ENGLAND AND WALES

1. Introduction

Conciliation is an alternative to official adjudication or to arbitration. As J. Jacob puts the difference shortly and clearly: ‘Adjudication operates by imposing on the parties a solution of their disputes; conciliation operates by producing an agreed solution of the dispute between the parties.’ As a result of the still growing popularity of the Alternative Dispute Resolution (‘ADR’) movement, it has nowadays become customary to use the term ‘mediation’ for the process in which a third party assists the disputing parties in reaching a solution to their dispute, without imposing any solution. In English legal culture, both conciliation and mediation are used and generally refer to the same process.

England has not had an impressive tradition of conciliation by judges or other officials since the courts had, in the past, ‘no power or duty to promote a settlement or compromise between the parties.’ The latter has changed considerably since the intro-

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2 ‘ADR’ may be defined as a range of procedures that serve as alternatives to litigation [or other forms of adjudication] through the courts for the resolution of disputes, generally involving the intercession and assistance of a neutral and impartial third party.’ See H.J. Brown and A.L. Marriott, ADR Principles and Practice, 2nd edition, London, Sweet and Maxwell, 1999, p. 12.
3 H.J. Brown and A.L. Marriott, supra note 2, p. 127; N. Andrews, Principles of Civil Procedure, London, Sweet and Maxwell, 1994, p. 406. That is not the fact in most other European jurisdictions. Since the term ‘mediation’ is relatively new in this context, use of the word mediation is reserved here for the conciliation process in the last decades of the twentieth century. Otherwise, the term ‘conciliation’ is used in this text. But, when reading other literature, one should be aware that these words cannot always be used interchangeably. In some contexts, the term mediation refers to a more evaluative (often rights-based) process than conciliation; sometimes the reverse is meant, e.g., in the employment field. See H.J. Brown and A.L. Marriott, supra note 2, p. 272.
4 J.H. Jacob, supra note 1, p. 116.
5 J.H. Jacob, supra note 1, p. 11.
duction of the CPR in 1999. But even before that, the conciliator was not a complete stranger to England’s soil. As early as the beginning of the second half of the nineteenth century, conciliation was introduced as a means of dealing with industrial (mainly employment) disputes. Around the 1970s, conciliation – or, as it was then mostly named, mediation – came to be applied in matrimonial contexts. In the following decades, mediators also appeared in commercial disputes.

One might wonder, did England not have a juge de paix, a Justice of the Peace, who, like in France, acted primarily as a conciliator and only if he was not successful as such, drew the judge’s sword to adjudicate between the parties? This question will be answered in the next paragraph, on the English Justice of the Peace. Subsequently, some aspects of industrial conciliation will be discussed. In the paragraphs that follow, I will briefly sketch the use of conciliation (or mediation, as it shall be called from then on) before the introduction of the CPR. The last paragraph will be dedicated to the present situation, where we will see that both the Legislator and the Judiciary nowadays strongly promote the use of ADR, especially mediation.

2. Justices of the Peace

England has never had an official like the French juge de paix, concerned with the prevention of litigation primarily through wise counsel and conciliation. Nevertheless, England has known the Justice of the Peace since medieval times, ‘perhaps the most distinctively English part of all our governmental organization;’ whilst being a local man himself, he embodied the Government at a local level.

Was not such a person extremely well equipped to conciliate parties and to mediate? Apparently not in the English tradition, even though, in the eyes of a civil lawyer, these magistrates administered ‘solomonic’ judgements, whereby their decision-making was inspired more by common sense and social convention than by outcome-determinative rules. This might remind us of arbitration, because arbitrators

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6 Already before the introduction of the CPR, strong incentives to settle were to be found in the Costs Rules. See N. Andrews, supra note 3, Chapter 13, on settlement and M. Partington, ‘Access to Justice: Reforming the Civil Justice System of England and Wales,’ Common Law World Review, 2001, p. 115. Needless to say that it can hardly be called fair that even those with ‘just cases’ might be scared out of litigation because of the enormous financial risks.
7 J.I.H. Jacob, supra note 1, p. 116; N. Andrews, supra note 3, p. 405.
8 Or, for example, Belgium, Spain and even Russia.
11 It lasted until 1918, before women became eligible to serve at the Bench. See E. Moir, supra note 10, p. 187.
may deliver justice *ex aequo et bono*. Conciliation, however, was never considered as a task of the Justice of the Peace, although in 1824 this came close (*infra*).

3. **Industrial Conciliation**

Industrial or employment conciliation and arbitration date back to the turn of the nineteenth century. In the nineteenth century, most successful developments in the employment field occurred as a result of private initiative, although the State tried to regulate the way that arbitration and conciliation were conducted. As early as 1824, an Act entered into force, providing that industrial and employment cases must be brought either before the Justice of the Peace or before a board, composed of equal numbers of employers and employees, nominated by the Justice. The Act was based on the practice of the French *conseils des prud'hommes*. In simple proceedings, these tribunals exercised jurisdiction over employment problems in such a way that a high percentage of the cases ended in mutual agreements between the parties. The 1824 Act has rarely, if ever, been used.

Around the same time as the above, voluntary boards of arbitration and conciliation, not based on the 1824 Act, were introduced into some of England’s industries. They were given a legal basis with the Acts of 1867 and 1872. Again, these Acts never had much practical value.

The boards of arbitration and conciliation became especially successful when, around 1860, the first permanent boards were initiated. These boards were composed of an equal number of representatives from the employers and their employees. They were soon to be followed by boards in other industries. The reason for this was simple: the principle worked. There were reduced strikes, lock-outs and industrial violence.

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15 The same year that the prohibition on trade union associations was repealed.
16 5 Geo. 4, c. 96.
18 Until 1878, it was almost 80 per cent. See J.D. Weeks, ‘Conseils des Prud’hommes,’ in *Lalor’s Cyclopedia*, New York, Maynard, Merrill and Co., 1899.
20 The so-called Lord St. Leonards’ Act, entitled ‘An Act to Establish Equitable Councils of Conciliation to Adjust Differences Between Masters and Workmen’ (30 & 31 Vict., c. 105).
21 35 & 36 Vict., c. 46.
22 It was called ‘pretentious’ legislation. See J.D. Weeks, *supra* note 17; H.J. Brown and A.L. Marriott, *supra* note 2, p. 270. The rest of this paragraph is to a large extent based on Chapter 11 of Brown and Marriott.
23 By the early industrial entrepreneur A.J. Mundella in Nottingham (hosiery and glove trade) and, without having knowledge of the actions of his Nottingham counterpart, by Rupert Kettle in Wolverhampton (building trade).
24 At the end of the nineteenth century, J.D. Weeks wrote, ‘Arbitration and Conciliation has not been generally adopted in England as a means of settling labour disputes […] but in those trades in which it has been most thoroughly and systematically used during the time it
This is even more interesting since these boards were purely voluntary and had no sanction in law; ‘There is no forced submission of disputes, nor is there any power except a man’s sense of honour, public opinion, and the aggregate honour of the trade unions or the employers’ associations to enforce the acceptance of the awards; and to the honour of the parties involved be it said, that except in a very few isolated and unimportant cases, these have been found sufficient.’

The Acts of 1867 and 1872 were repealed in 1896 by the Conciliation Act. From then on, this Act provided the legal basis for voluntary conciliation services provided by the State. Despite the fact that, within a few decades, this Act was followed by yet another Act, the 1919 Industrial Courts Act, Parliament acknowledged that it was no use interfering in the process between employers and their employees. From 1919 onwards, ‘[t]he new role for the State would be a hands-off approach, encouraging without forcing, by supplying the means, funding and if necessary the location for conciliation.’ This policy remains largely unchanged. The State provides recourse to standing, independent arbitration and conciliation services such as Employment Tribunals, the Central Arbitration Committee and ACAS (Advisory, Conciliation and Arbitration Service) but accepts that most disputes are dealt with outside State-supplied institutions.

4. Conciliation and Mediation in Family Matters

The term ‘conciliation’ had long existed in family law, but was given a new meaning in the 1970s. The Summary Procedure (Domestic Proceedings) Act that was introduced in 1937 already provided machinery for conciliation, but then the terms prevailed, strikes and lockouts were almost unknown’ (J.D. Weeks, supra note 17; also H.J. Brown and A.L. Marriott, supra note 2, p. 271).

25 J.D. Weeks, supra note 17.
26 59 & 60 Vict., c. 30.
27 9 & 10 Geo. 5, c. 69.
29 Before the 1998 Employment Rights (Dispute Resolution) Act (c. 8), these were called Industrial Tribunals.
30 The organisation as it exists today was founded in 1974, but the organisation as such originates from the 1896 Act; ‘Publicly funded ensuring we are independent, impartial and confidential’ (quote from the ACAS website). According to ACAS, of all individual complaints to employment tribunals passed to ACAS, 75 per cent have been settled or were withdrawn. See <http://www.acas.org.uk/> (consulted 30 November 2004).
31 Mediation in family matters is treated in a separate section because it seems to have taken a somewhat different course from mediation or conciliation in (other) civil and commercial matters. There has been a shift from reconciliation to conciliation, which almost appears as an autonomous process, heavily influenced by the changing attitudes towards divorce and the attention that has been drawn to the social results of divorce, especially for children and single parents (Finer Report). See R. Dingwall and J. Eekelaar (eds), Divorce Mediation and the Legal Process, Oxford, Clarendon Press, 1988; also R.H. Mnookin and L. Kornhauser, ‘Bargaining in the Shadow of the Law: The Case of Divorce,’ Yale Law Journal, 1979, p. 950.
32 1 Edw. 8 & 1 Geo. 6, c. 58.
‘conciliation’ and ‘reconciliation’ in English Family law both referred to the repair of failing relationships. It was another forty years before the Finer Report on One-Parent Families, published in 1974, gave the starting signal for the use of conciliation in the contemporary sense of ‘assisting the parties to deal with the consequences of the established breakdown of their marriage […] by reaching agreements or giving consents or reducing the area of conflict […]’.

The Finer report had two objectives: firstly, family breakdown should be approached in a quiet, restrained way with the least possible bitterness and fighting and, secondly, the parties themselves should take primary responsibility for resolving their own disputes.

In 1990 the report ‘Family Law: The Ground for Divorce’ was published. The number of divorces had increased considerably since 1971. This increase was a main concern, but another concern was the effect of the divorce process on couples and, especially, their children. According to the 1990 Report, mediation should be an important element in developing a new and more constructive approach to the problems of marital breakdown and divorce. This proposal was incorporated into the Family Law Act 1996 (c. 27), which strongly promotes the use of mediation and makes legal aid available for mediation in family matters, while at the same time providing that ‘A person shall not be granted representation […] unless he has attended a meeting with a mediator to determine whether mediation appears suitable to the dispute […]’ (Section 29).

The Family Law Act also enabled lawyers to recover some area they had lost in the field of mediation to other, non-lawyer professionals. Traditionally, English lawyers had acted as partisan representatives of only one party and had operated mainly in the shadow of litigation. In the 1990s, this changed importantly when lawyers ‘discovered’ that they could act as mediators themselves and also asserted the claim that mediation is a part of legal practice.

36 M. Roberts, supra note 34, p. 22. See also the Practice Directions of the Courts’ Family Division on Conciliation, November 2, 1982, modified by the Practice Direction, October 18, 1991 (H.J. Brown and A.L. Marriott, supra note 2, Appendix III, Nos. 6 and 7).
37 Law Commission, 1990, No. 192. In 1985, the Booth Committee had reinforced the recommendations of the Finer Report: M. Roberts, supra note 34, p. 23.
41 S. Roberts, supra note 40, p. 24 and p. 26. The growth in applied ADR resulted in anxiety among lawyers, which led them to re-examine their own practices in two reports, both from
Unfortunately, the first results of the Family Law Act with regard to mediation are not very positive. It seems that only a relatively small percentage of people who start divorce proceedings try to resolve their problems with mediation. Perhaps even more disappointing is the fact that those who try mediation do not tend to be very satisfied with the process.\footnote{J. Walker, \textit{Picking Up The Pieces – Marriage and Divorce Two Years After Information Provision}, at \texttt{<http://www.dca.gov.uk/pubs/reports/prefexec.htm>}, consulted 18 December 2004. See Chapter 6: The Divorce Process. Only 10 per cent of the respondents had tried mediation and 46 per cent of those were satisfied.}

\section{The Access-to-Justice Movement: The Rise of ADR}

The use of mediation and conciliation in England has not been confined to family affairs. In the last three decades of the twentieth century, the access-to-justice movement was an important impetus for the use of alternative modes of dispute resolution like conciliation or mediation in many other kinds of disputes. This world-wide reform movement was aimed at overcoming economic, organisational and procedural obstacles for people to acquire civil justice.\footnote{M. Cappelletti, ‘Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement.’ \textit{Modern Law Review}, 1993, p. 282. See also the \textit{Interim Report} of Lord Woolf, 1995, in which he recommends to monitor developments abroad in relationship to ADR (Recommendation 62).} This led to, \textit{inter alia},\footnote{Also the emergence of legal aid schemes and, in some countries, the development of the concept of class actions and similar solutions in civil litigation.} the search for alternatives to the ordinary courts and usual litigation procedures.\footnote{As illustrated by Lord Woolf’s recommendation to ‘monitor’ developments abroad, or Andrews’ explanation why arbitration, conciliation and mediation are the preferred alternatives to traditional litigation: ‘Dueling and wagers have their problems and limitations.’ See N. Andrews, \textit{supra} note 3, p. 405.} It is important to realise that methods of what is usually called ADR (alternative or, as it is now called as well, \textit{appropriate} dispute resolution) like conciliation, mediation and arbitration at the time constituted no new elements in dispute settlement; what was new was that the reasons for propagating these alternatives were founded upon the idea that the judicial process should be open to larger segments of the population then before, if not to the whole population.\footnote{Lord Woolf, \textit{Interim Report}, 1995, Chapter 18; N. Andrews, \textit{supra} note 3, p. 406; H.J. Brown and A.L. Marriott, \textit{supra} note 2, p. 32. In his \textit{Final Report} Lord Woolf also makes reference to}
encourage parties to consider the use of ADR, the Commercial Court issued a Practice Direction (1993) and a Practice Statement (1996) in which it promoted the further use of mediation and other ADR-techniques.


The introduction of the CPR has been a strong impetus for the proliferation of ADR-techniques such as mediation. The CPR promote this in several ways. The most fundamental way is the adherence of both the judges and the parties to the ‘overriding objective of dealing with cases justly.’ This stipulates that, amongst other things, the parties are under an obligation to try to avoid the necessity for the start of proceedings. They also have a duty, where appropriate, to consider mediation. To promote this, and to inform the courts of what happened before proceedings have been commenced, several ‘pre-action protocols’ have been developed for different kinds of cases, like personal injury claims and housing disrepair claims. The Practice Direction on protocols requires parties to comply with the general spirit of the protocols and the overriding objective whatever the subject of the claim.

The failure of parties to consider ADR can lead to ‘unfavourable’ costs decisions, as is illustrated in the Dunnet case. In this case, an appellate judge, when giving permission for the main dispute to proceed to appeal, suggested to the parties that it would be valuable for them to pursue ADR on the present facts. But the defendant (and respondent to the pending appeal) refused to co-operate or even to attend an ADR hearing. The Court of Appeal eventually heard the appeal concerning the merits of the substantive decision, which had been in favour of the defendant. It considered that, at least on the present facts, the respondent (and defendant) had been wrong to reject ADR as a potential solution to this dispute:

alternative dispute resolution mechanisms for medical negligence claims, Section IV, Chapter 15, No. 50.

49 The Woolf reforms ‘embraced’ ADR, according to M. Partington, supra note 6, p. 115. S. Roberts, supra note 40, p. 23, uses the same terminology.


51 At present there are eight different protocols. These can be found on the site of the Department of Constitutional Affairs, <http://www.dca.gov.uk/civil/procrules_fin/menus/protocol.htm> (consulted December 2004).


53 Or else face the consequences, as is shown in Dunnett v. Railtrack plc: [2002] 2 All ER 850. The successful litigant, Railtrack, forfeited a costs order in its favour because it refused to consider the court’s suggestion to mediate. See also N. Andrews, English Civil Procedure. Fundamentals of The New Civil Justice System, Oxford, Oxford University Press, 2003, p. 39. In Hurst v. Leeming [2001] EWHC 1051, Leeming escaped (although according to the judge he took a high risk in refusing mediation) but, unfortunately for him, Hurst was bankrupt. See also the main text of the case of Halsey v. Milton Keynes General NHS Trust, [2004] 4 All ER 920.
‘Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve.’

The court took this view even though the defendant had succeeded on the substantive merits of the case at both first instance and on appeal. So as to reflect its disapproval of the respondent’s neglect of ADR, the court made a costs order which denied that party the right to receive its costs (both in respect of the appeal, and below) from the defeated claimant. Denial of costs is a severe sanction. This case illustrates the courts’ determination to give ADR a chance to resolve matters. The courts have thus acknowledged that ADR can avoid the ‘victor takes all,’ expensive, slow and sometimes socially clumsy method of traditional legal decision.

Unfortunately, this could easily lead to tactical behaviour. A party fearing that it might lose a case can try to ‘scare’ the other party into mediation. If the other party feels that it has a strong case and refuses the offer to mediate, it risks winning the case, but still having to pay its own costs because it refused to try ADR. This dilemma is clearly illustrated in *Halsey v. Milton Keynes General NHS Trust* [2004] 4 All ER 920, in which the defendant refused several offers from the claimant to refer the case to mediation. The court discussed at length the reasons why ADR methods, especially mediation, should be used where appropriate. It then deliberately placed on the unsuccessful party the burden to show that there was a reasonable prospect that mediation could have succeeded. The claimant’s offers to mediate were, in the lower court’s words, ‘somewhat tactical’ – an understatement, says the Court of Appeal – since mediation had no real chance of success. The court ruled that the defendant’s refusal to mediate was not, therefore, unreasonable. The claimant accordingly had to pay the costs.

It is not just up to the parties to take into account the possibilities of using ADR. It is also defined as a case-management duty of the court to encourage the parties to use an alternative dispute resolution procedure if the court considers that appropriate, and to facilitate the use of such procedure. On the basis of CPR Part 26.4, the court can of its own motion decide to stay proceedings to encourage alternative dispute resolution or other settlement negotiations. Also, the courts have to take the pre-litigation activities of the parties into consideration when considering the issue of costs, as is described above.

The consequences of the CPR have already been evaluated several times. There has been a dramatic decline in the incidence of civil litigation since the CPR took effect.

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54 The Dunnet case, at 14 (*supra* note 53).
55 *Ibidem*, at 16, *per* Brooke LJ, in exercise of the broad discretion concerning costs contained in CPR, Part 44.
56 These last two paragraphs have been supplied by Neil Andrews.
58 In the parallel case of *Steel v. Joy and another*, the Court reached the same conclusion on essentially the same grounds.
59 CPR Part 1.4(2) sub e.
in April 1999. Indeed, seldom can the queues for trial have been shorter.\textsuperscript{60} In part, this decline has occurred because prospective and actual litigants are making greater use of ADR.\textsuperscript{61} This trend is not progressive; according to an evaluation that was published in 2002, there has been a levelling off in the number of cases in which alternative modes of dispute resolution have been used after a substantial rise in the first year following the introduction of the CPR.

\textsuperscript{60} ‘Civil Court Fees’ (Consultation Paper, the Court Service, September 2002), paragraphs 3.7 ff, noting that, between 1998 and 2001, there was a 22.5\% reduction in the number of County Court claims; during the same period, there was a 76\% fall in High Court claims; as a result, there are large shortfalls in court fee income.

\textsuperscript{61} The author would like to thank Neil Andrews for supplying the information in this paragraph.