a legal representative.¹⁴⁷⁷ The first is where it is alleged that the legal representative negligently advised a client to accept a settlement.¹⁴⁷⁸ Assessments made by lawyers when advising clients during a settlement are very subjective and courts are understandably reluctant to review such assessments, as the courts in England have put it, '[s]ettlements are to be encouraged as a matter of policy so it would be a discouragement if a party had to justify them in detail.'¹⁴⁷⁹

There is only likely to be judicial intervention where it can be seen that the view that the lawyer took was one that, in the circumstances, no reasonable lawyer could have taken.¹⁴⁸⁰ In the Australian case of *Studer v Boettcher*,¹⁴⁸¹ a client claimed that his

¹⁴⁷⁴ John Gilbert 'Mediation' *Law Society Gazette* (England) 2 June 2005.

¹⁴⁷⁵ *Halsey v Milton Keynes NHS Trust* [2004] EWCA (Civ) 576, Dyson LJ at par 11.

¹⁴⁷⁶ *Burchell v Bullard* [2005] EWCA Civ 358, Ward LJ at par 43. Similarly, in other jurisdictions, cost orders can be used to penalise parties where they or their lawyers fail to participate reasonably and cooperatively in the mediation process, see chapter 7 at 203.

¹⁴⁷⁷ See Boule and Nesic (note 426) at 526.

¹⁴⁷⁸ *Biggin & Co Ltd v Permanite Ltd* [1951] 2 KB 314 as cited by Boule and Nesic (note 426) at 526.

¹⁴⁷⁹ *J Sainsbury plc v Broadway Malyan (a firm)* (1998) 61 Con LR 31, High Court; and *DSL Group Ltd v Unisys International Services Ltd* (1994) 41 Con LR 33 at 39-43 as cited by Boule and Nesic (note 426) at 526.

¹⁴⁸⁰ *Atwell v Michael Perry & Co.* [1998] 4 All ER 65 as cited by Boule and Nesic (note 426) at 526.

¹⁴⁸¹ [1998] NSWSC 524 as cited by Boule and Nesic (note 426) at 526.

solicitor failed to make a proper assessment of the respective cases and in turn negligently advised him to settle at a mediation. On the evidence, the court found that the client made the decision to settle even if he did not like it. As Boulle and Nestic point out, this case illustrates that the involvement of an experienced mediator does not ensure that a mediated settlement agreement will not subsequently be challenged, and that mediators must ensure that parties consent on an informed basis to mediated settlement agreements.¹⁴⁸²

The second ground upon which a claim of negligence may be made against a legal representative, in the context of a settlement at mediation is where there is an allegation that he or she negligently failed to achieve settlement.¹⁴⁸³ This relates in part to causation, and where it is alleged that the lawyer's negligence consists of an omission to achieve settlement, what the client would have done had the lawyer recommended settlement would have to be considered, and this is a matter of inference to be assessed from all of the circumstances and could be difficult to prove.¹⁴⁸⁴

Another issue is the extent to which a lawyer has a duty to persuade reluctant clients of the advantages of a settlement.¹⁴⁸⁵ In *Studer v Boettcher*,¹⁴⁸⁶ although the specific issue did not need to be determined, Young J commented that he believed it is appropriate for solicitors to put pressure on clients to do what is, in the lawyer's view, in the clients' own interest. He did caution however that there may be circumstances in which a solicitor should know that he or she should not proceed, at least not before an independent person speaks to the client to ensure that the client understands the issues. As Boulle and Nestic point out, the need for a 'paternalistic' type approach may be greater when dealing with an inexperienced client who has an expectation that their attorney will take a broader view of the scope of their role and duties than is the case with an experienced client.¹⁴⁸⁷

¹⁴⁸² See Boulle and Nestic (note 426) at 526-527.

¹⁴⁸³ *Allied Maples Group Limited v Simmons & Simmons* [1995] 1 WLR 1602 as cited by Boulle and Nestic (note 426) at 527.

¹⁴⁸⁴ *Allied Maples Group Limited v Simmons & Simmons* [1995] 1 WLR 1602 as cited by Boulle and Nestic (note 426) at 527.

¹⁴⁸⁵ See Boulle and Nestic (note 426) at 527.

¹⁴⁸⁶ [1998] NSWSC 524 as cited by Boulle and Nestic (note 426) at 527.

¹⁴⁸⁷ *National Home Loans Corpn plc v Griffen Couch & Archer (a firm)* [1998] 1 WLR 207 as cited by Boulle and Nestic (note 426) at 527.

Lawyering and mediation: the conflict of professions

In the USA as in many other jurisdictions, more mediators come from the legal profession than any other profession, and a tension can exist when a mediator maintains an active bar licence. While they are two different professions, there can be a perceived overlap, as can be seen in Texas for example, where some mediators refer to themselves as ‘attorney-mediators.’¹⁴⁸⁸ Having arisen as an issue of competition and credentials, it has been argued that this designation is confusing in both the legal and mediation realms and harms both professions.¹⁴⁸⁹

The impact of disciplinary rules in the USA vary depending on whether the relevant bar considers a lawyer who is mediating to be practising law. In the event that it is deemed to be the practice of law, existing rules about client confidences and duties to report may conflict with or alter local mediation rules and guidelines, and some states have expressly stated that mediation is not the practice of law, while others have more nuanced tests to determine if an activity that is likely to occur in a mediation is considered to be the practice of law.¹⁴⁹⁰

The ABA, through its Dispute Resolution Section, issued the following resolution on Mediation and the Unauthorised Practice of Law:

Mediation is not the practice of law. Mediation is a process in which an impartial individual assists the parties in reaching a voluntary settlement. Such assistance does not constitute the practice of law. The parties to the mediation are not represented by the mediator.¹⁴⁹¹

As commercial mediation develops as an alternative in South Africa, it would seem sensible for the representative bodies of the attorneys’ profession and the bar to adopt a similar resolution in order to avoid any potential ambiguity between these two distinct professions.

Lawyers as gatekeepers

Lawyers have been described as the primary ‘gatekeepers’ to help commercial parties resolve their disputes, and there has been a transformation in the mindset of a large

¹⁴⁸⁸ Creo (note 40) at 314.

¹⁴⁸⁹ Creo (note 40) at 314.

¹⁴⁹⁰ Birke and Teitz (note 287) at 377.

¹⁴⁹¹ The comments to the resolution cite numerous rules and formal opinions of bar associations as support. See Creo (note 40) at 314.

number of members of the legal profession in countries where mediation has established itself as a viable alternative.¹⁴⁹² Over time, lawyers have become increasingly positive about the use of mediation to resolve disputes,¹⁴⁹³ with the most powerful tools of persuasion being the actual experience of the process and participation in mediator skills training.¹⁴⁹⁴ One of the main challenges for the development of this field in South Africa is the supply of sufficient numbers of competent lawyers, who have a genuine understanding of, and willingness to participate in, the process.¹⁴⁹⁵

Education and training can assist in developing this gatekeeper role. Law faculties should expand their curricula to offer a broader range of communication, negotiation and mediation skills, in order to appreciate that the human and commercial dynamics behind disputes is as important as interpreting legal issues, and to train future lawyers to be problem solvers and to work to find the most cost-effective commercial solutions for clients.¹⁴⁹⁶ It has been suggested that lawyers would be more competent at conflict resolution if they were required to study communication skills and a variety of interpersonal skills in addition to spending a number of years working in non-contentious legal areas before graduating to conflict work.¹⁴⁹⁷

Mediation and the practitioner: the umbilical link to justice

Former US President Abraham Lincoln once wrote: ‘Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser, in fees, expenses and waste of time. As a peacemaker the lawyer has superior opportunity of being a good man. There will still be business enough.’¹⁴⁹⁸ As discussed above, and as Lincoln discovered many years ago, the

¹⁴⁹² Carroll (note 319) at 401.

¹⁴⁹³ See John Lande ‘Getting the Faith: Why Business Lawyers and Executives Believe in Mediation’ (2000) 5 *Harvard Negotiation Law Review* 137; Julie Macfarlane ‘Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation’ 2002 *J Disp Resol* 241.

¹⁴⁹⁴ Carroll (note 319) at 401.

¹⁴⁹⁵ In correspondence between the Judge President of the Supreme Court of Appeal, Craig Howie, and the author, Justice Howie commented that he raised the issue of commercial mediation (on behalf of the author) with a group of five counsel from the Johannesburg Bar who came to introduce themselves before an appeal. Of the five only one (an SC) had been involved in a commercial mediation, three had no experience with the process and one had never heard of it. Letter to the author dated 4 May 2007.

¹⁴⁹⁶ See Carroll (note 319) at 402.

¹⁴⁹⁷ The feedback from hundreds of lawyers who have been trained by CEDR would seem to support this contention, the majority of whom wished they had learned mediator skills earlier, and many expressed a distaste for the overly adversarial system in which they work and seemed to be seeking escape routes to better ways of working. See Carroll (note 319) at 402.

¹⁴⁹⁸ Philip Van Doren Stern (ed) *The life and writings of Abraham Lincoln* at 15.

obvious lesson for the commercially-minded lawyer would appear to be that a disciplined approach to negotiation can be as effective for their clients as a disciplined approach to case management in litigation or arbitration.¹⁴⁹⁹

Some lawyers see their involvement in the mediation process as an opportunity to do something that they find more personally fulfilling than litigation. Some lawyers see mediation as a transformative experience, and others talk about the ‘magic’ of resolving disputes and that they, similar to athletes, have a feeling of being ‘in the zone’ when a mediation is progressing satisfactorily.¹⁵⁰⁰

It has also been suggested that the mediation of commercial disputes belongs at the heart of legal practice, and that the reason that there are signs of the ‘alternative’ appearing is due to the fact that the gap between justice and what the legal system can provide has become unacceptably wide. It follows that a system that assists parties to exercise personal power and autonomy to settle their differences through the facilitating skills of a third party should be seen as mainstream.¹⁵⁰¹

An issue that arises for the practitioner in this context is the relationship between the mediated settlement and justice. The French philosopher Comte-Sponville suggests that the core principle is to favour ‘equality, reciprocity or equivalence between individuals’. Justice, he believes, is the virtue of order and exchange, equitable order and honest exchange, and for an exchange to be just, it must take place between equals, or there should at least be no difference between the parties to the exchange regarding wealth, power or knowledge that might make them accept an exchange contrary to their interest, or contrary to their free and enlightened interest as expressed in a situation of parity.¹⁵⁰²

The critical point is that he suggests that equality is not so much about the objects exchanged, as between the *subjects* involved in the exchange, which presupposes that they are equally informed and free. We get from all of this a ‘golden rule of justice’. ‘In any contract and exchange, put yourself in the other’s place, but knowing everything you know and supposing yourself to be as free from need as it is

¹⁴⁹⁹ See Karl Mackie ‘The Future for ADR Clauses After *Cable & Wireless v. IBM*’ (2003) 19(3) *Arbitration International* at 351.

¹⁵⁰⁰ See Hensler (note 281) at 191.

¹⁵⁰¹ Armstrong (note 90) at 30.

¹⁵⁰² Andre Comte-Sponville *A Short Treatise on the Great Virtues, The Uses of Philosophy In Everyday Life*, chapter 6.

possible for someone to be and see if, in his place, you would approve this exchange or contract.¹⁵⁰³

This, it is suggested, could provide a yardstick for what is fair in a given context which, in turn, gives rise to the possibility of a ‘level playing field.’ It has been suggested that the mediation process gives scope for the purest and most intensely satisfying of legal work, which is to examine a client’s position in a measured way with consideration of all relevant authority and to be prepared to discuss that in civil dialogue with an opposing colleague. It follows that as the costs of mediation are usually well below the usual costs of the litigation process, there is better scope to allow this task the time it needs.¹⁵⁰⁴

Anthony Kronman, dean of Yale Law School and author of an interesting critique of the US legal profession,¹⁵⁰⁵ describes a spiritual crisis affecting the legal profession, and attributes it to the collapse of what he calls the ideal of the lawyer-statesman, which involves a set of values that gives precedence to good judgment over technical competence and encourages a public-spirited devotion to the law.

For nearly two centuries, Kronman argues, the aspirations of lawyers were shaped by their allegiance to a distinctive ideal of professional excellence. In the last generation, however, this ideal has failed, undermining the identity of lawyers as a group and making it unclear to those in the profession what it means for them personally to have chosen a legal career. A variety of factors have contributed to this. Kronman believes that it is partly the result of the triumph, in legal thought, of a counter ideal that denigrates the importance of wisdom and character as professional virtues. It is also partly due to an array of institutional forces, including the explosive growth of leading law firms and the bureaucratization of the courts. Each of these developments has a common tendency to compromise the values from which the ideal of the lawyer-statesman draws strength.¹⁵⁰⁶

All of these factors appear to have adversely affected the identity of lawyers. Kronman believes that if we think of the lawyer as a jack-of-all-trades, with a dilettante’s understanding of many fields but no expertise of his own, serving only as an intermediary between other disciplines, then the lawyer’s position will be one marked

¹⁵⁰³ Sponville (note 1502) at 70.

¹⁵⁰⁴ See Armstrong (note 90) at 30.

¹⁵⁰⁵ Anthony T Kronman *The Lost Lawyer*.

¹⁵⁰⁶ See Kronman (note 1505) chapters 5 and 6.

by deference towards the real experts in those areas. However, he believes that if the lawyer is an amateur in the fields of these other experts, they are amateurs in his, and when it comes to the imaginative probing of specific cases, it is the lawyer who is best equipped by training and temperament to lead the way. He suggests that the ability to fashion cases and to empathetically explore both real and invented ones is the lawyer's professional forte.¹⁵⁰⁷

In a similar spirit, it can be concluded that as the justice ideal is somewhere near the heart of the question of what is a lawyer's unique contribution, mediation offers an opportunity for members of the profession to reinforce their sense of the worth of what they do, by obtaining satisfaction from their engagement in the process.¹⁵⁰⁸

¹⁵⁰⁷ Kronman (note 1505) chapter 7.

¹⁵⁰⁸ See also Armstrong (note 90) at 30.

CHAPTER TEN: THE LIMITS AND POTENTIAL NEGATIVE IMPACT OF MEDIATION

The French philosopher Voltaire once remarked that ‘I was ruined but twice, once when I won a lawsuit and once when I lost one.’¹⁵⁰⁹ Indeed, it has been suggested that discontent with the law’s approach to resolving disputes seems endemic to human societies.¹⁵¹⁰

Roman citizens glorified Cicero when he defended popular figures, but turned against him when he took on unpopular causes.¹⁵¹¹ In Shakespeare’s *King Henry VI*, Dick the butcher offers to rebel Jack Cade the unforgettable suggestion: ‘The first thing we do, let’s kill all the lawyers.’¹⁵¹² Charles Dickens devoted an entire novel to the tale of the seemingly endless lawsuit, *Jarndyce and Jarndyce*, which moves through the court so slowly that by the time the case is concluded there is nothing left of the inheritance that the parties were disputing about.¹⁵¹³

The limits of mediation

Despite the traditional scepticism that many feel towards the courts as dispute resolvers, it would be foolish to contend, and it is not being suggested that mediation is a panacea for all commercial ills. Some suggest that settlements reached by alternative dispute resolution methods such as mediation lack the ‘legitimacy’ of authoritative judicial decisions, while many large commercial institutional litigants may also want a binding court precedent in order to guide future disputes.¹⁵¹⁴

There is clearly a fine balance between encouraging mediation through financial incentives, such as Italy’s company law reform that introduced tax incentives for mediated settlements,¹⁵¹⁵ and decreasing access to the courts through financial

¹⁵⁰⁹ Joe R Greenhill ‘State of the Judiciary Message’ quoted in Judy Kurth Dougherty ‘Family Mediation, What Does it Mean for Lawyers?’ (2001) 51 *Texas Bar Journal* at 31.

¹⁵¹⁰ See Hensler (note 281) at 168.

¹⁵¹¹ Robert Wilkin *A Legal Biography of Cicero*.

¹⁵¹² William Shakespeare *King Henry VI Part 2 Act 4 scene 2*.

¹⁵¹³ Charles Dickens *Bleak House*. See also Hensler (note 281) at 168.

¹⁵¹⁴ Trollip (note 77) at 17.

¹⁵¹⁵ See De Palo and Cominelli (note 247) at 218.

disincentives to go to court.¹⁵¹⁶ While the former promotes the use of mediation, the latter may effectively block access to justice before the courts.¹⁵¹⁷

There is little doubt that the handing down and publication of judicial decisions constitutes a valuable ‘public good’, in providing important information about what can and cannot lawfully be done, and it has been suggested by numerous commentators that the referral of commercial matters to mediation could stifle the development of law and precedent in this area.¹⁵¹⁸ There is also the possibility of weaker parties being pressured into accepting less than their full entitlement, while the fact that a dispute is resolved does not guarantee that the public interest has been appropriately served.¹⁵¹⁹

Some point to the danger that mediation will simply reflect existing power imbalances by merely legitimising existing, and possibly undesirable power structures, or that in some large corporate organisations, there will be a tendency to follow the path of least resistance and minimal risk, so that leaving issues to be resolved by a court may appear preferable to risking criticism from superiors who may regard particular settlements as imprudent.¹⁵²⁰

While client satisfaction is often promoted as a criterion for measuring the success of mediations, client satisfaction is a very subjective concept, and can, it is suggested, correspond to a number of elements such as a need for speed and cost savings or a need for self determination.¹⁵²¹ Therefore, as discussed below, such commentators believe that the success stories relayed about mediation may not reflect the full picture.

While disputes are inevitable, the way in which they are handled can have an enormous impact on the profitability and viability of business, and as previously noted, competitive approaches to dispute management and resolution can be costly. With the establishment of mediation in Australia some years ago, it was suggested that ‘mediation is much cheaper than litigation’ and ‘it has been said that the mediation of a commercial dispute by the Australian Commercial Disputes Centre costs 5 per cent of

¹⁵¹⁶ See Australian Law Reform Commission ‘Review of the Adversarial System of Litigation’ Issue Paper 20 at 115.

¹⁵¹⁷ See Alexander (note) at 25.

¹⁵¹⁸ See Trollip (note 77) at 18.

¹⁵¹⁹ Trollip (note 77) at 18.

¹⁵²⁰ Trollip (note 77) at 18.

¹⁵²¹ D Luban ‘The Quality of Justice’ (1989) 66 *Denver University Law Review* 381 at 405.

the costs of litigating or arbitrating the same matter'.¹⁵²² There was little doubt that mediation was a viable option for business. As far back as 1989, it was estimated that only 5.7 per cent of all commercial disputes in Australia ended up within the court system.¹⁵²³

However, the court and tribunal system plays an important role regarding the broader and larger dispute resolution system, and is said to cast a shadow over the dispute resolution system, as many disputes are resolved or discontinued on the basis of the likely court outcomes, and more importantly in many cases, the cost of litigation. As many commercial disputes can involve contrasting and often irreconcilable views about issues that can never be eliminated by techniques that encourage emotional purges and an understanding of needs and interests, conventional legal adjudication processes have traditionally served and will need to continue to serve as a means of publicly resolving such irreconcilable differences.¹⁵²⁴ The formal system will continue to play an important preventative and precedent setting role. In addition, the court system is increasingly involved in determining how mediation processes are to operate, in defining and clarifying the guidelines, processes and structures used in mediation.¹⁵²⁵

Court backlog and vanishing trials

It is interesting to look at the impact that ADR processes such as mediation have had on the backlog of court cases and the more recent phenomenon of vanishing trials in other jurisdictions. In light of the private nature of commercial mediation as defined in this thesis, it is understandable that no studies exist to indicate the impact that settlement through this process has had on the rate of court adjudication. We consequently turn to the studies that are available. Two comments should be made in respect of the discussion below. First, many of the studies cover ADR processes in general and consequently their scope is much broader than commercial mediation. Second, the mediation elements generally relate to court-annexed or court-mandated mediation. Consequently they are reviewed for information purposes and are discussed in order to

¹⁵²² 'Report of the Chief Justice's Policy and Planning Sub-committee on Court Annexed Mediation, November 1991' at 9.

¹⁵²³ M Fulton *Commercial Alternative Dispute Resolution* as quoted by Sourdin (note 164) at 59.

¹⁵²⁴ Trollip (note 77) at 18.

¹⁵²⁵ Sourdin (note 256) at 59.

identify and analyse potential criticisms of mediation as an ADR process. They are not necessarily indicative of the impact mediation, as defined in this thesis, will have in this jurisdiction.

The court backlog

The dramatic increase in cases in many jurisdictions caused such a backlog that it seemed to reach critical proportions. This issue has obvious relevance for South Africa. In 2005, the Department of Justice estimated over 130,000 backlogged cases.¹⁵²⁶ An article in 2002 described the position in the USA as follows:

Even without the considerable impact of additional pre-trial proceedings, it would now be completely impracticable to try the one out of six-and-a-half criminal cases or the nearly one out of 10 civil cases that were tried in 1970. In 2000, that would have meant 41,000 total trial dispositions, as against the 10,000 that occurred. The cost of the necessarily gargantuan complement of more judges, logistical support, and courtrooms would be an intriguing figure to quantify and contemplate in the distant mist of a political/economic mirage.¹⁵²⁷

Given the backdrop of such a dramatic increase in cases being filed, the decline in the number of trials during this period has apparently been a self-fulfilling necessity:

What are trials, and what are the future, long term implications of the almost dinosaur-like dwindling in their number? Litigation represents a breakdown in communication, which consists in the civil area of the inability of the parties to work out a problem themselves and, in the criminal area, of ineffectively inculcating society's rules and the consequences for violating them. Trials are the method we have ultimately used to deal with those breakdowns. However, the goal of our system is not to try cases. Rather, it is to achieve a fair, just, economical, and expeditious result by trial or otherwise, where communication has previously failed.¹⁵²⁸

Vanishing trials

Civil caseloads have declined significantly over the past number of years in courts in many jurisdictions,¹⁵²⁹ while there has simultaneously been a dramatic decrease in the fraction of civil cases reaching trial.¹⁵³⁰

¹⁵²⁶ Bougardt and King (note 24) at 18.

¹⁵²⁷ Edmund V Ludwig 'The Changing Role of the Trial Judge' (2002) 85 *Judicature* 216 at 253.

¹⁵²⁸ Ludwig (note 1527) at 217.

¹⁵²⁹ See Hensler (note 281) at 166-167.

As part of the ABA's Litigation Section's Civil Justice Initiative, Professor Marc Galanter compiled the report, 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts'.¹⁵³¹ The report documents the apparent paradox that the proportion of cases going to trial dropped sharply during the previous 40 years, despite substantial increases in other indicative legal factors such as the number of lawyers, the number of cases filed and the amount of published legal authority. The most remarkable fact seems to be that the civil trial rate in the federal courts dropped steadily from 11.5 per cent in 1962 to 1.8 per cent in 2002, and while the number of federal cases filed increased, the absolute number of trials decreased.¹⁵³²

Some argue that rhetoric of 'vanishing trials' panders to the fears of 'litigation romanticists'¹⁵³³ who regret the end of a time when it was easier to get to trial, and when a judge's role was to try cases rather than to manage them. As noted above, others contend that by settling cases through forms of ADR such as commercial mediation, the development of public norms and vindication of public values are impeded.¹⁵³⁴

Commenting on the report, one commentator remarked that in a time of fiscal constraints, it is tempting to some politicians to use startling data about 'vanishing trials' to criticise courts for being unproductive and over-funded which in turn, could prompt some judges to use ADR as a scapegoat and cut court-connected ADR programmes, in an effort to increase trial rates and in turn regain legitimacy.¹⁵³⁵

However, Galanter's report suggests that ADR is not the cause of reducing trial rates, and he doubts that ADR resulted in the 'disappearance' of many trials. Galanter identifies a number of possible causes for the decline, but does not specify which factors were most responsible.¹⁵³⁶ The possibilities include (a) increased complexity and expense of litigation and trial, (b) changes in the definition and nature of cases as units of measurement, (c) increasing tendency of defendants to settle for fear of large adverse judgments, (d) enhanced role of judges as case managers and proponents of settlement,

¹⁵³⁰ See Patrick Higginbotham 'So Why Do We Call Them Trial Courts?' (2002) 55 *SMU L Rev* 1405. See also Hensler (note 281) at 167.

¹⁵³¹ Marc Galanter 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts' (2004) available at www.abanet.org/litigation/ (last visited 21 June 2007).

¹⁵³² For a more detailed discussion of the report, see John Lande "'The Vanishing Trial' Report: An Alternative View of the Data' Summer 2004 *Dispute Resolution Magazine* at 19.

¹⁵³³ Carrie Menkel-Meadow 'Ethics and the Settlements of Mass Torts: When the Rules Meet the Road' (1995) 80 *Cornell L Rev* 1159 at 1172.

¹⁵³⁴ Lande (note 1532) at 20.

¹⁵³⁵ Lande (note 1532) at 20.

¹⁵³⁶ See Lande (note 1532) at 20.

(e) expanded discretion of the judiciary, (f) lack of faith in trials by the public, judges and lawyers, and (g) increased use of ADR.

Some have concluded that all of the changes in the litigation environment in recent decades that reduced the trial rate are likely also to have increased the use of ADR. In light of the increases in aspects of the legal system such as judicial caseloads and the complexity of litigation, it seems sensible for the courts to devote more resources to pre-trial case management and ADR.¹⁵³⁷

Costs to lawyers, clients and justice

Commentators have also pointed to the negative impact that the increased use of ADR processes have had on young lawyers in view of the decline in available trials, as they not only get less experience, but can enjoy the practice less. Clients, it seems, suffer too, as they can pay more now to receive the same quality of legal service they received a decade ago, and may pay more in settlements when represented by litigators who fear the prospect of a trial. As a consequence, the absence of trials means that there is a lack of experience to measure settlement options and litigation risks against. The system of justice is ultimately affected, as the reduction in trials results in a reduction in the quality of advocacy and the ability of lawyers to try cases protecting legal rights.¹⁵³⁸

The lesson from the above is that mediators should be conscious of the negative implications of their success. While the process provides parties with a medium through which to express themselves, to identify their interests and to achieve amicable solutions, it seems that there are occasions when parties complain that mediators are overreaching, coercive, or overly evaluative based on limited information about the dispute, and consequently deprive parties and their lawyers of the freedom to make decisions. It has therefore been suggested that mediators should take exceptional care not to convert a voluntary process of dispute resolution into a means of coercion to resolve disputes outside the public forum when clients genuinely want and/or need a public and binding judicial resolution of an issue.¹⁵³⁹

¹⁵³⁷ See Lande (note 1532) at 20-21.

¹⁵³⁸ Scott Atlas and Nancy Atlas 'Potential ADR Backlash: Where Have All the Trials Gone? To Mediation or Arbitration' Summer 2004 *Dispute Resolution Magazine* at 16.

¹⁵³⁹ Atlas and Atlas (note 1538) at 16-17.

The absence of trials, it is believed, also deprives mediators of the experience required to assist parties in assessing their litigation costs, risks and benefits. It is also believed that the courts have a responsibility to ensure that trials are available to parties that elect to take the risk and want a judicial decision. In the USA some parties and lawyers complain that the courts have become increasingly concerned with case management and that parties seeking a trial are often viewed disfavouredly by the judge. If parties elect trial, the courts should be willing to provide the forum and resources, and only then, it is believed, can the parties and the system operate fairly.¹⁵⁴⁰

An economic and cultural phenomenon

One commentator with over three and a half decades of judicial experience has suggested that the decline in trials is an economic and cultural phenomenon:

Aside from the economic cost, litigants shrink from the uncertainties, the time investment, the lack of finality, the aggravation and stress, as well as the impaired opportunity for more productive activity.

Trials, to an increasing extent, have become a societal luxury. Correspondingly, the role of the trial judge has taken on new and large dimensions that are essential to our society's welfare. Specialised training is available to assist judges in learning to facilitate early settlements and how best to be authoritative neutrals or, as case managers, to recommend the most auspicious referral for a non-trial resolution.¹⁵⁴¹

Few would argue against the notion that trials unquestionably have positive qualities in providing precedents and serving as catharsis for litigants. ADR has sometimes been derided in the USA for this reason as an acronym for 'Attorney Deficit Revenue.'¹⁵⁴² Despite this, others believe that the US justice system is fortunate to have had a reduction in trials, and given the limited resources available, judges who demonstrate the ability and willingness to take on the challenge of case management and dispute resolution are performing an extremely valuable public service.¹⁵⁴³

¹⁵⁴⁰ Atlas and Atlas (note 1538) at 17.

¹⁵⁴¹ Ludwig (note 1527).

¹⁵⁴² Edmund V Ludwig 'A Judge's View, The Trial/ADR Interface' Summer 2004 *Dispute Resolution Magazine* at 13.

¹⁵⁴³ Ludwig (note 1542).

Beyond altruism

A US circuit court judge believes that acting as a mediator in the federal court's ADR programme improved her performance as a lawyer. Even extremely competent lawyers, in her view, often mesmerise themselves with the merits of their cases or project unsubstantiated optimism in an effort to please clients. When the advocacy process is viewed from the perspective of a mediator while still practising as a lawyer, it serves, in her view, as an antidote to such self-delusion in a lawyer's own practice. Observing the work of many other advocates from a detached perspective is also beneficial as opportunities arise to see behaviours that are counter-productive as well as behaviours that encourage more constructive and less defensive responses. This in turn, it is believed, acquaints a lawyer with a variety of ways to respond to difficult behaviours by clients or opposing counsel and to meet parties' substantive needs. It also gives the person acting as a mediator a chance to feel how a person sitting in the neutral's chair reacts to a range of lawyering behaviours.¹⁵⁴⁴

Documented experience

The Centre for Analysis of Alternative Dispute Resolution Systems ('CAADRS') based in Chicago summarised the results of 62 studies that assessed the effectiveness of more than 100 court mediation programmes.¹⁵⁴⁵ The studies revealed a wide range of programmes varying widely in both effectiveness and structure, some of which examined the impact on the trial rate, and while revealing mixed findings, in most studies mediation was found to have no impact on the trial rate. Overall, the studies revealed many other ways in which mediation can alter the dispute resolution experience, such as improved settlement rates, greater participant satisfaction with the process or its results, perceptions of enhanced fairness, cost savings, faster resolution, improved or sustained relationships among parties and higher rates of compliance.

¹⁵⁴⁴ Marsha Berzon 'Beyond Altruism, How I Learned to be a Better Lawyer by being a Pro bono Neutral' Summer 2004 *Dispute Resolution Magazine* at 27.

¹⁵⁴⁵ See Jennifer Shack 'Efficiency: Mediation Can Bring Gains, But Under What Conditions?' Winter 2003 *Dispute Resolution Magazine* at 11 which provides general descriptions of surveys that are summarised more specifically on the CAADRS website at www.caadrs.org (last visited 20 June 2007)). See also Thomas J. Stipanowich 'ADR and "The Vanishing Trial"' Summer 2004 *Dispute Resolution Magazine* at 7.

A report published in 2004 by the Judicial Council of California provides one of the most revealing examinations of court-connected mediation ever conducted.¹⁵⁴⁶ A state statute mandated Early Mediation Pilot Programmes in five superior courts, involving three mandatory, in Fresno and Los Angeles and San Diego and two voluntary, in Contra Costa and Sonoma, and required the Judicial Council to study these programmes. The study assessed the impact of the mediation programmes on settlement/trial rate, disposition time, litigant/attorney satisfaction, litigants' costs and courts' workload. In measuring the overall effectiveness of the programmes, the study used data provided by the courts' computerised case management system in addition to surveys of the parties, attorneys and judges, and during the pilot period of 2000 and 2001, almost 8,000 cases were mediated.

In particular the California study revealed the following:

- In the San Diego and Los Angeles programmes, the trial rate was 24 to 30 per cent lower among cases in the mediation programme group than those in the control group.
- All of the pilot programmes resulted in reduced disposition time for cases and enhanced attorney perceptions of the services provided by the court or the litigation process.
- Four of the five pilot programmes reported reduced numbers of motions or other pre-trial court applications.
- Attorney estimates indicate that the programmes may have saved over \$49 million in litigant costs and more than a ¼ million attorney hours.

California's landmark study strongly supports the notion that court-connected mediation programmes are capable of producing important benefits for courts, litigants and lawyers, and reinforces the fact that much depends on the specific characteristics of a programme and the context within which it is established.¹⁵⁴⁷

Just over a decade ago, Cornell University conducted a study of ADR use among Fortune 1,000 corporations, and concluded, based on responses from more than 600 companies that 'ADR processes are well established in corporate America,

¹⁵⁴⁶ Judicial Council of California, Administrative Office of the Courts, Office of General Counsel, Evaluation of the Early Mediation Pilot Projects (27 February 2004). See also Thomas J. Stipanowich 'ADR and "The Vanishing Trial"' Summer 2004 *Dispute Resolution Magazine* at 7.

¹⁵⁴⁷ See Thomas J. Stipanowich 'ADR and "The Vanishing Trial"' Summer 2004 *Dispute Resolution Magazine* at 8.

widespread in all industries and for nearly all types of disputes' and that 'ADR practice is not haphazard or incidental but rather seems to be integral to a systematic, long-term change in the way corporations resolve disputes.'¹⁵⁴⁸ From the companies that responded, 87 per cent reported some use of mediation in the previous three years, and 80 per cent reported using arbitration during the same period. While other forms of ADR processes were used, mediation was the preferred ADR option, based on perceptions that it offers potential cost and time savings, enables parties to retain control over the issues to be resolved and is generally more satisfying both in terms of process and outcomes. More recently, in an international study involving over 400 respondents from over 31 countries, 59 per cent of companies reported that they had engaged in the process to resolve disputes.¹⁵⁴⁹

Power imbalance

One of the most damning criticisms of commercial mediation is that it does not provide the procedural safeguards of a court and consequently offers second-class justice, particularly where there is an imbalance in bargaining power between the parties.¹⁵⁵⁰ The logical response to this criticism is that commercial mediation is voluntary, if either party does not like the way the mediation is progressing, they can choose to exit the process. While almost all commercial mediations will have lawyers present, on the rare occasions when lawyers are absent, if either party is unsure about the proposed settlement agreement, they can make it conditional upon their lawyer's approval.¹⁵⁵¹

¹⁵⁴⁸ See generally, David B Lipsky and Ronald L Seeber 'The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by US Corporations' (Cornell/PERC Institute on Conflict Resolution 1998). The survey was directed at general counsel or heads of litigation at the Fortune 1,000 companies. In it, ADR was defined as 'the use of any form of mediation or arbitration as a substitute for the public judicial or administrative process available to resolve a dispute.' See also Thomas J. Stipanowich 'ADR and "The Vanishing Trial"' Summer 2004 *Dispute Resolution Magazine* at 8.

¹⁵⁴⁹ Fullbright and Jaworski 'Third Annual Litigation Trends Survey 2006' as quoted in Amanda Bougardt and Mervyn King (note 24) at 18. Despite the increased use of mediation, it seems that many parties elect to go to trial, rather than settle, often to their detriment. In a US survey of 2,054 cases that went to trial between 2002 and 2005, 61 per cent of plaintiffs ended up with less from a judgement, than they would have received had they accepted a settlement offer, while a survey of trial outcomes over a 40 year period up to 2004, shows that over time, such decisions to go to trial resulting in adverse financial consequences have become more frequent. The study is expected to be available in September 2008 at www.blackwellpublishing.com/journal.asp?ref=1740-1453&site=1 For an overview of the study see www.nytimes.com/2008/08/08/business/08law.html?_r=1&adxnnl=1&oref=slogin&adxnnlx=1218658341-vhh1MyrtNxxvOWqTUDHrPUA (last visited 13 August 2008).

¹⁵⁵⁰ M Cappelletti 'Alternative Dispute Resolution Processes Within the Framework of the World Wide Access to Justice Movement' (1995) 56 *Modern Law Review* 287 at 288.

¹⁵⁵¹ See Lovenheim (note 7) at 30.

A variety of mediator techniques and strategies have evolved in order to deal with inequalities of power, most notably in the USA. Bush, through his concept of ‘active impartiality,’ believes that mediators should direct their invitations, support, encouragement and challenges towards each party in turn, and each party should see clearly that the other is receiving similar treatment.¹⁵⁵² If necessary, mediators should explicitly assure the parties that they intend to behave identically towards each side, and fulfil this assurance. Bush believes that mediators who positively encourage the parties, and adhere to the requirement of ‘active impartiality,’ can act as translator for each side to the other and also serve as devil’s advocate to each party respectively, without losing the trust and confidence of both sides which is required to fulfil the mediator’s role.¹⁵⁵³

In addition to not being associated with either side, mediator impartiality means that due to a lack of personal investment, a mediator has more distance and perspective on the parties’ discussions. In order to fulfil both the empowerment and recognition functions, he believes that a mediator can and should be an actively impartial ‘narrator’ who ensures that no relevant exchange between the parties is unheard or ignored.¹⁵⁵⁴

One of the most challenging activities that must occur at a commercial mediation, is the conversion of the dispute from an ‘either/or’ situation, a binary choice, to a focused, joint problem-solving exercise involving the voluntary participation of parties in a collective as opposed to an individual effort, and this willingness to participate is within the unilateral control of every commercial party.¹⁵⁵⁵ The willingness of a party to engage in this manner is seen as more important to the success of a mediation than any amount of screening for mediator aptitudes or orientation, or matching of disputes and disputants to the process, or the relative ‘power-over’ of the parties. A willingness to engage in ‘power-with’ is critical for commercial parties in a mediation, which entails the conversion of a situation from one that pulls parties away

¹⁵⁵² R A B Bush ‘Efficiency and Protection, or Empowerment and Recognition? The Mediator’s Role and Ethical Standards in Mediation’ (1989) 41 *Florida Law Review* 253 at 281-282.

¹⁵⁵³ Bush (note 1552) at 281-282.

¹⁵⁵⁴ Bush (note 1552) at 281-282. Some commentators suggest that arm’s length commercial parties are almost always presumed to be of equal bargaining power, regardless of their differences, and any vulnerability is presumed to be preventable through more prudent exercise of their bargaining, see G Chornenki ‘Mediating Commercial Disputes: Exchanging “Power Over” for “Power With”’ in J Macfarlane (ed) *Rethinking Disputes: The Mediation Alternative* at 163-168.

¹⁵⁵⁵ See Chornenki (note 1554) at 163-168.

from each other to one that moves them together, at least for the purposes of resolving the dispute.¹⁵⁵⁶

Unless a commercial party accepts the values and attitudes that interest-based mediation requires, then the process is unlikely to produce the desired result, as it requires some element of vulnerability and ‘letting-go’ in order that the possibilities for settlement can be explored.¹⁵⁵⁷ For commercial parties who can suspend reliance on power as a form of unilateral influence and control and participate in a collective problem-solving effort, the mediation process has much to offer. It is a measured understanding of mediation’s demands rather than its benefits that will assist parties in having more realistic expectations.¹⁵⁵⁸

As power imbalances or at least potential power imbalances arise in every mediation, one of the most challenging tasks for a mediator is how to deal with them.¹⁵⁵⁹ Mediators often deal with such situations by trying to enhance the perception of equal power, by encouraging each party to list its bases of power and then identifying the costs and benefits to each from exercising that power.¹⁵⁶⁰ Another method involves shifting the focus from power relationships to interests, by focusing on the process of how the parties’ needs can be satisfied.¹⁵⁶¹ The openness of the mediation process can also be seen as enabling the mediator to remind the parties that they have agreed to certain process values such as respect for the other party and a commitment not to intimidate.¹⁵⁶²

The most difficult problem the mediator faces in the context of power relationships is where there is a wide discrepancy between the strength of means of influence. As a result of a mediator’s commitment to neutrality and impartiality, he or she is ethically barred from direct advocacy for the weaker party, but is also ethically obliged to assist the parties in reaching a mutually acceptable agreement. It has been suggested that the mediator should initiate moves to assist the weaker party by mobilising the power he or she possesses. The mediator should not, however, directly

¹⁵⁵⁶ Chornenki (note 1554) at 163-168.

¹⁵⁵⁷ Chornenki (note 1554) at 163-168.

¹⁵⁵⁸ See Chornenki (note 1554) at 163-168.

¹⁵⁵⁹ Murray, Rau and Sherman (note 1041) at 342-3.

¹⁵⁶⁰ Gerry Bellows and Bea Moulton *Assessment: Framing the Choices, in the Lawyering Process* 998-1017.

¹⁵⁶¹ Christopher W Moore *The Mediation Process* at 280.

¹⁵⁶² Davis and Salem ‘Dealing with Power Imbalances in the Mediation of Interpersonal Disputes’ (1984) *6 Mediation Quarterly* 17 at 21.

act as an organiser to mobilise or develop new power for the weaker disputant unless the mediator has gained the other party's approval. The mediator must avoid acting, and avoid the perception of acting as a secret advocate, as this would put the mediator's impartiality and effectiveness as a process intervener at risk.¹⁵⁶³

Empowering moves could include assisting a weaker party in obtaining, organising, and analysing data and identifying and mobilising his or her means of influence, assisting and educating the party in planning an effective negotiation strategy, aiding the party to develop financial resources so that the party can continue to participate in negotiations, referring a party to a lawyer or other professional advisor,¹⁵⁶⁴ and encouraging the party to make realistic concessions.¹⁵⁶⁵

Academic critique

With the advent of judicial settlement and court mandated mediation, many scholars argued that the neutrality of the judiciary could be compromised by their attempts to promote settlement,¹⁵⁶⁶ and that the settlement movement would disadvantage less powerful litigants and as previously mentioned, erode public values inherent in formal adjudication.¹⁵⁶⁷ Instead of providing more options for disputants, the critics saw the advent of such alternatives as fundamentally transforming the civil justice system.¹⁵⁶⁸

Others offered empirical evidence that parties whose cases are tried or arbitrated felt that they had been treated more fairly than parties whose cases were resolved through settlement processes.¹⁵⁶⁹ The notion that people who believe they have a legal claim prefer to resolve their disputes through mediation rather than adversarial litigation and adjudication was rejected; such a belief, it was argued, was based on questionable

¹⁵⁶³ Moore (note 1561) at 281-282.

¹⁵⁶⁴ In the interviews with practising commercial mediators conducted in Cape Town and Johannesburg between 21 May and 20 June 2007, there was unanimity in the responses from those interviewed on this point. Provided a mediator suggests to a party to seek professional advice in such a situation, respondents believed the mediator's obligation was discharged. Further, respondents did not believe that it was the mediator's job to assess the fairness of a particular settlement agreement.

¹⁵⁶⁵ Moore (note 1561) at 281-282.

¹⁵⁶⁶ Judith Resnik 'Managerial Judges' (1982) 96 *Harvard Law Review* 374.

¹⁵⁶⁷ See Fiss (note 84); see also Harry Edwards 'Alternative Dispute Resolution: Panacea or Anathema?' (1986) 99 *Harvard Law Review* 668; Judith Resnik 'Due Process: A Public Dimension' (1987) 39 *U Fla Law Review* 405; Judith Resnik 'Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication' (1995) 10 *Ohio St J On Dispute Resolution* 212.

¹⁵⁶⁸ See Hensler (note 281) at 176.

¹⁵⁶⁹ E Allan Lind et al *The Perception of Justice: Tort Litigants' Views of Trial, Court-Annexed Arbitration and Judicial Settlement Conferences*; E Allan Lind et al 'In the Eyes of the Beholder: Tort Litigants' Evaluations of their Experiences in the Civil Justice System' (1990) 24 *Law & Society Rev* 953.

assumptions and debatable extrapolations from other social conflict contexts.¹⁵⁷⁰

Researchers, it seems, have not paid sufficient attention to the terminology they use to describe the procedures, for example, what the researchers termed ‘mediation’ resembled non-binding arbitration, where a third party heard the evidence, did not discuss it with the disputants and rendered an advisory non-binding opinion.¹⁵⁷¹

In the studies undertaken, it seems that the perceptions of parties of the fairness of dispute resolution procedures depended on procedural characteristics, rather than on whether they won or lost their case or were satisfied with its outcome.¹⁵⁷² Hence people saw the outcomes of dispute resolution procedures as legitimate and complied with them when the outcomes were unfavourable to them, provided they believed that the process used was fair.¹⁵⁷³ It seems that we have yet to see the kind of detailed analysis of individual assessments of the procedural features of mediation that has been performed for court arbitration, and the conclusion that litigants’ perceptions of the fairness of mediation procedures are more positive than their perceptions of court or arbitration has yet to be comprehensively tested.¹⁵⁷⁴

While it seems that only a few studies have been carried out in the USA that reflect empirical observations of what has happened during court mediation, the information that is available reveals that parties were largely not involved in the process, rarely participating and that mediators rarely encouraged integrative negotiation. In the courts studied, mediation resembled traditional judicial settlement conferences, with a privately selected and privately paid mediator taking the place of a publicly funded and publicly selected judge.¹⁵⁷⁵ In addition, anecdotal reports indicate that evaluative

¹⁵⁷⁰ See Deborah R. Hensler ‘Suppose It’s Not True: Challenging Mediation Ideology’ (2002) 1 *Journal of Dispute Resolution* at 85. In the interviews conducted with practising commercial mediators in Cape Town and Johannesburg between 21 May and 20 June 2007, there were only two instances where mediators received negative feedback about the process. Both instances related to the initial stages of the mediation where parties had misunderstandings about the process and consequently unrealistic expectations as to its purpose. The mediator in both instances felt that the problem may have resulted from a lack of clarity in describing the process at the outset. In both instances, the mediator clarified what the process was about, the parties engaged and a settlement resulted. It is submitted that as mediation becomes more popular and commercial parties become more familiar with it, this is likely to become less of a problem.

¹⁵⁷¹ Deborah R. Hensler ‘Suppose It’s Not True: Challenging Mediation Ideology’ (2002) 1 *Journal of Dispute Resolution* at 87.

¹⁵⁷² For a more detailed review of this research, see Tom Tyler and E Allan Lind ‘Procedural Justice’ in Joseph Sanders and V Lee Hamilton (eds) *Handbook of Justice Research in Law* 65.

¹⁵⁷³ See for example Tom Tyler ‘The Psychology of Disputant Concerns in Mediation’, (1987) 3 *Negotiation Journal* 367 at 396.

¹⁵⁷⁴ Hensler (note 281) at 188.

¹⁵⁷⁵ See Deborah Hensler ‘In Search of “Good Mediation” Rhetoric, Practice and Empiricism’ in Joseph Sanders and V Lee Hamilton (eds) *Handbook of Justice Research in Law*; see also Julie Macfarlane

mediation is the form of mediation that has taken firmest hold in some courts.¹⁵⁷⁶ Similar to earlier judicial settlement and arbitration programmes, court mediation programmes appear to result in very little time or cost savings,¹⁵⁷⁷ while very little is known about the outcomes of mediation programmes, about whether they change the distribution of power between the ‘haves’ and ‘have nots.’¹⁵⁷⁸

Broadly speaking there are two comments that can be made about such commentaries. First, the above criticisms do not focus on mediation as an alternative per se, but relate to the expansion of mediation into court mandated settlement processes¹⁵⁷⁹ and the way in which this is responsible for reshaping how judges view the role of the courts.¹⁵⁸⁰ The attack tends to focus on the fact that courts are empowered to order parties to use a private ADR process, run by private providers, in circumstances that impede public scrutiny, as a condition for seeking access to the courtroom.¹⁵⁸¹ As discussed in chapter one, the expansion of mediation into court mandated programmes is not within the scope of this thesis. Indeed, the criticism in part seems to focus on the fact that mediation as a term is misused in describing these processes.

The second comment is that the criticisms centre on forms of mediation other than commercial. Some of the literature, for example, speaks of ‘second class justice’ intended for second class citizens i.e. individuals with claims that are of low value.¹⁵⁸² Again, these areas of mediation do not come within the remit of this thesis.

Critics also argue that in order to encourage people to consider alternatives to litigation, mediators are telling claimants that legal norms are contrary to their interests, that vindicating their legal rights is contrary to social harmony, that juries are erratic,

‘Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation’ 2002 *Journal of Dispute Resolution* 241; Nancy Welsh ‘Disputants’ Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice’ 2002 *Journal of Dispute Resolution* 179.

¹⁵⁷⁶ Hensler (note 281) at 193.

¹⁵⁷⁷ See James Kakalik et al *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act* Santa Monica, CA: Rand Institute for Civil Justice 1996. For a review of empirical research on court mediation of civil money disputes, see Hensler (note 1575).

¹⁵⁷⁸ Marc Galanter ‘Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change’ (1974) 9 *Law & Society Rev* 95. See also Hensler (note 281) at 188.

¹⁵⁷⁹ As noted in chapter 1 at 14, the author is not disputing the relevance or effectiveness of court annexed or mandatory forms of mediation in resolving disputes. See for example Boule *Mediation: Principles, Process, Practice* Chapter 11, and in particular 414-417 dealing with some of the available survey evidence. It is not however within the remit of this thesis to deal with such forms comprehensively.

¹⁵⁸⁰ See Hensler (note 1571) at 82.

¹⁵⁸¹ See Hensler (note 281) at 195.

¹⁵⁸² Diane Wood ‘Court Annexed Arbitration: The Wrong Cure’ 1990 *U Chi Legal F* 432 at 435; Sharon A Jennings ‘Note: Court-Annexed Arbitration and Settlement Pressure: A Push Towards Efficient Dispute Resolution or Second Class Justice?’ (1991) 6 *Ohio St J On Disp Resol* 313.

that judges cannot be relied upon to apply the law properly, and that it is better to seek inner peace than social change.¹⁵⁸³ To drive these messages home, it is believed that courts and legislatures mandate mediation and preclude dissemination of information about what transpires during a mediation. In addition, both legislatures and courts seem to display a complacent approach to vetting the qualifications¹⁵⁸⁴ of those who act as mediators and to the costs imposed on litigants by mandatory mediation requirements, based on the belief that any alternative to adversarial conflict must be beneficial.¹⁵⁸⁵ While it is conceded that mediation has much to recommend it, the visible presence of institutionalised and legitimised conflict, channelled productively, teaches parties that it is not always better to compromise and that great gains can be made from peaceful contest.¹⁵⁸⁶

Even the harshest critics of mediation concede that parties should be free, in most circumstances, to negotiate privately and to keep any agreements reached in mediation confidential. There is no doubt that trials should not be regarded as a ‘failure’ of the legal system, and sufficient resources should be allocated by legislative bodies to enable courts to operate efficiently in order to hear cases within a reasonable period of time after they are filed, and judges should manage pre-trial and trial processes efficiently so that the costs of the process are not such that they make trials effectively inaccessible.¹⁵⁸⁷

It is not being disputed that some commercial disputes need and ought to be tried, for example, a dispute that requires legal principles to be tested, where a precedent is needed or where a dispute is unsuited to mediation. As discussed,¹⁵⁸⁸ a dispute involving a genuine zero sum game, is likely to be ideally suited to adjudication in court.¹⁵⁸⁹ Similarly, a dispute resolution system based on negotiation requires some adjudication in order to provide the ‘shadow of the law’ that is required for efficient bargaining.¹⁵⁹⁰

¹⁵⁸³ Hensler (note 281) at 195.

¹⁵⁸⁴ See chapter 8 at 220 on the importance of training and accreditation.

¹⁵⁸⁵ Hensler (note 281) at 195.

¹⁵⁸⁶ Hensler (note 281) at 197.

¹⁵⁸⁷ See Hensler (note 1571) at 96.

¹⁵⁸⁸ See chapter 2 at 27.

¹⁵⁸⁹ Trollip (note 77) at 12.

¹⁵⁹⁰ Hensler (note 1571) at 96.

The issues discussed above do not invalidate the form of mediation being discussed in this thesis; they merely assist in defining its appropriate limits.¹⁵⁹¹ While courts will always be needed to determine disputes that require judicial adjudication, commercial mediation should be encouraged to develop as a distinct process that will facilitate the resolution of disputes in appropriate circumstances. This will entail the simultaneous benefit of freeing up courts to concentrate on those cases that do require what US Justice Holmes called ‘the magnificent deliberateness’¹⁵⁹² of a trial.

¹⁵⁹¹ See Trollip (note 77) at 18.

¹⁵⁹² Justice Holmes quoted by Mario M Cuomo ‘The Truth of the “Middle Way”’ (September 1984) 39 *Arbitration Journal* at 4.

CHAPTER ELEVEN: CONCLUSION

Mediation is not a novel process in South Africa, and was used as the primary method of dispute resolution in some traditional pre-industrial societies. As discussed, the perception exists that mediation as a method of dispute resolution has more in common with traditional African methods of dispute resolution than the adversarial style of arbitration practice associated with colonial arbitration legislation of English origin. While the resolution of community based disputes has traditionally been seen as part of *ubuntu*, many believe that this concept is developing in the corporate realm in the form of commercial mediation.¹⁵⁹³

Corporate South Africa is beset by conflict and urgently requires processes like mediation that empower participants to tackle commercial conflict at source. Despite the relatively conservative approach of South Africa's business community to dispute resolution, there is an increasing tendency among people in business to employ alternative forms of dispute resolution in resolving commercial disputes. However, despite widespread interest in forms of dispute resolution other than litigation, mediation is still vastly under-utilised as a form of dispute resolution.¹⁵⁹⁴

One of the crucial issues that lawyers advising clients involved in commercial disputes should assess is whether a dispute is suitable for mediation. The issue is essentially one of process selection and design.¹⁵⁹⁵ It is not being suggested that mediation is the appropriate process for every commercial dispute, for example, court adjudication will always be required where legal principles need to be tested, where a precedent is required or where the dispute is unsuited to mediation.¹⁵⁹⁶ An appropriate assessment of the type of dispute and the relevant forms of alternative should be completed in order to select the appropriate dispute resolution process for that dispute. What is being suggested is that where mediation is the appropriate means of resolution, it can prove very effective.¹⁵⁹⁷

When commercial parties litigate, they surrender control to their lawyers, who largely direct strategies and create the space within which to manoeuvre. Modern

¹⁵⁹³ See chapter 1 at 6.

¹⁵⁹⁴ Pretorius (note 91) at 163.

¹⁵⁹⁵ See chapter 2 at 32.

¹⁵⁹⁶ See chapter 10 at 281.

¹⁵⁹⁷ See chapter 3 at 71.

sophisticated commercial litigation will always be dominated by legal specialists.¹⁵⁹⁸ In many commercial cases a familiar scenario unfolds, involving the customary protracted pleading process, pre-trial meetings, consultations, and numerous hours of management time preceding the trial date, when almost magically, the disputing parties experience the epiphany that it is prudent to settle and avoid the trial, except as a last resort.¹⁵⁹⁹ During this period, the parties will have deferred to their legal advisers who will have controlled the process, while opportunities for the parties to maintain control over the case are not fully explored. A respite prior to embarking on litigation, to assess the prospects of interest-based negotiation in the context of mediation will often show that genuine opportunities exist to resolve the dispute without sacrificing control.¹⁶⁰⁰

Instead of parties engaging in a legal wrangle, focusing on rights and obligations, an opportunity exists for parties to engage, through a mediator, to explore how contending interests could be reconciled and traded, in an effort to achieve a result that makes commercial sense. This is preferable to efforts at redefining business interests to fit into the pigeonholes of legal rights and obligations, and the process will be far more familiar than litigation, while the degree of control retained by the parties is infinitely greater.¹⁶⁰¹ As one experienced South African commercial mediator has remarked, when disputing parties gather, an intellectual energy is created, and when a trusted and experienced mediator is appointed, that energy is directed through the mediator rather than between the parties, which helps the parties to see reason and learn that compromise can often serve their interests better than litigation.¹⁶⁰²

The ultimate aim of this process is to reach agreement. Whether drafting the agreement to mediate or settlement agreement, certain precautions should be taken in order to limit the potential difficulties in giving either agreement legal effect.¹⁶⁰³ In light of the extensive jurisprudence that has developed in this area in other jurisdictions, careful drafting of agreements can go a long way in avoiding enforcement complications. On the small number of occasions when compliance with a settlement appears that it may be an

¹⁵⁹⁸ Antrobus and Sutherland (note 5) at 167.

¹⁵⁹⁹ It is estimated that between 80 and 90 per cent of commercial disputes in South Africa are settled near the doors of the court. See Bougardt and King (note 24) at 18.

¹⁶⁰⁰ Antrobus and Sutherland (note 5) at 168.

¹⁶⁰¹ Antrobus and Sutherland (note 5) at 168.

¹⁶⁰² Mervyn King in Bougardt and King (note 24) at 20.

¹⁶⁰³ See chapter 5 at 88.

issue, the necessary legislative changes proposed would assist by facilitating the parties in converting their agreement into a judgment or award.¹⁶⁰⁴

While a balance is required between supporting mediation, on the one hand, and not freezing litigation or upholding illegality, on the other, we have seen that this balance is not easy to achieve. The approach of absolute rules or uniform statutes, while appearing to create straightforward rules for an informal process, can prove, as we have seen, to be either overreaching or inappropriate.¹⁶⁰⁵ The reforms proposed would adopt a middle path, protecting mediation confidentiality but allowing evidence about the mediation to be admitted in limited circumstances to be specified by the court on a case-by-case basis.¹⁶⁰⁶ This would also make South Africa a more alluring venue of choice for disputing parties from different jurisdictions who seek a mediated resolution of their dispute, but also wish to maintain confidentiality over their business affairs.

One of the major issues for commercial parties in dispute is costs. The mediation industry in South Africa needs a ‘tipping point’ in order to propel the process into the business mainstream. One of the inherent benefits of commercial mediation is the fact that there is voluntary engagement in the process. It is ironic that the development of this consensual, informal process in other jurisdictions has had to be fostered by a degree of compulsion, or at least pressure, generated by the formal legal system. As discussed, the *Halsey*¹⁶⁰⁷ approach is the correct one, provided the courts are equipped with the power to excuse a party if it can be shown that mediation would have been unreasonable in the circumstances.¹⁶⁰⁸ The legislature has already adopted the concept of a costs sanction in specific circumstances. It is to be hoped that this initiative can be expanded into legislation with a more extensive impact that will give the process the impetus it requires.

In the absence of legislation the South African judiciary has proved that it can be imaginative when it comes to dealing with the costs issue. While there is no specific case law in respect of mediation, as we have seen, precedents exist that could be used analogously to order a costs sanction in respect of a party who unreasonably refuses to engage in the process despite the existence of an agreement to mediate. In addition to

¹⁶⁰⁴ See chapter 5 at 134.

¹⁶⁰⁵ See chapter 6 at 171.

¹⁶⁰⁶ See chapter 6 at 187.

¹⁶⁰⁷ [2004] EWCA (Civ) 576.

¹⁶⁰⁸ See chapter 7 at 213.

jurisprudence, we also saw how a Uniform Rule could support this endeavour coupled with the fact that the CPR could prove influential in South Africa, despite the absence of equivalent domestic reforms. All that is required is a willingness on the part of the judiciary, and the appropriate test case.

As the use of the process develops, there is inevitably a need to ensure that mediators are sufficiently and continuously trained and accredited.¹⁶⁰⁹ Clarity will also be required regarding mediator ethical and professional standards. As discussed above, the EU Code of Conduct and the US Model Standards should serve as a guide in this area.¹⁶¹⁰ The code of conduct will effectively become a standard of care against which mediator services will be measured. The code must be seen as an organic instrument, subject to revision and change as needs over time require.

The role of the commercial mediator must be clearly understood as the person that assists the parties to reassess their dispute from a broad perspective.¹⁶¹¹ The process must also be fully explained to potential users, as it is frequently misunderstood, even in countries where it is well developed.¹⁶¹² In order to facilitate the process, the parties must be fully prepared and understand all of the commercial, financial, legal and other relevant factors involved in the dispute, so that they can fully participate in the process and ensure that the mediator is fully informed.¹⁶¹³ Lawyers must also be adequately trained in order to appreciate the distinct role they have to play in the process.¹⁶¹⁴ Education in mediation should become an essential part of law school curricula, long before lawyers enter into commercial practice.¹⁶¹⁵

In addition to making available sufficient numbers of suitably trained and accredited mediators who will abide by an appropriately drafted code of conduct, the development of the process will require a great deal of time, energy and commitment from those already engaged in this field. This will require, first, business leaders who understand and embrace the opportunities that mediation offers to help resolve

¹⁶⁰⁹ See chapter 8 at 220.

¹⁶¹⁰ See chapter 8 at 226.

¹⁶¹¹ See chapter 3 at 36 and chapter 8 at 218.

¹⁶¹² For example, in a CEDR client feedback survey over a three-month period, over 75 per cent of commercial decision makers were first-time users and 87 per cent said that, while they had not been sure what to expect, the process had exceeded their expectations. One practical suggestion is for lawyers to make user-friendly material available to their clients, designed to explain how and why mediation can prove effective and the important role played by the client in the process. See Carroll (note 319) at 404.

¹⁶¹³ See chapter 10 at 275.

¹⁶¹⁴ See chapter 9 at 261.

¹⁶¹⁵ See chapter 8 at 220.

commercial conflict. Second, lawyer gatekeepers who must be more expansive in the services they offer in order to assist business leaders to understand the opportunities and realise the benefits that mediation can offer. Third, a willing legislature to introduce the necessary legislative reforms in the areas discussed. Finally, a proactive judicial system which understands the need to give effect to agreements to mediate and settlement agreements, strikes the necessary confidentiality balance and possesses the innovation and imagination with regard to costs in order to offer parties sensible opportunities to resolve their disputes themselves.

Despite the necessity of formal statutory or judicial persuasion, we have seen how the arguments for the development and systematic use of mediation remain best understood and adopted from the voluntary standpoint to see what clients really want, and how commercial mediation can be built into the thinking of law firms, the Bar and, most significantly of all, the parties who are their clients.

As commercial mediation began to emerge in other jurisdictions it was called ‘the sleeping giant’ of dispute resolution.¹⁶¹⁶ The South African mediation community will need to galvanise its collective strength and energy in order to develop the process. The potential is present¹⁶¹⁷ but, just as F W de Klerk said about Nelson Mandela, ‘[He] has walked a long road, and now stands at the top of the hill. A traveller would sit and admire the view. But the man of destiny knows that beyond this hill lies another,’¹⁶¹⁸ the development of commercial mediation in South Africa will require the same spirit, as there is no time to admire the view.

¹⁶¹⁶ Carroll (note 319) at 408.

¹⁶¹⁷ See chapter 4 at 82.

¹⁶¹⁸ FW de Klerk ‘Speech delivered on the outcome of the elections’ 2 May 1994, available at www.fwdklerk.org.za/download_archive/94_02_05_Election_Results_A.doc (last visited 18 July 2008). See also Carroll (note 319) at 408.

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