MEDIATION: THE NEXT TEN YEARS

Master, Ladies and Gentlemen,

1. It is a great honour to be asked to deliver the Master's Lecture this year in succession to a line of highly distinguished commentators. It is a particular honour to be receiving the hospitality of the Worshipful Company of Arbitrators tonight as a mediator. There was, I think, a period of rivalry. Mediation rather liked being the upstart, "the new kid on the ADR block". Indeed I recall speaking in a number of balloon debates directed to discovering which was best, mediation or arbitration. That seems absurd now. The arbitrator and the mediator do two different and complementary jobs. If I do nothing else tonight I am keen to put paid to the idea that mediation and Arbitration are in any sense competitors.

2. Arbitration and mediation have recognised that they have much to learn and much to gain from each other. Many arbitrators have now trained as mediators. The February edition of the Chartered Institute of Arbitrators Journal: "Arbitration" is published for the first time under its new title:

> "**The International Journal of Arbitration, mediation and Dispute Management**"

3. Appropriately this particular volume is a marvellous collection of some of the best writing about current mediation issues.

4. As the title of this lecture suggests this is to some extent an exercise in prophesy. I feel I should warn you that my previous attempts at soothsaying have not been uniformly successful. In an article in The Lawyer in 2004 which attempted to look ahead to the imminent judgments in the **Halsey v. Milton Keynes** case, I wrote this:

> "**Rumours circulated a few years back that some plucky counsel had sought to resist a a mediation order at a Case Management Conference by relying on**

> **the Human Rights Act. So far research suggests that this was a folk-tale…The idea that requiring parties to attend on a given day before a neutral facilitative mediator crosses some impermissible line and becomes an infringement of human rights simply seems wrong. The process barely delays at all their day in court, should they ultimately require one**"

5. The rest of course is history. When the judgment came out Dyson L.J. had reached the following very clear conclusion:

> "**It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court. ….it seems to us likely that compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a breach of Article 6."**

6. The ten year period of this evening's title was actually prompted by an announcement in "Out of Court", the ADR magazine published by HMCS:

> "**10 years of mediation at Central London was celebrated at an event at the Royal Courts of Justice on 10 October**…"

7. We have travelled far and fast in the last ten years. Where will be ten years hence?

8. Of course mediation, even in the UK, is more than ten years old. ADR was well-established in the United States by the 1970's. When I attended Law School there in 1978 alternative dispute resolution was being taught and discussed. (At that stage I did not have the wit to appreciate its value or significance.) In this country CEDR was founded as long ago as 1990. Family mediation has been well-established in this country for significantly longer than commercial mediation. It has evolved as an entirely separate discipline for reasons of history and because of the much stronger involvement of Government funding.

9. The particular areas I wish to consider as we try to look ten years ahead are these:

- Will the use of mediation grow or stagnate?
- To what extent will the Courts continue to encourage mediation? Will mediation become mandatory?
- Who will be conducting mediations?
- What degree and kind of regulation will Mediators be subject to?
- Will a move to a more evaluative style of mediation take place?

Any one of these would be worth at least an hour's exposition in its own right of course. Let's see how we get on.

Will the use of mediation grow or stagnate?

10. The use of a neutral facilitator to spend, typically, a day, with the parties in a mixture of private and joint sessions in order to explore possible settlements of disputes that either are or are about to be arbitrated or litigated is now a well-established part of the legal landscape. Mediation is used for both one-off civil disputes and continuing relationship cases. It is applied in a broad range of civil claims and disputes. These include insurance disputes, construction disputes, employment disputes, personal injury claims and medical negligence claims. In all of these areas mediation can now be said to be well-established.

11. Let me give two examples of areas where mediation is used to a growing extent, and where its application might not initially be obvious.

12. The Financial Services Authority (the FSA) uses mediation enthusiastically in order to reduce the cost and delay involved in its disciplinary proceedings. The FSA and the party being disciplined conduct, in effect, a form of plea-bargain using a mediator. The terms of the ruling to be accepted and the penalty (the level of fine or the length of a suspension) are thrashed out. If settlement cannot be achieved then the matter goes to a disciplinary tribunal.

13. Another area is competition law. One of the very few mediations that I am able to talk about directly is a mediation that I conducted for CEDR between the British Waterways Board and the British Marine Federation (the trade association representing marine and boating industry interests). BWB and BMF's members were squaring up for an immensely expensive piece of competition litigation. BWB was, and is, being encouraged by the Government not merely to act as a regulator and supervisor of the waterways but also to fund its activities and reduce the level of subsidy that it receives by engaging in commercial activities. These include the operation of inland marinas. Private marina operators were, and to some extent still are, extremely apprehensive about the participation of such an influential body not merely as effectively their regulator but as their competitor as well. The parties approached CEDR and I was appointed to mediate. The potential litigation was successfully settled. More than that under the terms of the settlement I then became chairman of a working party which at a series of meetings over a period of months developed a Fair Trading Code of Conduct. The two parties were rightly proud of what they had achieved.

14. So mediation is proving extremely adaptable. How many mediations take place per year? It is very hard to be sure. The last CEDR audit held in 2005 estimated some 2500 to 2700 taking place. Oddly enough a very similar figure was reached by International Financial Services in their survey of 2006, even though that was restricted to mediations taking place in London.

15. So far as trends are concerned CEDR's own year-on-year figures may be the most reliable guide: in the last four or five years CEDR mediations have conducted some 550 to 650 mediations per annum. Trade is very steady at around that level. Rumours occasionally sweep the bazaars to the effect that there has been "a surge after the **Dunnett v. Railtrack** decision" or that there was "a slump after **Halsey v. Milton Keynes**". The figures tell us that the last four to five years have been years of solid and reliable business. The core of the civil mediation activity we are talking about centres on the higher value civil cases, equating to High Court jurisdiction.

16. Mediation activity is also clearly centred on a relatively small number of individuals. The CEDR audit revealed that 34 individuals do over 50% of the

mediations in the country. That concentration is undoubtedly perpetuated by the directories, Legal 500 and Chambers, which are an even more important influence in this new and unfamiliar area of practice than they are in the general law and litigation.

17. Three or four years ago it was rare for any of the lay clients attending a mediation to have mediated before. We are clearly now getting repeat business. Clients say things (annoyingly) such as "We had David Shapiro last week. He was brilliant. So assertive …".

18. Another change from three or four years ago is that people were then speaking of exponential growth. Perhaps this was post-Woolf euphoria. The belief quite simply was that the idea of mediation was irresistibly good. We were all marching on to the sunlit uplands. The less exciting truth may be that this is in fact a sober period of hard work and consolidation.

19. For the next ten years I think we will be steaming steadily on. There is undoubtedly now a growing supply of experienced, confident and competent mediators who can deliver the product. Styles differ widely (even though most of them have undergone some variant of the CEDR model training developed by David Richbell and others). That very diversity is a huge strength of mediation. Individual mediators are now talked about for their individual styles, for a particular technique one uses, for another's charm, another's robustness.

20. This has been condemned as amounting to a star system. But even if there is a star system it seems to me that it gives vital profile to the profession. Those who market football in this country will tell you: a few stars with a high profile are what you need to get a buzz going. Every footballer in the country earns more today because of the high profile enjoyed by the Beckhams and the Rooneys at the top. The commercial bar knows about the value of an inner core of stars. It used to thrive on the buzz of Mustill and Rokison, and subsequently Grabiner, Pollock and Sumption. We have Naughton, Kallipetis, Willis and Andrewartha.

21. Not only does the mediation world enjoy the presence of some stars but it has even had a little bit of scandal. I have in mind the Christmas 2005 Legal Business attack on CEDR. (The article was actually an extremely good account

of how CEDR works. It made two particular criticisms of CEDR which attracted everybody's attention: broadly these were that the billing methods of CEDR were not transparent and that the clients of CEDR felt that they had too little influence over the choice of their mediator. For the record both these matters have now been substantially addressed by CEDR.) What is significant is not what the article said but that it was written at all. There is only one thing worse than being the subject of an attack in Legal Business and that is not being the subject of an attack in Legal Business. Mediation needs to be good copy every now and then. Nobody can sell newspapers by reporting that mediators are all of a uniformly competent standard and their business practices are wholly unexceptionable

22. Another vignette: I recall the POCA "riot" of 2005. This was the first occasion on which I saw the mediation community at its roused and energetic best. Mediators were extremely apprehensive, indeed angry about the apparent need for them to notify the National Criminal Intelligence Service about the mediations they were conducting as soon as any allegation of any form of fraud or criminality was alleged. (This was the perceived effect of section 328 of the Proceeds Of Crime Act 2002). The Civil mediation Council held a meeting at a West End hotel which was attended, bravely I thought, by a representative of the NCIS. He attended in order to explain that actually they got some quite useful information from Mediators and hoped that we weren't all finding notification too burdensome. However the mediators were implacable. The atmosphere was electric and the speeches were passionate. Perhaps it was a "coming of age". (The immediate concern over POCA is widely thought to have been removed by the Court of Appeal's judgment in **Bowman v. Fels**.) The event was unforgettable. I am proud to say I was there.

23. Well if there is an attractive, vigorous product available, does it have a market?

24. Let me turn straight to the insurance companies. Insurance companies are serial litigators. They have to deal with claims on policies, reinsurance disputes with one another and the control and defence of claims made against the holders of indemnity cover. Now in many ways the greatest challenge faced by any Mediator is to try to soften the hearts of twelve claims managers sitting around a

table, each trying to out-tough the others. But we have in insurance companies some of mediation's strongest supporters. They have decided that mediation is an acceptable way of controlling their colossal legal spend. They are good at mediating. They are comfortable with the technique. They will go on using it.

25. Outside the world of the professional litigator the experience of other customers of mediation is, they regularly tell us, also good and positive. Every customer is worried about fee levels, particularly in London. Today's Law Society Gazette headline tells the story:

"**In-House Rebellion Over City Fees Grows** …"

26. Like many of my colleagues I always begin mediations by writing up on a flip-chart the fees incurred to date by the two parties and the further fees that they will incur if they fight the matter through to a final resolution. Frequently the clients' jaws will hit the table at that point and stay there for the rest of the day.

27. It is inescapable that people like the experience of mediation and that we mediators like conducting them. Anywhere outside a courtroom the truth is allowed to be (and almost always is) paradoxical. This is no exception: for mediation's strength is that it is both special and ordinary.

28. Mediation is special because it is, I am now convinced, a skill. When I watch good mediators mediating, I can see their training and experience coming through and making a difference. A skilled and trained mediator can add value, of that I have no doubt.

29. When I say mediation is ordinary, I have in mind that in the most successful mediations the parties come to realise that they are not engaged in a difficult or mystical process, but in a process for which their ordinary every day experience perfectly equips them. Certainly there are more lawyers present than usual. An unusual figure called a mediator is in attendance. But commercial clients tend to know how to negotiate. They all know how to prioritise their different needs and interests. In many ways the task of the Mediator is to create an atmosphere in which they can relax, and do what comes naturally.

30. I recently mediated a wrongful dismissal claim brought by a very senior buying director at a major UK high street retail chain. She was extremely nervous and diffident about mediating her claim. But she was a woman who had spent the previous fifteen years flying around the world negotiating huge production and supply deals. Once she realised that the principles were effectively the same the mediation worked extremely well.

31. I often think that the sign that the parties are beginning to relax into the process is when they start to swear. If people swear in the course of their ordinary commercial lives why not in mediation? I recall the shortest ever opening statement that I have heard made in a mediation. The Defendant's representative listened to the Claimants opening remarks and then, when they had finished, rose to his feet, said "f*** off, a*****le" and stormed out. We settled that case 12 hours later; and in part we settled it because he had released all of his tension and freed himself to concentrate on a constructive solution.

32. Over the next 10 years mediation will not stagnate but will continue to enjoy sure and steady progress.

To what extent will the Courts continue to encourage mediation? Will mediation become mandatory?

33. So far as court encouragement of mediation is concerned, the orthodox picture is that the current level of encouragement (broadly speaking **Dunnett** fleshed out and modulated by **Halsey**) sets the level of encouragement about right. Essentially the encouragement consists of a costs sanction for those who unreasonably refuse to participate in mediation. Orthodoxy goes on to say that nobody should want to move to compulsion because the essence of mediation is that it is voluntary and it could never enjoy its present levels of success if parties were forced to take part.

34. Let me just take a moment to sow some seeds of doubt in relation to the orthodox view.

35. I was sitting in the Apostrophe coffee bar discussing mediation with a senior DCA official. (The role of the Apostrophe coffee bar in modern civil procedure and dispute resolution is another area of discussion to which I cannot do full

justice this evening.) He paused, looked across at the Royal Courts of Justice and said in a breathless whisper, "Do you have any idea how much that building costs to maintain?". It occurred to me at that time that if that was the view in the DCA, goodness knows what the Treasury thought about matters. We know the kind of financial constraints the court service is working under. His Honour Judge Collins recently spoke of a crisis of competence in the County Courts which he blamed squarely on inadequate funding. My belief is that there is a degree of impatience that the big idea of mediation is simply not catching on fast enough to reduce all these costs. That is likely at some stage to turn the tide in the direction of compulsion. (At some point, of course, we will have to deal with Dyson L.J. and Article 6 of the European Convention. But I am bound say I am still arrogant enough to think that the Article 6 argument is wrong and that when the arguments are properly put there will be held to be no breach of Article 6 in orders compelling mediation.)

36. We need to be aware too that compulsion is a lot closer than 10 years away; in some parts of our legal system it has already arrived. . Parties to a financial dispute taking place pursuant to a divorce have to attend an FDR, a Financial Dispute Resolution, hearing. This is to all intents and purposes a mediation conducted by a Judge at which the parties have to explain what offers they have made (and will make) to each other. Their positions are evaluated and commented upon by the Judge. That Judge is thereafter excluded from any involvement in deciding the case, should a full hearing be necessary and should no settlement be achieved. These are immensely effective and worthwhile hearings and now form an indispensable part of the system. But they are to all intents and purposes mandatory.

37. Next the County Courts. There can be no doubt that mediation can and should be moved downmarket away from the High Court jurisdiction into the County Courts. One of the key lessons of the pilots that have been conducted is that if you give parties the option to challenge a requirement to mediate at a suitability hearing they will often take it and will often spend disproportionate amounts of money arguing about whether to mediate or not. This in cases where a full blown mediation would itself cost a great deal measured against the sums in issue. In other words where a mediation may itself already be of a borderline

cost-effectiveness, to provide the parties with the machinery to debate whether to mediate or not looks like a serious extravagance.

38. Then employment tribunals. These tribunals are experiencing a rapidly increasing burden of business. More claims are being brought and they are taking longer to decide. There can be no doubt that the Better Regulation Commission (who are presently considering how to deal with spiralling cost and delay in these tribunals) will be looking closely at the New Zealand experience. In New Zealand it is a threshold requirement of going to an industrial tribunal that a party has to go through mediation. It is entirely possible that compulsory mediation will become part of the industrial tribunal system in the same way.

39. Of course there are many overseas examples, many states of the EU, the United States of America and Australia where the broader civil jurisdiction employs mandatory mediation. It is often difficult to find in any research done in these jurisdictions any justification for the view that compulsory mediation is less successful. We have all mediated cases in situations where the parties may both come with extreme reluctance, perhaps compelled to attend by a robust Judge or by the terms of an escalation clause in their contract. Yet when the process begins and they begin to see the possibilities they are drawn in and they start to negotiate. Lo and behold, they settle.

40. It seems to me that the grip of orthodox view is becoming progressively weaker and that the trend towards compulsion can only strengthen over the next ten years.

Who will be conducting mediations?

41. The question of "who is going to mediate?" takes us straight away to Manchester and to the small claims court there. The DCA report of September 2006, "An evaluation of the small claims mediation service at Manchester County Court", is being treated by many in the mediation community as the most significant development for many years. The DCA give every impression of regarding it as their vision of the future It records the work of James Rustidge, a former police officer who has received no mediation training that either CEDR or the Chartered Institute would recognise. He was employed to provide a free

mediation service at the Manchester Small Claims Court during the 12 months to May 2006. He conducted 121 mediations with an 86% success rate. It is clear that well before the end of the pilot period he was rarely meeting the parties on a face to face basis and was dealing with matters almost entirely by telephone.

42. So does this represent the future of mediation? Are we going to become bureaucratised? Is mediation going to be turned into a phone call or two? There are real concerns here. When parties are telephoned by "the court" and asked to discuss resolving the case are fully aware that they do not have to settle? Are they fully aware of the mediator's role and the nature of the process? Are they truly aware that the Judge is not involved in the discussion and will know nothing about the negotiations? (I note that those who undergo FDR hearings often seem confused by the different roles of the FDR Judge and the Judge who subsequently decides the case.)

43. Clearly we should not be too precious about this. I would not choose to give up the contact I have with the parties to my mediations. I do use phone calls frequently in the course of mediating, but this only works because I have held face to face meetings already and I am talking to people with whom a relationship has been established. Equally I am not mediating small claims in Manchester. By comparison I am doing the easy stuff. I have plenty of time. I am talking to the parties about the case over smoked salmon sandwiches in a partners' dining room in the City.

44. The acid test, for the paymasters anyway, is "does this new approach work?" The Manchester success rates seem to speak for themselves. They may ask "would you rather these cases went to trial?"

What degree and kind of regulation will Mediators be subject to?

45. Turning to regulation I am bound to note that Arbitrators aren't regulated at all. Anybody can arbitrate. The way they arbitrate is regulated by a statutory scheme. But if I can find somebody to hire me, then I can arbitrate. From that point of view it almost seems unfair that advanced discussions are still taking place about

imposing a regulatory regime on us Mediators. After all, it is not as if mediators can order anybody to do anything.

46. One reason for the difference is that, as I have already noted, mediation is likely to be tried and applied in disputes involving the consumer and disputes of lower value. There is a perception that in areas of this kind the free market is an inadequate safeguard and the quality and consistency of service has to be guaranteed in other ways. If we were only ever going to mediate with Microsoft and IBM then I think nobody would be talking about regulation.

47. The CMC is running a pilot programme for the accreditation of providers. They list on their website the providers, such as CEDR and the Chartered Institute, who currently satisfy their accreditation criteria. Thus, if you are a Mediator who works through a provider (and approximately half of the mediations conducted in this country are reckoned to be conducted through panels or providers in this way) then you are indirectly regulated already. No regulation at all presently affects those of us who are independent. The European directive on mediation was at one stage thought to be a potential source of this kind of initiative. But the latest draft I have seen only speaks of the need for governments to promote voluntary codes of conduct in order to ensure standards and quality.

48. If court-imposed mediation becomes a stronger force then regulation may come with it. It is also the case that the Courts will become increasingly involved around the edges of mediation. Issues of privilege are already bubbling up. Only this morning I was appearing before a Chancery Master arguing about the privilege that protects the documents produced for the purposes of the mediation on behalf of a fellow Mediator. The US experience tells us that there will be mediation-based litigation in a number of areas, not least the potential civil liability of the Mediator and the validity of any contractual exclusions.

Will a move to a more evaluative style of mediation take place?

49. It is often said that the mood is changing towards a more evaluative style of mediation and that this is what our customers want. I don't agree. I am firmly convinced that the Mediator has to stay out of the arena. The distinction

between remaining impartial on the merits and vigorously testing out the realities of a party's position may seem cosmetic, but it is absolutely vital. The mediator needs to prepare, he needs to understand the case, he needs to help the parties analyse their strengths and weaknesses. But he needs to stress throughout the process that if the parties actually want to know the answers, then they must go to the Court or the Tribunal to get them. What the customers actually want is a mediator who is tougher and more evaluative, but only with the other side.

50. What I think is increasingly common is that the techniques of Arbitration and mediation can be mixed and matched. (I am not talking about Med-Arb where the same individual switches between the roles of conciliator and arbitrator. That seems fraught with difficulty.) Frequently, in the course of a mediation it becomes clear that there are one or two decisive issues dividing the parties that will in truth determine the outcome of the entire dispute. Such an issue has recently arisen in a mediation being conducted by a colleague. I am now conducting an urgent, time-limited arbitration of that single point. The mediation will resume once I have given my ruling on that issue. Perhaps that is an attractive example of these two great professions working together provides a fitting conclusion tonight.

Concluding thoughts

51. I have spared you the "mediation will save the world" message that sometimes gets aired in this kind of context. I recall hearing at one mediation conference that mediation will ultimately move us all away from a confrontational view of law to the extent that case names would no longer be "**X v Y**" but instead would be more like "**X and Y working together on a shared problem**" Personally I think that that particular shift is rather more than 10 years away.

52. Let me wrap up with some more prosaic but I hope provocative predictions.

53. In ten years time mediation will be compulsory as a threshold condition of litigation almost everywhere. This may even be true in high value, High Court level civil claims. Success rates might be dropping slightly as a proportion but the total number of successful mediations will have gone up because at least some

cases capable of settling will have been brought into the mediation arena. Mediators will only be able to sell their services if they are accredited and regulated under a statutory or semi-statutory scheme.

54. To cope with the extra throughput and the spread of mediation of low value cases there will be increasing use of quick and dirty mediations, where the parties may not even meet, but merely communicate indirectly and by telephone call. Many of these will be conducted by a salaried civil servant rather than by a Mediator appointed **ad hoc**.

55. If that is a utopian vision for you, then all well and good. If it is an Orwellian vision then you need to get on and do something about stopping it.

56. Ladies and Gentlemen, when Mao Tse Tung was asked what he thought the principal consequences of the French Revolution had been, he famously replied that it was too early to say. By those standards, perhaps by any standards, these have been rash and speculative thoughts. But I have enjoyed the exercise and I hope some of this may provoke discussion.

WILLIAM WOOD QC