PENNINGTONS MANCHES COOPER

THE PHENOMENON OF MEDIATION: JUDICIAL PERSPECTIVES AND AN EYE ON THE FUTURE

ENGLISH/CHINESE

By

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PREFACE

How disputes are solved obviously lies right at the very heart of Dispute Resolution. Almost all cases carry a settlement imperative, at the right time, on the right terms, if that can be achieved. Alternative Dispute Resolution (ADR), and mediation in particular, has assumed an ever-increasing importance in Dispute Resolution, hence this paper.

It is more than 20 years since the new Civil Procedure Rules were implemented in 1999, following the recommendations of Lord Woolf. This projected mediation to centre stage in the administration of justice in England and Wales.

It is more than ten years since the European Mediation Directive was passed by the European Union (in 2008) to be implemented by the summer of 2011.

In 2014 the European Parliament issued a report assessing the impact of the Mediation Directive and proposing measures to increase the numbers of mediations in the European Union, of which the UK was then a Member State.

In October 2017, the Civil Justice Council in the UK issued an interim report entitled *ADR and Civil Justice* with the objective of reviewing the ways in which ADR is encouraged and positioned within civil justice in England and Wales to identify ways to encourage the use of ADR, including mediation. The final report was issued by the Civil Justice Council in 2018 and makes an illuminating read. The report concludes, when reviewing the types of ADR available, that mediation *"is the principal process for us to consider, operating in the direct shadow of the civil courts. Almost all of the Court decisions about ADR have been about mediation. Mediation is flexible, massively successful and consistently surprises professionals and parties alike in its ability to achieve settlements where the parties appear implacably opposed."*

During this period, Dispute Resolution in England and Wales, and mediation in particular, has undergone significant evolutionary change. One example is the development of Early Intervention in 2015. However, there has been yet further huge change by the adoption of Visual ODR, mediation or early intervention online, not solely by text but by live meetings on software platforms such as Zoom, Microsoft Teams and Skype for Business, substantially replicating the original processes but in a radical new manner .This is one of the most noticeable and significant impacts of the COVID-19 pandemic in Dispute Resolution, commencing in the spring of 2020. (Likewise, the English Courts and, most especially for present purposes, the Business Courts (including the Commercial Court) have rapidly adapted to providing justice online). This is extraordinary, rapid change and much of it is likely to be permanent.

The UK finally left the European Union on the expiry of the transition period on 31 December 2020. There may well be significant changes to the trade relationships of the UK and in English commercial Dispute Resolution practice as a result.

This is, therefore, a convenient point to assess the use and development of mediation and the materials published for the guidance of users. This is not legal advice for any particular case. Separate legal advice should always be obtained in any particular matter.

Some uncertainly seems to prevail, even now, about what ADR (Alternative Dispute Resolution) is, how the different types of ADR can be compared, and how they respectively interact with one another (if they do), with litigation, and with arbitration. To explain these concepts in the clearest visual way we published *ADR, Mediation, Facilitative Mediation and Early Intervention in the era of COVID-19: a Topological Diagram of Dispute Resolution* in October 2020 [link at Penningtons or on Linkedin?]. This is the companion piece abstracted from a new paper entitled *"The Impact of COVID-19, Facilitative Mediation, Early Intervention, and the new Visual Online Dispute Resolution"*, which is to be published formally shortly.

This is the latest paper in a planned sequence written by the writer as part of a major project commenced about 20 years ago with an *At a Glance Guide on Mediation* (2001/2) (as co-author), when the process was in its infancy. That was followed

by *Mediation FAQs* in 12 languages (2004/5) and thereafter a series of main papers. These were published at intervals of about five or six years as the process evolved and as ADR, but most especially facilitative mediation, moved to the centre of Dispute Resolution, where it now sits at the centre of orthodox legal thinking and practice, at the heart of justice in England and Wales.

The English language may now be enormously widespread. It may be the lingua franca of business. But the ability to convey information in the mother tongue of clients, friends and contacts is one of the great courtesies of business and social engagement, even if this can only be offered as a "free"" translation, and thus for guidance only, the core text remaining in English.

China and the Chinese language have become globally ever more important over the last 20 or 30 years. Trade between China and the UK has grown substantially in that period. In the light of all these changes, we are now therefore publishing here one of the main articles referred to in the above sequence: *The Phenomenon of Mediation, Judicial Perspectives and an Eye on the Future*. This article was first published in the *Journal of International Maritime Law* in 2010. The publication here, however, contains both the original English text and, given the importance of the language, a "*free*" translation into Chinese. This is also published now to mark the advent of the Chinese New Year on 12 February, 2021 (the year of the Ox).

The Chinese text is provided for illustration only. If there is any inconsistency between the English and the Chinese text, then obviously the English text is the text to which one should refer. Again, this publication is not in the nature of legal advice for use in any particular matter. If legal guidance is needed by any reader for any particular matter, separate legal advice should be obtained.

The enclosed paper is deliberately short and concise, in order that the reader can readily absorb some of the core information on mediation, principally facilitative mediation. Although the original paper was published in 2010, it was deliberately drafted to contain a substantial amount of generic content, much of which remains valid today. This paper is also available in French and Italian (Spanish is to follow). The intention is, for example, that multiple parties, perhaps engaged in the same dispute, should be able to read the same concepts, but each expressed in their own language, in "free" translation format as a guide to the English text.

It is always important that those involved in legal disputes (whether domestic disputes, disputes of a personal character or complex international commercial disputes) should understand the procedures by which those disputes are resolved. In order to play it is essential to understand the rules of the game; mediation is no exception. This paper together with the "*free*" translation into Chinese[1], as well as the Topological Diagram and the COVID -19 Impact paper, when published, are intended to facilitate such an understanding.

The writer was accredited as a mediator by CEDR in 1998.

February, 2021

[1] I should like to thank Samuel C. Ding, Dihuang Song and Justin Cheuk for their assistance in the creation of the free translation into Chinese.

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THE PHENOMENON OF MEDIATION: JUDICIAL PERSPECTIVES AND AN EYE ON THE FUTURE[2]

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INTRODUCTION

The `Review of Civil Litigation Costs: Final Report' by Sir Rupert Jackson was published on 14 January 2010[4]. It contains yet further support for Alternative Dispute Resolution (ADR), and mediation in particular. Prompted by the publication of the Final Report, this article sets out some points about mediation, its function, its place in civil justice, the likely effect of the European Mediation Directive, the role of mediation in the maritime field and, in particular, expresses a short note of concern about how mediation might develop. The author does not purport to cover the entire ground but touches upon a few selected areas and in particular focuses on certain views expressed, prior to the Final Report, by senior members of the judiciary in support of the wider use of mediation. Mediation is something of a global phenomenon, as a short glimpse on the internet alone will attest; but this article is primarily concerned with the picture in England and Wales. Mediation is in many ways a remarkable process; vigorous, dynamic and effective. Its wider use is to be encouraged; its development should be handled with care.

DISPUTES: THE CASE FOR SETTLEMENT

Historically, disputes were resolved in trial by battle; one lived, one died. Litigation and arbitration were developed as a fine set of rules to allow parties to obtain an adjudication to resolve legal disputes, even quite ferocious disputes, in a disciplined and effective manner without the need for bloodshed. But again, the idea is that there is a decision, and generally a winner(s) and a loser(s).

However, the vast majority of cases settle, generally by negotiation, leaving a small minority where settlement is truly impossible or where settlement is inappropriate, for example test cases to set a precedent or cases where publicity is both necessary and desirable. Both are relatively rare.

In March 2008 Lord Phillips, now President of the Supreme Court, expressed this view:

...It is madness to incur the considerable expense of litigation [...] without making a determined attempt to reach an amicable settlement. The idea that there is only one just result of every dispute, which only the Court can deliver is, I believe, illusory...[5]

[2] This article was first published in the Journal of International Maritime Law at (2009) 15 JML 5008.
[3] Rhys Clift is a solicitor and commercial mediator. He has lectured widely on dispute resolution and insurance in the UK, Scandinavia, Europe, the USA and South America. He was short-listed in the CEDR Awards for Excellence in ADR 2006 and 2008. His masterclass on mediation can be found on the website of the Chartered Insurance Institute at www.cii.co.uk.
[4] The Final Report can be found on the website Judiciary of England and Wales at www.judiciary.gov.uk. Following publication of the Final Report, the Senior Judiciary has considered its response. The Judicial Executive Board has agreed to support the recommendations of the Final Report and has established a Judicial Steering Group to lead judicial contributions to its implementation
[5] Lord Phillips of Worth Matravers, then Lord Chief Justice of England and Wales `Alternative Dispute Resolution, An English Viewpoint', India 29 March 2008.

Life was ever thus. More recently in June 2009 Lord Clarke observed:

> *A truth that our civil justice system has long recognised: that the vast majority of disputes settle before trial - the present figure of 98 per cent settlement rate mirrors that which was noted in the 1820s by the Common Law Commissioners [...] only a madman does not want to settle*[6].

I will touch on some of the reasons in a moment, but plainly effective new procedures that facilitate settlement must be welcomed. And although this is a matter of fine judgment in each case, this must be so especially if they facilitate earlier settlement, for example before incurring the costs of disclosure, witness statements, experts' reports and trial. Indeed the case for early settlement, with most `routine' disputes (as distinct from, say, the most complex civil fraud cases) is even more compelling with the advent of E Disclosure with the inevitable additional delay, cost and technical difficulty this must entail.

The effective management of litigation and arbitration requires considerable skill. It may be necessary, even essential, to go through some of the main procedural steps including, for instance, disclosure and exchange of witness statements and experts' reports, in order to put an individual case into the strongest position from which to negotiate, whether that negotiation is conducted in the usual way or through mediation. But a sharp focus on settlement on the `right terms' (whatever they may be) remains an imperative for almost all cases.

WHAT, IN A NUTSHELL, IS MEDIATION?

Mediation is a relatively new and highly effective means to settle commercial disputes, often more quickly and more cheaply than by normal litigation, arbitration and negotiation. Mediation has a long history in family and labour relations, it has featured in international diplomacy and particularly in the Far East.

There are essentially two types of mediation; facilitative and evaluative. In evaluative mediation (something of a minority sport) the mediator at some point may express a view to the parties about the strengths and weaknesses of their cases, or about what might be a fair and just resolution to their dispute. This will almost never happen in facilitative mediation (although mediation agreements often contain a liberty for the mediator to express such views, if all the parties so wish).

In facilitative mediation a neutral third party, a mediator, assists the parties to settle their disputes. It is a voluntary process of managed negotiation where the parties negotiate their own deal, but it has a timetable, a structure and dynamics which `simple' negotiation lacks. Mediators issue no judgments or awards. They control the process, not the result. Facilitative mediation is the dominant form of mediation used for the resolution of commercial disputes in England and Wales.

Mediation is a subset of ADR which includes for example adjudication (widely used in the construction industry) and early neutral evaluation. Mediation is probably the most widely used form of ADR. The mediator is the catalyst. The presence of, and the role played by the independent third party mediator is the key distinguishing feature of the process.

When mediation was in its infancy in the United Kingdom, about 20 years ago, and even 10 years ago, it attracted considerable scepticism. Some thought that it would probably, or inevitably result in a soft compromise or 50/50 split. In fact, in practice it is absolutely nothing like this. In mediation hard issues are often confronted and difficult

[6] Lord Clarke of Stone-Cum-Ebony, Master of the Rolls: `Mediation ± An Integral Part of our Litigation Culture', Littleton Chambers Annual Mediation Evening, Gray's Inn, 8 June 2009.

things are said. Mediation is even effective in resolving disputes involving allegations of fraud or dishonesty, where a soft compromise or 50/50 split may have no place. Significantly it can preserve not only the relationships between the parties in the dispute but the reputations of the individuals involved (which can be important in relation to maritime matters where there may be substantial `repeat business'). It is particularly effective at resolving multi-party disputes which can be so difficult to resolve by negotiation and where settlement discussions can (and do) break down on the whim of one party. Finally, and most particularly, mediation works; cases settle. The settlement rate is somewhere between 75 and 80 per cent, either on the day or shortly after.

WHAT IS THE POSITION OF MEDIATION IN CIVIL JUSTICE IN ENGLAND AND WALES?

Arbitration and litigation proceedings in England and Wales are in many respects excellent; highly developed and refined, respected for honesty, thoroughness and intellectual rigour. And the legal process is arguably indispensable. In June 2009 Lord Clarke echoed the views of many senior jurists when he said:

> *An effective Civil Justice System that is readily accessible to everyone is an absolutely essential element of any open, democratic society committed to the rule of law*.[7]

No one would dispute this. However, and these are broad generalisations, the legal process has its deficiencies which can be remedied in suitable cases (and at a suitable time) by the use of mediation. Many of the shortcomings of litigation and arbitration apply equally wherever the legal process is conducted, whether in England and Wales or elsewhere under foreign systems of law.

What are these shortcomings? Without denigrating the processes one jot, litigation and arbitration can be, to put it a little bluntly, slow, costly, adversarial and risky; slow to achieve a final result (judgment or award), costly with the inevitable time and effort required (by lawyers, barristers, experts, witnesses and clients), adversarial by its very form and method, risky in the sense that there is (rarely) any guarantee of result. The law is not physics; it is not a discipline of perfection. And whatever the care and skill applied, there are sometimes nasty surprises (inconvenient documents, inadequate witnesses and experts, surprising judgments). Indeed these are some of the factors that have always motivated parties to settle and must form the basis of the views expressed on the wisdom of settlement by Lords Clarke and Phillips, both of whom had extensive knowledge of litigation from their time at the bar before going to the bench.

Litigation (and arbitration) is also necessarily focused on the past (perhaps a distant past by the time matters finally come to trial) whereas mediation is directed to the future.

The enormous potential of mediation has been recognised at the very highest level in the English judiciary for some time. Lord Woolf may well have been a pioneer in this respect in 1998/9, but his views have since spread widely. Lord Phillips declared his position in March 2008: `*Let me end by nailing my colours firmly to the mast. I number myself with Sir Anthony Coleman and Sir Gavin Lightman as an enthusiastic supporter of ADR*'[8]. In May 2008 Lord Clarke (Sir Anthony Clarke, as he then was) was equally unequivocal:

> *...ADR in general and mediation in particular, where it is the appropriate ADR mechanism, must become an integral part of our litigation culture. It must become such a well established part of it that when considering the proper*

[7] Lord Clarke ibid.
[8] Lord Phillips (n 2).

management of litigation it forms as intrinsic and as instinctive a part of our lexicon and thought processes as standard considerations like what, if any, expert evidence is required…

He goes further, expressing the view that mediation must become `*…part of the culture; so that it becomes second nature to us all*'.[9]

Perhaps the full integration of mediation has since been achieved? In June 2009 Lord Clarke expressed the position succinctly thus:

…Mediation and ADR are part of the civil procedure process. Thus, as I see it, mediation too is an integral part of litigation, and not simply ancillary to it. […] Mediation is an adjunct to formal justice.[10]

Indeed, in some quarters there are suggestions that mediation is even usurping the function of the civil justice system. Nothing could be further from the truth. The courts exist to try cases and in appropriate cases (the tiny minority) will always be there to discharge that function. Those who are engaged in disputes, whether as a routine part of their daily work or, sadly, where they have become wrapped up in a dispute in their personal life, will always have access to justice (although at a price).

Here again are the views of Lord Clarke:

Speaking only for myself (as they say in the Court of Appeal [where he then sat]) I do not think that the proper use of ADR and mediation supplants in any way the role of the courts or risks any downgrading of civil justice. On the contrary the existence of the judges and the courts remain in order to determine the rights and obligations of the parties in the very few cases in which settlement is impossible.[11]

There are those who favour referring disputes to mediation even before proceedings are started; Lord Phillips is one. Indeed some favour making mediation compulsory or mandatory (attendance and participation at mediation that is, not settlement). And the spread of compulsory mediation is foreshadowed by the European Mediation Directive (see below). But for all sorts of good reasons mediation before the commencement of proceedings is relatively unusual (at least for the present). These reasons include (with a particular eye on maritime disputes) preservation of time bar, securing an advantageous jurisdiction, obtaining security for a claim or preserving evidence (including by search and seizure in suitable cases).

Mediation is therefore most usually invoked after the commencement of proceedings, in tandem with legal process; it is the silk glove on the iron fist of litigation (or arbitration). And in this it discloses part of its heritage in international diplomacy, when it was often bolstered by the sword or the gun ship.

WHY HAS MEDIATION NOT SPREAD MORE RAPIDLY - MISCONCEPTIONS AND A LACK OF EDUCATION?

Although there has certainly been a significant increase in the use of mediation in England and Wales in recent years, it has not spread as rapidly as it might have done. If the process is so good, so effective, the question must be: `Why not?' This is something of a puzzle, given some of the obvious virtues and values of mediation. Perhaps it is because, even now, nearly ten years after the reform of the rules of civil justice in 1999 (the Woolf Reforms),

[9] Sir Anthony Clarke, Master of the Rolls, the Second Civil Mediation Council National Conference `The Future of Civil Mediation', Birmingham 8 May 2008
[10] Lord Clarke (n 3)
[11] ibid. Lord Clarke was appointed as a Justice of the Supreme Court with effect from 1 October 2009; the first Justice to be appointed direct to the Supreme Court.

which first brought mediation to prominence, misconceptions remain. Many of the key ideas and concepts are thought to be well known and understood; it is voluntary, without prejudice, private and confidential, it necessarily involves an independent mediator and the like. But nonetheless there is undoubtedly an enduring need to explain what mediation is and, moreover, how it works. Sir Anthony Clarke rather lamented in May 2008: *Experience...shows even now there are far too many people who know far too little about mediation. I think we can all agree that this has to change...*[12].

And this view has been reiterated most recently in Sir Rupert Jackson's report (Review of Civil Litigation Costs: Final Report). The report aims to set out a coherent package of interlocking reforms designed to control costs in litigation and to promote access to justice. Sir Rupert observes:

> *Alternative Dispute Resolution (ADR) (particularly mediation) has a vital role to play in reducing the costs of civil disputes by fomenting the early settlement of cases. ADR is, however, underused. Its potential benefits are not as widely known as they should be*.[13]

He then recommends:

> **There should be a serious campaign to ensure that all litigation lawyers and judges are properly informed of how ADR works, and the benefits it can bring*.
>
> **...An authoritative handbook for ADR should be prepared, explaining what ADR is and how it works and listing reputable providers of ADR services. This handbook should be used as the standard work for the training of judges and lawyers*.[14]

I shall return to the latter point in a moment and will touch on the former in the context of maritime disputes.

But it must be said that it is somewhat curious that misconceptions and misunderstandings persist. Over a number of years there has been a veritable explosion of interest in mediation and a substantial growth in the number of mediation service providers. In this, I am not thinking simply of the United Kingdom (although very significant progress has been made here) but generally internationally both in the common law nations and more recently in the civil law nations (where costs pressures are said to be less of a factor in settlement). Again, this much is clear if one only looks on the internet. There is a vast literature available, in a multitude of languages.

Literature may not be the best way of teaching this new art. It is often best to explain in person, by talk or seminar. But reference works certainly have their place. In this the Insurance Institute of London is playing its part. Under its programme of Research Study Groups the IIL is creating a `manual' of mediation by and for the insurance and reinsurance industry (and this will include of course the maritime industry) under the chairmanship of Paul Moss of Montpelier Re. The book is to be published later in 2010 and will go some way to providing the sort of manual that Sir Rupert, perhaps, had in mind (and although sharply focussed on a particular industry, it has substantial generic content).

THE INHERENT CONSERVATISM OF THE LEGAL PROFESSION AND THE PARADIGM SHIFT

Has the spread of use of the process been restrained by the inherent conservatism of the legal profession? Perhaps...It has been the case until relatively recently that mediation meant very little to English lawyers. Indeed,

[12] Sir Anthony Clarke (n 6).
[13] Note1.
[14] ibid

some had a negative attitude towards mediation and some may still have; such views can be heard (although less so, latterly). Until recently lawyers in England were not trained in negotiation skills or dispute resolution either at university or in law school. The inevitable consequence was that this had an effect on their thinking and way of working. The emphasis was on the process of handling disputes; knowledge of the rules of arbitration organisations and familiarity with the Commercial Court Guide. The mindset was to identify issues and unearth evidence by way of documents, witness testimony and expert opinion, the objective being to place that material in a suitable form, at a suitable time before an arbitrator or a judge. Less emphasis perhaps, was placed upon seeking out a solution. Perhaps this is, in part, an expression of English reserve (and deference?), of sticking to the rules, forming queues and a reluctance to haggle.

Surely, however, matters have changed? Law firms have undergone a cultural change of approach. Almost all now have `Dispute Resolution' departments, rather than litigation departments. And mediation has been a key feature and driver of this process.

Perhaps then it is less a matter of lack of familiarity on the part of lawyers and the judiciary, but, rather, a lack of familiarity with, and understanding of, mediation within society generally; that is, amongst the clients, the users of the courts and arbitration processes. Even this is something of a surprise; many members of the judiciary, solicitors, barristers, mediators and mediation service providers have put in enormous time and effort to spread the word over many years. Perhaps it is simply the fact that the enormous cultural and social change represented by the spread of mediation simply takes time; and a great deal of time at that.

New ideas will always take time to reach acceptance; their integration into orthodox thought follows a predictable pattern: first they are ignored, if they persist they may be treated with hostility or derision and then, finally, suddenly they form part of mainstream thinking. One can think of parallel examples in art (Picasso's Blue Period), science (heliocentricity, plate tectonics) and social justice (universal suffrage).

Some view the phenomenon of mediation as a change of radical proportions, comparable even to the revolution worked by the Judicature Acts at the end of the nineteenth century. Perhaps it is simply an illustration of the time required to recognise, and adapt to, a paradigm shift?

However, presumably for those who have never actually taken part in mediation, its subtle alchemy has remained and will remain a mystery; after all how can a voluntary, non-binding, non-decision making process solve what are often long standing, entrenched and sometimes bitter disputes? Participation in the process is often a revelation.

WHAT WILL BE THE IMPACT OF THE NEW EUROPEAN MEDIATION DIRECTIVE?

The Mediation Directive was published in the Official Journal of the European Union on 24 May 2008 and took effect from 11 June 2008.[15] It is the culmination of a body of work within the European Union, including the European green paper published by the Commission in 2002,[16] the European Code of Conduct for mediators launched in 2004[17] and the draft Mediation Directive published in October 2004.[18]

ADR has been recommended directly or indirectly by a diverse body of other European Union legal instruments or proposals, for example those touching on legal aid, family relationships, consumer disputes in e-commerce,

[15] Directive 2008/52/EC of the European Parliament and the Council on certain aspects of mediation in civil and commercial matters OJ L136/3 24.5.2008. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF
[16] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0196:FIN:EN:PDF
[17] http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf
[18] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0718:FIN:EN:PDF

so called open network provision (telephony) and the Framework Directive for electronic communications networks. It can be seen by this that ADR and mediation have already penetrated wide and deep into the structures of the European Union and that, notwithstanding the fact that most of the Member States in the European Union are civil law states, mediation is strongly supported within the European Union.

The Directive applies only to cross border disputes, in other words disputes where parties are domiciled or resident in two different Member States. But nothing in the Directive prevents Member States from extending the scope of any implementation legislation they pass to Cover domestic disputes.

At present within the European Union there exists quite a wide variety of practice in mediation. It seems almost certain that the Mediation Directive will give a new impetus to the spread of knowledge and use of mediation within the European Union, including here in the UK, and probably well beyond, given the range and extent of relationships between EU and non-EU states. It should also go some way to standardising the practice.

WHERE DOES MEDIATION FEATURE IN THE MARITIME WORLD?

From the time of the implementation of the new Civil Procedure Rules in 1999, mediation has progressively become a fact of life in civil litigation. The pressure that the courts can apply by active case management has meant that mediation has become, even if somewhat slowly, more common. Indeed, many commercial lawyers would probably accept that there is now a strong possibility, or even a probability, that almost all disputes will be referred to mediation at some point if not settled before trial. The most likely point for the court to apply pressure will be at a Case Management Conference.

But similar pressures do not necessarily exist in arbitration and many of the typical disputes in the maritime field are subject to binding arbitration agreements (for example, charterparty and bill of lading disputes). Arbitration tribunals may not encourage or order parties to go off to mediation, but nonetheless mediation is becoming more common in resolving disputes which would otherwise be referred to a final determination by an Arbitration Tribunal. This is almost certainly a response to client demand. Increasingly clients, in particular insurers and mutual insurance associations, significant and highly sophisticated users of legal process, have seen that mediation saves time and that cases settle. They know that it works and so increasingly they are requiring that mediation be used in conjunction with arbitration. The inclusion of mediation clauses in standard form contracts (which also include arbitration clauses) will, however, be essential to speed up the spread of the process.

In this, the Maritime Solicitors Mediation Service (MSMS)[19] has played a significant part. MSMS was originally set up in August 2003 and formally launched on the internet in January 2004. In 2009 MSMS was registered with the European Commission as a mediation service provider whose mediators comply with the European Code of Conduct for Mediators 2004. In many respects, MSMS is an unusual organisation. First, it is an unincorporated association of 19 English maritime law firms which set up the body in a collegiate manner and in the spirit of co-operation. Indeed that cooperation runs deep; immediately after the launch of MSMS the member firms ran a year-long programme of mock mediations (in the UK and other countries) to provide a practical demonstration of what the process is, how it works and just how effective it can be.

Secondly, MSMS is also somewhat unusual in that it is sector-specific, designed expressly for the maritime and marine insurance trades. There is a fairly large number of bodies providing ADR services whose focus is deliberately general, prominent amongst which is the Centre for Effective Dispute Resolution (CEDR). This group now includes service providers such as the Chartered Institute of Arbitrators (who have recently welcomed

[19] See www.msmsg.com

mediation), the Academy of Experts and the Ombudsman Service. However, according to a thorough and lengthy report issued by the European Civil Justice Systems Research Programme, at the Centre for Social-Legal Studies, University of Oxford (`Civil Justice in England and Wales: Beyond the Courts'[20]) the sector-specific mediation service providers (MSPs) are few and far between. The report identifies a mere handful including, in addition to MSMS, the Pensions Advisory Service and ACAS (Employment).

HOW SHOULD MEDIATION EVOLVE?

THE PRESENT

Mediation (in the UK at least) is currently a relatively informal process, but this may be under threat. The parties generally agree on the appointment of a particular mediator, sometimes on the recommendation of an MSP, sometimes, perhaps increasingly, from a (short) list of well known mediators. About ten years ago it was a fairly common view that any skilled mediator could mediate any dispute and to some degree that is certainly true. But with experience the market, particularly the maritime and marine insurance market, has matured. Many in this market would now say that it is important, some say vital, that the mediator has specialist expertise in the subject matter of the dispute. The development of the MSMS is a significant manifestation of this trend.

As it is at the moment the process is not complex and prescriptive. Generally all the parties need to do is to prepare a mediation summary (some call this a position statement) and put together the key documents. These summaries should certainly not be so long that they would take more than a few hours for a mediator to read; 10 to 20 pages are often more than enough. The summaries generally put forward the parties' best cases. It is important that they are written in normal prose and not in the arcane language of the law; not in the sort of technical legal language used in legal documents and in pleadings in court cases (and in some arbitrations). They are a pitch to a jury, not a summing up in legal argument. The ideal approach is accuracy, brevity, clarity. This is because a significant purpose of a mediation summary is to explain the dispute clearly, not only to help the mediator understand the case, but most particularly to help the party on the other side (as distinct from his lawyers) to understand the case against him.

These summaries exemplify what mediation is about. They distil in an easily understood form exactly what matters in a dispute, and what matters to the parties individually and in their relationships with one another (sometimes beyond the legal issues in the case), in a process where parties will be constantly asked to focus their attention on their interests and needs and not on their rights and wants, as they may perceive them. Indeed the whole process of creating the summary is a vital part of preparation. It should compel the parties (the lawyers and the clients) to think - very carefully. This work, and the work on the day, will (should) promote a dense effort of concentration.

As to documents, the papers gathered together for a mediation should include just a few core documents and sometimes charts, diagrams or photographs. The alpine snow-storm of documents that are typically seen in litigation or arbitration proceedings (after disclosure, especially after E Disclosure) is generally unhelpful and even if such documents are produced they are rarely looked at.

Generally a common bundle of documents is created to be used by the mediator and all the parties; each party will have a copy. But in addition to this sometimes parties provide documents (and information) to the mediator

[20] www.csls.ox.ac.uk/documents/themelist.docx.

on a confidential basis. This may help the mediator to understand the background to the dispute and ultimately may assist him in fashioning a bargain between them.

Obviously mediators do not reveal either the existence or the contents of such confidential documents to other parties unless and until authorised to do so.

The whole mediation process itself is regulated by a simple mediation agreement setting out the key aspects of the process including confidentiality and certain protections for the mediator.

It is beyond the scope of this article to describe in detail how mediations work on the day. Every one is different. But broadly they fall into three phases; exploration, negotiation and a concluding phase, often settlement. The whole process is informal. Strict rules of evidence, legal terminology and legal advocacy are all inappropriate for mediation. In some senses mediation provides an artificial deadline, like an approaching day in court. There is often a rush of adrenaline, with the speed and clarity of thought that this brings. The guillotine concentrates the mind.

Of course not all cases settle on the day. It is not unusual for discussions between parties to continue after a mediation day, often with the assistance of the mediator, and for a settlement to be concluded days, weeks or even months later.

There is no central body gathering all mediation statistics in England and Wales (although the Civil Mediation Council is progressively encouraging mediation service providers to disclose settlement statistics on a confidential basis). Anecdotal evidence from some of the most active and prominent commercial mediators suggests that the ratio for settlement on the day may have originally been somewhere in the region of 60/40 or perhaps 50/50. But progressively this may have declined as parties (or perhaps lawyers?) get more used to the process; some refer now to a ratio of 40/60. In other words, about 60 per cent of cases may now settle after the mediation day, although the general percentage of settlements in absolute terms seems to have remained reasonably constant at somewhere in the region of between 75 per cent and 80 per cent.

THE FUTURE

So much for the current picture; there are indeed concerns that the process of mediation may progressively become more structured and detailed, with the hazard that it may become progressively less effective. This is a serious matter. The Right Honourable Lord Judge touched on this concern at the end of an address to the Civil Mediation Conference on 14 May 2009 in the following terms:

> *Can we just take a long term view? Every few years, or about every ten years, there is a great hullabaloo about the cost of civil litigation. Arbitration, after all, is a system of avoiding court process. Do you remember when employment tribunals began? These were to be informal meetings at which the opposing parties would put their cases to a tribunal, almost a form of palm tree justice. Consider now how much more complicated and expensive the processes have become.*
>
> *I do urge the Council to recognise this danger. The mediation process could, unless the danger is recognised and addressed, particularly if it is part of the court process, may eventually, and quite unintentionally, and by unforeseen accretion become increasingly formalised and procedural. It really must not eventually become just one more part of the expensive process that all of us are trying to avoid*.[21]

[21] The Rt Hon The Lord Judge, Civil Mediation Council Conference 14 May 2009

I would echo that sentiment; but it is not simply the matter of cost. Generally one should be wary of the development of what is described as mediation advocacy and the creation of a standard form timetable and procedural requirements and the risk of progressive linkage of mediation (solely) to the issues in an action. The youthful, dynamic and optimistic face of mediation must not be allowed or pressured to morph into litigation or arbitration by any other name; therein lies elaboration, rigidity, ossification. If it does it will have failed.

The fate of arbitration provides a clear warning. A splendid treatise on the subject is `Arbitration: the new Litigation'[22] by Professor Thomas Stipanowich, previously head of the International Institute for Conflict Prevention and Resolution (CPR).[23] Although describing the American experience, the concerns expressed there should be heard here. For example he notes that:

> *Early in the twentieth century...Arbitration was popularly touted as a more efficient, less costly, and more final method for resolving disputes; there was little or no discovery, motion practice, judicial review, or other trappings of litigation. By the beginning of the twenty-first century, however, it was common to speak of US business arbitration in terms similar to civil litigation - "judicialized", formal, costly, time-consuming, and subject to hardball advocacy....These practices...have made arbitration...increasingly similar to civil litigation, and arbitration procedures have become increasingly like the civil procedures they were designed to supplant, including pre-hearing discovery and motion practice. Not surprisingly, clients and counsel often complain about the costliness and length of arbitration...*

Although there are differences, of course, one sometimes hears similar views expressed about English arbitration procedure. Stipanowich then observes that the emergence of mediation has, in the USA:

> *...revolutionized public and private dispute resolution, as well as challenged the primacy of litigation and arbitration with their emphasis on full information exchange, full exposition, and extensive due process.*

His description of and explanation for the upsurge in popularity of mediation, on the phenomenon of mediation, makes compelling reading.

Those who run litigation and arbitration should not, therefore, seek to bring their skills, their work-template and their mindset to mediation and seek to impose these on this lively new process. They should set aside preconceptions about the ways disputes are conducted and resolved, and learn the new processes. Mediation is not merely common sense; it is a new skill that repays time spent in learning. Those involved in disputes of any character need to be vigilant to ensure that mediation (probably used skilfully in conjunction with legal process) retains its dynamism, simplicity and effectiveness. In architecture, clarity of expression and now in the resolution of disputes it seems that in some measure `less is more'.[24]

Rhys Clift, 2010

[22] University of Illinois Law Review vol 2010 No. 1. 2010
[23] See www.cpradr.org for further details. CPR, based in New York, was one of the pioneers of mediation.
[24] Mies van der Rohe.

调解的现象：司法角度和未来展望

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导言

2010年1月14日，鲁布特·杰克逊爵士发表了题为“民事诉讼成本回顾”的最终报告[1]，该报告进一步支持替代性争议解决程序（ADR），特别是调解的使用。受该报告的启发，本文旨在进一步探讨如下内容：调解及其作用、调解在民事司法中的地位、《欧盟调解指令》的可能影响以及调解在海事海商领域扮演的角色。此外，本文还特别关注到调解未来的发展趋势。本文内容无意包罗万象，仅着重于选定的领域并特别聚焦在上述报告发布之前，英国司法界资深人士就支持更广泛地应用调解所表达的一些特别意见。调解是个环球现象，我们只需在互联网上检索便可窥见一斑；但本文主要关注的范围限于英格兰和威尔士地区。在相当多方面，调解是一种令人赞叹的程序，它不仅富有活力而且灵活有效。调解的更广泛使用应当得到鼓励，但对于调解的发展趋势须抱有相当的谨慎态度。

争议：为何需要和解

历史上的争议都通过决斗来解决的：决斗的任何一方非死即生。在解决纠纷方面，诉讼和仲裁后来经发展成为一套精巧的程序规则，争议两方借此以一种有效而有纪律的方式获得裁判，从而解决双方之间有时相当残酷的法律纠纷，避免了流血冲突。但请记住，这里存在着一项裁决，通常总有赢家和输家。

然而，绝大多数的案件当事人通过谈判从而和解结案，只有少数的案件不大可能或不适合和解。譬如为获得先例的案件或有必要公开审理的案件。但这些情形相對少见。

2008年3月，菲利普勋爵（现为英国最高法院院长）曾表达过这样的意见：

[1] 该最终报告可在英格兰和威尔士的司法系统网站www.judiciary.gov.uk查阅。继该报告发表之后，司法界资深人士已经考虑过回应。司法执行委员会同意支持该最终报告的建议，并设立了司法指导小组致力于从司法系统支持实施有关建议。

…在没有决定尝试达成友好和解的情况下，[…]从而产生大量的诉讼费显得有点疯狂。那种认为任何争议只有法院才能作出唯一公平判决的想法，在我看来，是不真实的。[2]

2009年6月克拉克勋爵也表达以下意见：

我们的司法系统长期以来确立的实际情况是：绝大多数的案件在庭审之前都和解了。目前案件 98% 的和解率也正是早在19世纪二十年代普通法委员会所观察到的情形[...] 只有疯子才不想和解。[3]

根据我稍后会提及的原因，我们应当欢迎旨在促进和解的直接而有效的新程序。尽管每个案子需要不同的判断，但我们特别需要能够推进早期和解的程序，譬如在产生有关文件披露、证人供述、专家报告和庭审等费用之前进行。确实，进行早期和解对于大多数“常规”案件（相对于最为复杂的民事欺诈案件来说）甚至更为必要，特别是在引入“证据电子文档披露”后不可避免带来延迟、成本和技术困难方面，这就更有必要了。

仲裁和诉讼的有效管理需要有相当的技巧。有时候，为了能让某一案件以最有利的条件进行和解

（无论该和解是以通常方式还是以调解方式进行），要经过某些主要的诉讼或仲裁环节是必要甚至关键的，比如经过证人供述和专家报告的披露和交换等。但对于绝大多数案件来说，强调以“正确的条件”（无论其内容）达成和解仍然是势在必行的。

.1 究竟何为调解？

调解是解决商事争议的一种新型、有效的方式，通常要比一般的诉讼、仲裁和谈判来的要快、成本要低。调解在家庭和劳动关系领域有着很长的应用历史，在国际外交以及特别是远东地区的使用尤为突出。

调解基本上有两种类型：推进型和评估型。评估型调解一般用的较少，在此种调解程序中调解员会在特定阶段就双方各自案情的优势和劣势发表意见，或者提出一项可能是公平公正的争议解决方案供双方参考。而这种情形在推进型调解中几乎不可能出现，尽管有关调解协议往往有条款规定如所有当事人同意，调解员可以发表有关案情的意见。

在推进型调解中，调解员作为中立的第三方协助双方解决争议。这是一种受规范的自愿谈判过程，双方可以自由协商，但程序设有时间表、争议有结构有规则，这是“单纯”谈判所不具有的。调解员毋须作出判决或裁决，他们掌控过程而非结果。可以说，推进型调解是英格兰和威尔士地区解决商事争

[2] 来自Worth Matravers的菲利普勋爵当时任英格兰和威尔士的首席大法官。“替代性争议解决 – 英国视角”，2008年3月29日， 印度。
[3] 来自Stone-Cum-Ebony的克拉克勋爵，时任上诉法院民庭首席大法官。“调解：诉讼文化的不可分割部分”，Littleton Chambers 年度调解研讨会，Gray's Inn，2009年6月8日。

议最主要的调解形式。

调解是ADR的一个子集，而ADR还包括诸如广泛用于建筑行业的裁量程序（adjudication）和早期中立评估程序等。调解可能是ADR中应用最为广泛的一种形式。调解员的作用可比喻成催化剂，而这种独立第三方角色的存在是调解程序最为引人注意的特色。

二十年前（甚至十年前）当调解在英国还处于婴儿期时，遭受了很多怀疑。有人认为调解很可能、

甚至不可避免地导致双方五五开的软妥协。然而，实践当中这绝非如此。调解程序中往往会碰到棘手的难点，而通过调解却能有效地解决那些50/50妥协所不能解决的案件，比如欺诈。调解不仅能维持当事人之间的关系还能维护所牵涉的个人的声誉（而这对于海事海商案件中大量存在的长期业务来说尤为重要）。对于解决多方争议，调解显得相当有效，而一般谈判很难奏效，因为谈判往往因某一方的念头而破裂。调解最重要的是它有效：案件得以和解。调解中的在调解当日还是其后达成和解率一般在75%至80%之间。

.2 调解在英格兰和威尔士民事司法中的地位如何？

英格兰和威尔士地区的仲裁和诉讼程序在很多方面相当完备、高度发展且精细化了，其诚实、精深化以及智识投入广泛被尊重，因此法律程序在某种意义上不可或缺。2009年克拉克勋爵表达了诸多法学界人士的观点，他说：一个有效的民事司法系统应该让每个人都能使用，而这是任何开放、民主的法治社会极其关键的要素。[4]

我想没有人会反对这个观点。然而，这只是笼统的概而言之。法律程序本身有其不足，而这在合适的案件（或合适的时间）中却可以通过调解得以弥补。仲裁和诉讼法律程序的种种缺陷，无论在英国还是其他外国法律制度，都是普遍存在的。

那么，法律程序到底有哪些不足呢？无意贬损之，但坦率地说，诉讼和仲裁有如下缺点：1）获得最终的判决或裁决，程序较慢；2）需要向律师、专家、证人以及客户支付的费用高昂；3）形式上和内容上敌我分明的对抗性；以及4）对结果无法把握的败诉风险。法律不是物理学，也并非一门完美的学科。无论施以多大的谨慎和技巧，总有讨嫌难料的情景，譬如不利的文件、证人和专家证据的不足以及令人意外的判决等等。确实，总有促使当事人进行和解的因素存在，而这些因素也是克拉克勋爵和菲利普勋爵所表达的有关和解智慧观点的基础。上述两位勋爵在他们当任法官之前的律师职业生涯中有着相当丰富的诉讼知识和经验。

诉讼和仲裁的重心必然在于关注过去（也许是很久之前发生的事实最终进入审理程序），但相反的调

[4] 同上注。

解却指向未来。

调解的巨大潜力已为英国司法界最高层所认可。沃尔夫勋爵从1998/9年起就很可能是这方面的先锋，他的观点自从那时起就广为人知。菲利普勋爵在2008年3月这样描述自己：

> *让我来给自己确切地归类吧，我跟安东尼·克勒曼爵士和加文·莱特曼爵士一样都是ADR的热情拥护者。*[5]

2008年5月克拉克勋爵（当时为安东尼·克拉克爵士）同样也直言：

> *…ADR，特别是调解，在恰当的场合，ADR机制应当成为我们诉讼文化不可分割的一部分。调解必须成为那种一提及诉讼管理就能本能地成为我们词汇的一部分，成为我们标准考量的程序一部分，就像需要专家证据一样…*

他继续评论道，调解必须成为

> *"...诉讼文化的一部分；变成我们的第二天性一样。*[6]

或许对调解认知的全面融合自从那时起就已经达成？2009年6月，克拉克勋爵如此简洁地评论调解的地位：

> *…调解和ADR是民事诉讼步骤的一部分。因此，在我看来，调解也是诉讼的一个不可或缺的部分，而不只是附属于诉讼。[…] 调解是实现司法正义的一个助手。*[7]

确实，有些人认为调解甚至篡夺了民事司法系统的功能。但这种理解是完全错误的。法院存在的目的就是为了审理案件，而只有在合适的少数案件中法院才会完成这种任务。参与诉讼的当事人，无论是作为他们的例行公事的一部分或者不幸的是他们自己个人的生活被卷入其中， 总会有途径实现正义（尽管为此需要付出代价）。

再一次，克拉克勋爵说：

> *个人看来，我认为ADR和调解的适当应用并不会削弱法院的角色也不会有损于民事司法。相反的，法官和法院的存在依旧是在那些和解不成的少数案件中为当事人确定和裁判权利与义务。*[8]

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[5] 同注2。
[6] 安东尼克拉克爵士，上诉法院民庭首席大法官，第二次民事调解委员会全国会议，"民事调解的未来"，伯明翰，2008年5月8日。
[7] 同注3。
[8] 同上注。克拉克勋爵自2009年10月1日起被任命为最高法院的大法官，也是首位直接向最高法院任命的大法官。

也有人支持在法律程序启动之前就将争议提交调解的，菲利普勋爵就持这种观点。甚至还有人支持将调解强制化的（出席和参与调解而不是和解）。下文将要述及的《欧盟调解指令》在这方面预示着强制调解的可能性，但因各种原因，至少在目前而言，在法律程序启动之前进行调解，相对来说还不常见。这些原因包括：（特别在海事海商案件中）保护时效、保住有利的管辖范围以及为诉讼保全或证据保全的目的（包括在合适的案件中搜查和扣押等）。

因此，调解更普遍地在法律程序启动之后应用，或与之并行而用。形象地说，调解好比是戴在诉讼或仲裁这个铁拳头上的丝质手套。在这一点上，我们可以看出调解来源于国际外交，而这种外交在彼时是由刀剑枪炮作为后盾的。

.3 为何调解未能迅速广为使用 – 误解？缺乏了解？

近年来，尽管在英格兰和威尔士地区调解的使用有实质性的增长，但它仍然未能尽其可能地得以迅速发展。人们会问，如果调解程序真的如此好用、有效，为什么会存在这样的局面？这显得有点蹊跷，特别是考虑到调解有着如此明显的优点和价值时。原因也许在于：即便在自1999年开始将调解推向前端的民事司法改革（Woolf Reform）十年之后的今天，甚至仍有误解存在。有关调解的主要概念和观点已被当成是众所周知，如调解的自愿性、无损性、私密性以及程序必然涉及一位中立的调解员等。然而，解释到底何为调解、调解究竟如何运作的需要，无疑一直存在着。安东尼·克拉克爵士在2008年5月就此曾直言：*“经验显示：即便到如今，依然还有很多人对调解知道的甚少。我想，我们都同意这种局面必须改变”*。[9]

此种观点在鲁布特·杰克逊爵士最近的有关报告中（《民事诉讼成本回顾：最终报告》）也有重述。该报告旨在为控制诉讼成本、促进实现正义而提出连贯的交互式改革。鲁布特爵士评论道：

> *替代性争议解决方式（ADR），特别是调解，在较早地和解案件从而降低民事诉讼成本方面大有作为。然而，ADR的使用并不足，其潜在的利益并未如其所能地广为人知。*[10]

鲁布特爵士接着建议：

> *应当有一项认真的项目以确保所有的诉讼律师和法官都能适当知晓ADR如何运作以及其所能带来的利益。*
>
> *…应当准备一本有关ADR的权威手册，用以解释何为ADR、其如何运作并列出ADR良好的服务提供者名录。这种手册应当被用作培训法官和律师的标准材料。*[11]

[9] 同注6。
[10] 同注1。
[11] 同上注。

我会稍后提及上述第二点，并将对第一点的论述放在海事海商争议的背景里。

但是，对调解的误解仍旧存在，不得不说这多少有点奇怪。多年来，有关调解的兴趣与日俱增，有关调解服务提供者的数目也有实质性增加。在这方面，我并非仅指英国（这里确实有非常显著的进展），在国际层面的普通法系以及大陆法系（据称和解过程中成本压力相对较少）一般都是如此。此外，人们只要去网络检索就会窥见一斑——网上存在相当多的，不同语言的调解著述。

文献在这里也许并非最好的教学方法。最好的方式莫过于一对一的解释，通过研讨会或者讨论。但参考书也有它的作用。在这方面，伦敦保险协会是个很好的例子。在它的研究小组的规划下，伦敦保险协会在Montpelier Re的保罗莫斯的主持下，正在起草有关保险和再保险行业的调解“手册”。该书将在2010年下半年出版，而这也可以说是提供了鲁布特爵士上述所建议的手册的一部分（尽管它聚焦于特定行业，但有些实质性内容也普遍适用）。

.4 法律职业固有的保守和范式转化

调解的使用是否因为法律职业固有的保守而受到局限呢？或许吧。直到不久之前，调解对于英国律师来说并不意味着什么。确实，过去不少律师对调解有着负面的态度，而到如今尽管越来越少，也许仍然还有持同样意见的声音。直至最近，英格兰的律师们在大学或法学院还没有接受过有关谈判和争议解决技巧的培训，而这不可避免地会对律师们的思维和工作方式产生影响，他们关注的重点在于如何解决争议、了解仲裁机构的规则以及熟悉商事法院的诉讼指引。律师们习惯于辨析争议点、从文件中发现证据、侧重于证人供述以及专家意见，目标是为了能将上述材料以适当的形式在适当的时间呈交给仲裁庭或法院。也许他们关注的重心很少在于寻求解决方案。这也许部分地折射了英国人保守特色：对规则的固守和顺从、排队精神以及不愿讨价还价。

然而，事情起变化了吗？律师事务所现在已经历了一场争议文化的变更。几乎所有的律师事务所现在都有“争议解决部门”而非传统的诉讼部。而调解在这变化过程中起了关键的驱动角色。

也许问题的关键还不在于律师或法院系统缺少对调解的了解，而是作为整体的社会（也即作为法院和仲裁程序使用者的客户圈）对调解缺乏一般性的熟悉和认知。而这种缺乏对调解的了解甚至令人相当意外。多年来，许多司法界人士、律师、调解员以及调解服务提供者在调解知识的传播及其应用上花费了大量时间和精力致力。也许根本的原因在于简单的事实，即：促使调解广为使用的文化和社会变更因素需要时间的积累，确实而言，也许会需要很长时间。

新想法要被接受往往需要很长时间。新思维融入正统思维的过程往往有着固有的范式：起初它们被忽略，如果他们坚持，会被敌视；最后，突然之间他们却成为主流思维的一部分。我们可以从其他领域找出很多这样的例证：艺术当中毕加索的蓝色時期，自然科学的日心说、板块构造说以及社会正义理论的普选制等等不一而足。

有人视调解现象为激进的变更，甚至相比于19世纪末《司法组织法》（Judicature Act）的那种革命性。也许这种看法勾勒出：是时候承认和调整到新的范式了。

然而，对于那些从未实际参与过调解的人来说，调解的微妙魔力仍然是一个谜。毕竟，一种自 愿的、无约束力、没有决策过程的程序如何能解决那些久拖不决、根深蒂固有时甚至棘手的争议呢？参与调解过程本身往往是了解这一程序的最佳途径。

.5 新的《欧盟调解指令》会带来什么影响？

《欧盟调解指令》于2008年5月24日发布在欧盟官方期刊并于2008年6月11日开始生效。[12]该指令实际上是欧盟内部有关调解规范的一个高峰，这些规范还包括：2002年欧盟委员会发布的欧盟绿皮书[13]、2004年发布的《欧盟调解员行为守则》[14]以及2004年发布的调解指令的草案。[15]

ADR已直接或间接地被其他一系列欧盟的立法文件或建议机构所推荐，譬如涉及法律援助、家庭关系、电子商务中的消费者争议、所谓的“开放式网络供应”（open network provision）以及为电子通讯网络的“框架指令”等。凡此种种，都表明ADR和调解已经广泛而深入地融入欧盟的框架之内。尽管大多数欧盟国家属于大陆法系，但调解的使用在欧盟内确实也得到了强有力的支持。

上述调解指令只适用于欧盟内的跨界争议，换言之，适用于那些住所或地位不同的成员国的当事人。但指令本身并不限制成员国将其范围延伸适用于解决内国纠纷。

目前，欧盟范围内存在各种各样的调解规范。几乎可以肯定，调解指令将会促使调解知识和使用在欧盟范围内广泛推广，当然包括英国在内，其效果也许远及欧盟之外，特别是考虑到欧盟与非欧盟国家关系的范围和内容。因此，调解实践标准化显得势在必行。

.6 调解在海事海商领域的特色何在？

从1999年的新民事诉讼程序规则实施开始，调解就逐渐成为民事诉讼的一部分。尽管过程有些缓慢，法院能够通过积极的案件管理施加调解的压力，意味着调解已经变得更加普遍。确实，许多商业律师都可能持有这样的观点，即：几乎所有的案件在开庭之前和解不成时都有很大可能通过调解得以解决。法院最可能将会在所谓的“案件管理会议”这一环节施加调解的压力。

但是，同样的调解压力并不当然适用于仲裁程序当中，特别是在海事海商领域里，大部分的争议都是通过仲裁协议提交仲裁解决（比如租船合约和提单争议等）。仲裁庭不会像法院那样鼓励或命令当事

[12] 欧洲议会和理事会关于民商事案件调解若干问题的指令第2008/52/EC号，OJL136/3，2008年5月24日。 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF
[13] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0196:FIN:EN:PDF
[14] http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf
[15] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0718:FIN:EN:PDF

人去调解，但调解确实在争议解决中日益普遍，而如果调解不成，争议还是最后由仲裁庭作出裁决。而这一趋势显然是为了回应客户的需求。特别是像保险人、互保协会以及使用法律程序的高端客户日益感觉到调解更能节省时间，同时案件能够和解。他们知道调解是有用的，故而日益要求在仲裁程序中进行调解。在这方面，在标准合同中加入调解条款（当然包括仲裁条款）对于加速调解的应用至关重要。

“海事律师调解服务” (MSMS)[16]在这一领域起到了重要的作用。MSMS最初设立于2003年8月， 而在互联网上正式发起于2004年1月。2009年，MSMS作为一家调解服务提供者在欧盟委员会登记，它的调解员须遵守2004年的《欧盟调解员行为守则》。MSMS在很多方面是一个非凡的组织。首先，它是由19家海事律所组成的未经注册的协会性组织，以一种协作型的方式进行合作。这一合作是很深入的；在其成立后不久，成员律所通过在英国和其他国家举办长达一年期的模拟调解项目，向人们实践性地展示了何为调解程序、调解如何运作以及调解如何有效等。

其次，MSMS的特殊性还在于它是特定行业的，即专门为海事海商和海上保险业提供调解服务。当然也有相当多的ADR服务提供机构，他们的服务是一般性的，譬如有效争议解决中心 (CEDR) 。该组织现有的服务提供者包括：特许仲裁员协会 (Chartered Institute of Arbitrators)（该协会最近欢迎并容纳调解）以及专家和监察员服务协会 (Academy of Experts and the Ombudsman Service)。然而，根据剑桥大学社会法律研究中心“欧盟民事司法系统研究项目”的一份详尽的报告（“英格兰和威尔士的民事司法：法院之外” [17]），特定行业的调解服务提供者非常少。该报告提到了少数几个，除MSMS外，还有养老金咨询服务 (Pension Advisory Service) 以及专于劳动法的 ACAS。

.7 调解应如何演进？ 现状

目前调解还是一种相对非正式的程序，至少在英国如此。但这种局面可能也面临威胁。当事人一般就特定调解员的任命达成一致意见，有时基于调解服务提供者的建议，而越来越多的情形是从知名调节员名单中选择。大约十年前，相当普遍的观点认为任何有经验的调解员可以调解任何争议，某种程序上而言也确实如此。但是，随着经验的增长市场已经成熟，特别是海事海商和海上保险市场。在这样的市场中，为数不少的观点认为调解员就争议事项的专业知识和经验很重要， 甚至被认为是关键性的。而MSMS最近的发展趋势就是一个重要的例证。

就目前而言，调解程序并不复杂。大体上，各方当事人需要准备的是一份调解摘要（有人称之为案情陈述）连同主要的文件材料。这些摘要不会很长，调解员通常不需要几个小时就能读完；10 到20页纸一般就足够了。调解摘要的目的是陈述己方的案情，因此以平实的语言陈述非常重要， 而不要用艰深晦涩的法言法语，也不要用通常出现在法院诉讼（或有些仲裁）案件中那种专业的诉讼文书语言，因为调解摘要是用以陈述案情而不是概述法律论点。最理想的方式是追求准确、简洁和清晰，因为调解

[16] 请访问其官方网站：www.msmsg.com..
[17] www.csls.ox.ac.uk/documents/themelist.docx.

摘要很重要的一个目的就是清晰地解释争议，不仅为帮助调解员理解案情，更重要的是帮助对方当事人（而不是他的律师）去理解针对他的案情。

这些调解摘要贴切说明了调解究竟涉及什么，其以一种易于理解的形式提取出何为争议中真正重要的方面，以及对当事人自身及彼此关系重要（有时候并非法律问题）的内容。而在调解这样的程序中，当事人会不断被要求关注他们的真正利益和所需要的，而不是他们的权利或所想要的，因为后者往往会蒙蔽自己的判断。调解程序会促使当事人及其律师慎重考虑，而这种摘要准备工作以及调解当日的任务会（也应该会）促进各方精力的高度集中。

至于文件方面，调解所需的文件材料应包括主要的关键性材料以及一些图表、表格或者图片等。而诉讼和仲裁中常见的（在披露之后，特别是证据材料电子披露之后）铺天盖地的文件通常是没有帮助的，甚至很少有人会去看这些提交的材料。

通常会有一套共同的案件材料供调解员和当事人使用，每方持有一套。但除此之外，有时候当事人会私密性地向调解员提供材料或信息，而这会帮助调解员理解争议的背景并最终有助于调解员在双方之间促成和解。

当然，除非经披露一方授权，调解员不能将其披露的保密材料和信息向另一方披露。

整个调解程序受制于一个旨在设定程序节点的简单的调解协议，其中包括保密义务以及对调解员的保护等内容。

限于本文篇幅，在此不去详述调解当日程序究竟如何运作。因为每个案子都是不同的。但广而言之，可以分为三个阶段：探索、协商和结论（通称达成和解）。整个程序是非正式的。对于调解来说，严格的证据规则、法言法语以及法律辩论都是不合适的。在某些层面来说，调解提供了一个人为的期限，好比是法庭程序中开始的听证日。调解程序往往需要相当的思维反应速度和清晰度。因为终止辩论交付表决意味着注意力的集中。

当然，不是全部的案件都会在调解当日和解。在其之后，双方通常会借助调解员的协助继续讨论进行和解，为了达成数日、星期、甚至数月后的和解。

英格兰和威尔士地区，尚无中心机构记录和统计调解的数据（尽管民事调解委员会正在逐步鼓励调解服务提供者在保密的基础上向其披露有关调解的和解数据）。然而，来自相当活跃的商事调解员的非正式证据显示，调解当日案件和解比例最初在60/40或50/50左右；但随着当事人越来越习惯这种程序，这一比例下降至40/60。换言之，现在大概有60%的案件一般会在调解日之后和解，尽管最后以绝对的和解结案的比例似乎一直保持在75%至80%的合理水平。

.8 未来

就调解现状我们说了很多。然而对于调解程序将来可能越来越结构化和繁琐化、进而造成程序的低效率的担忧，也确实存在。贾济勋爵在2009年5月14日向“民事调解会议”的发言中，提到了这一担忧：

> *我们是否可以看的跨度更长一点呢？大约每隔几年或每隔十年，总会存在对民事诉讼成本的各种争议。仲裁，最后成为避免法院程序的一个替代系统。诸位是否还记得当初有关劳动争议的仲裁庭何时开始？这些曾被视为非正式的会议，其中当事人以一种非常“朴素”的形式向仲裁庭陈述各自的案情。现在，想想看这样的仲裁程序变得何等之复杂和昂贵。*
>
> *我在此促请委员会能够留意这样的危险。而除非大家认识到这种危险，不然调解程序（特别是作为法院程序的一部分时）很可能会最终不知不觉变得越来越正式和程序化。而调解不能最终变成我们正试图去避免的昂贵司法程序的一部分。*[18]

我想在此特别重申这样的担忧。然而，这不仅仅是成本的问题。我们还应该注意到存在的其他问题，比如一种被称为“调解辩论”（mediation advocacy）的发展趋势、对标准格式的时间表和程序要求，以及逐渐将调解联系到诉讼争议点的风险。调解年轻、活力和乐观的面孔决不能以任何名目沾染上诉讼或仲裁的那种事无巨细、僵化的习气。不然，调解也将会失去它的吸引力。

仲裁的命运已经提供了一个清晰的警示。在这方面，有“国际争议预防和解决学会” (CPR)[19]主席 托马斯斯蒂帕诺维奇教授的力作，题为《仲裁：新的诉讼》[20]。尽管这文章说的是美国的例子，但其中所表达的担忧同样也适用于英国。下面摘一些他的论述：

> *20世纪早期…仲裁受到人们欢迎，被当作一种更有效、低成本和更有决断效果的争议解决方式， 其中很少甚或没有文件披露，也没有辩论的“大动作”，没有司法审查或其他诉讼的繁杂程序。 然而，到了21世纪初，人们普遍地认为美国的商事仲裁几乎类同于诉讼，也即变得“司法程序 化”了、正式了、更费时、成本更高了，而且对律师的辩论要求更严了…这些趋势…使得仲裁越来越无异于诉讼，其程序越来越靠拢当初其正要避免的诉讼程序，包括了庭前证据交换以及律师的辩论。毫不奇怪，客户和律师都抱怨仲裁的昂贵和费时…*

当然，尽管有所不同，但人们也时常听到有关英国仲裁程序类似的观点。斯蒂帕诺维奇教授接着评论

[18] 贾济勋爵，民事调解委员会会议，2009年5月14日。
[19] 更多详情请访问www.cpradr.org。该学会本部在纽约，是调解领域的先锋组织。
[20] 伊利诺伊斯大学《法律评论》2010年第一卷。

道，在美国调解的出现：

> *…改变了无论国家性的还是私人性争议解决，同时也挑战了重点在于信息交换、完整披露以及包含大量程序环节的诉讼和仲裁的主流地位。*

该教授有关流行调解的阐释以及对调解现象的论述，非常值得一读。

因此，习惯于从事诉讼和仲裁的从业者，不应寻求将其自身的职业技能、工作模式和思维习惯带给或强加给调解这样的新兴程序。他们应该摒弃那些有关争议解决方式的先入为主的陈见，并学习新的程序。调解并不仅仅是运用常识，这是一项值得学习且有报偿的新技艺。那些无论从事何种争议解决的人们需要警惕并确保调解（可能与法律程序相结合而得力使用）保持它的活力、简洁性和有效性。极简主义的“少即多”[21]，不仅可以用在建筑学和清晰表达上，现在用在争议解决领域也似乎颇为恰切。

[21] Mies van der Rohe

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Rhys was trained and accredited as a mediator by the Centre for Effective Dispute Resolution (CEDR) in 1998. Since then he has over nearly 20 years played a pivotal role initially in the establishment and use of mediation in the maritime field in England and Wales. He has "***a formidable reputation in the mediation marketplace***" (Sir Henry Brooke, then Chairman of the Civil Mediation Council in the United Kingdom).

Rhys was a co-founder of The *Maritime Solicitors Mediation Service* (in 2003), which he administered until 2018, and of *Seamediation Chambers* co-founded in 2015. He is listed, for example, on the Panel of Distinguished Neutrals of *CPR: the International Institute for Conflict Prevention and Resolution* in New York.

Rhys is the original architect of and contributing author in *"Alternative Dispute Resolution in Practice"*, published by the Institute of Insurance of London in 2011, primarily directed to the insurance and reinsurance market, but with substantial generic content.

Rhys has published numerous bulletins, articles and papers on maritime law, insurance and dispute resolution (the latter particularly on mediation), published and republished, nationally and internationally in multiple languages. He is a highly regarded public speaker. He has spoken widely internationally (in Europe, Scandinavia, North America, South America, India, Middle East), in a huge number of private and public forums (sample feedback***..."absolutely first class"***).

He has nearly 40 years' experience of commercial litigation and arbitration, with a particular emphasis on marine and non-marine insurance and reinsurance matters and disputes covering a wide range of risks. He heads a dedicated team within the Marine Trade and Energy division of the Business Services Group of Penningtons Manches Cooper LLP, based in the City of London. The work of the team is focussed on insurance and reinsurance, predominantly marine, and related risks including political violence, terrorism and kidnap & ransom.

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