

Resolving Financial Disputes in the Context of Global Civil Justice Reforms

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Abstract

In recent years, many countries have increased their use of alternative mechanisms of dispute resolution to resolve a growing number of financial and commercial disputes. This trend has been supported by civil justice reforms including those within the United Kingdom, Hong Kong, Australia, and Canada. The United States, while a common law jurisdiction, nevertheless has seen the growth of appellate mediation programs based on Rule 33 of the Federal Rules of Appellate Procedure. Such reforms have aimed at encouraging cost effective, expeditious and amicable case handling within the civil justice system. Drawing on comparative cross-jurisdictional analysis, this paper reviews the scope and nature of such reforms and examines lessons learned including the implementation of regular evaluation to fine-tune mediation rules in order to maximize their effectiveness.

Keywords: Financial dispute, civil justice reforms.

Introduction

Global civil justice reforms including those within the United Kingdom, Hong Kong, Australia, and Canada have supported the increased use of alternative mechanisms of dispute resolution to resolve a growing number of financial and commercial disputes. The United States, while a common law jurisdiction, nevertheless has seen the growth of appellate mediation programs based upon Rule 33 of the Federal Rules of Appellate Procedure. Such reforms have aimed at encouraging cost effective, expeditious and amicable case handling within the civil justice system.

Part 1 of the paper will analyze the increasing use of mediation to resolve financial disputes. Part 2 will review global civil justice reform activities in five jurisdictions and examine how courts are being empowered to award adverse costs consequences for parties that unreasonably refuse to attempt mediation. Drawing on comparative cross-jurisdictional analysis, Part 3 will examine the lessons learned from the process of implementing such reforms including the implementation of regular evaluation to fine-tune mediation rules in order to maximize their effectiveness.

Part 1: Increasing Use of Mediation to Resolve Financial Disputes

Since the mid 2000's, the use of mediation and other alternative forms of dispute resolution to resolve financial and commercial disputes has increased in many regions of the world. This increase can largely be attributable to Civil justice reforms in the United Kingdom, Hong Kong, Australia and Canada. In the United Kingdom, the Financial Ombudsman Service ("FOS") which was established in 2006 has received an increase in complaints due to recent financial turmoil.¹ Where informal settlements fail, the FOS may set up more detailed investigations including an 'appeal' to one of their panel of ombudsmen for a final decision.² In 2008/2009 financial year, 51% of complaints were resolved via mediation, 41% via adjudication and only 8% by a formal review carried out by an ombudsman to make a final decision.

In Hong Kong, aggrieved investors of the failed Lehman "mini-bonds" have largely attempted mediation or arbitration through the Hong Kong International Arbitration Centre (HKIAC). Such alternatives to suing respective banks for misrepresentation are attractive, given that in most cases, claims that exceed the \$50,000 limit set by the Small Claims Tribunal, are required to use lengthy and costly court proceedings³.

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¹ Annual Review Financial Ombudsman Service. Rep. UK: Financial Ombudsman Service, 2009. pg 7

² FOS, supra n. 19

³ The Standard, supra n.3

The Australian Financial Ombudsman Service recorded a 52% increase in disputes between January and the end of April 2009 compared to 2008.⁴ In light of the recent financial crisis, the Australian Securities and Investment Commission (ASIC) has revised its Early Dispute Resolution scheme and increased the upper limit of compensation to AUS\$500 000⁵. It has also implemented other changes to improve consumer access such as giving EDR schemes the power to award interest in addition to compensation awards where appropriate.⁶ In the United States, the use of alternative dispute resolution in the financial arena has largely been in the area of securities as well as refinancing negotiations. The Financial Industry Regulatory Authority (“FINRA”) offers investors the option to resolve disputes via mediation or arbitration.⁷

Given the growth in the number of cases brought to mediate financial disputes, it is necessary to investigate the wider judicial environment encouraging the use of mediation to resolve civil disputes. The following sections will examine recent reforms in the United Kingdom, Hong Kong, Australia, Canada and the United States.

Part 2: Review of Global Civil Justice Reforms

Global civil justice reform activities in the United Kingdom, Hong Kong, Australia, Canada and reforms at the Federal level in the United States have empowered courts to encourage the use of mediation in a growing number of civil and commercial cases. This next section examines the background and development of such reforms.

United Kingdom

The UK Civil Procedure Rules came into force in April 1999 as a result of the Woolf Reforms. Prior “to the implementation of these reforms, mediation was viewed by the legal profession as an “alternative” tool in their litigation armoury. It was usually invoked only in cases where clients wished to settle or where there was a strong commercial imperative to settle.”⁸ The Woolf Reforms emphasized the early settlement of disputes through pre-action protocols, the court’s active case management powers, and adverse costs consequences if parties unreasonably refused to attempt negotiation or consider alternative dispute resolution. The UK courts have recognized their duties to encourage the use of alternative dispute resolution. Lord Woolf stated in *Cowl and others v Plymouth City Council*⁹ that “the importance of this appeal is that it illustrates that, even in disputes between public authorities and the members of the public for whom they are responsible, insufficient attention is paid to the paramount importance of avoiding litigation whenever this is possible.”¹⁰ This case will have served some purpose if it makes it clear that the lawyers on both sides of a dispute of this sort are under a heavy obligation to resort to litigation only if it is really unavoidable” and that information should be provided about ADR to make “failure to adopt it, particularly when public money was involved, indefensible.”¹¹

Post Woolf Reforms, UK courts are empowered to impose costs sanctions on parties which unreasonably refuse to mediate. In *Dunnett v Railtrack plc (in administration)*¹² the Court of Appeal refused to award costs to the successful party on the ground that the successful party refused to mediate. The Court of Appeal, during the hearing of the application for leave to appeal, advised both parties that they should consider the use of alternative dispute resolution methods. The claimant suggested to the defendant that they should attempt mediation, but the defendant “instructed their solicitors to turn it down flat. They were not even willing to consider it.”¹³ The claimant’s appeal was eventually dismissed. Nevertheless, Brooke LJ, when dealing with the costs of the appeal, stated that “it appears to me that this was a case in which, at any rate before the trial, a real effort should have been made by way of alternative dispute resolution to see if the matter could be satisfactorily resolved by an experienced mediator, without the parties having to incur the no doubt heavy legal costs of contesting the matter at trial.”¹⁴

⁴ [Financial Ombudsman Service 2009 National Conference](#), Proc. of Financial Services - the changing landscape, Australia, Melbourne. 11 June 2009. Australian Securities and Investments Commission.

⁵ [http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/FOS_speech-11Jun09.pdf/\\$file/FOS_speech-11Jun09.pdf](http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/FOS_speech-11Jun09.pdf/$file/FOS_speech-11Jun09.pdf)

⁶ Ibid

⁷ Ibid

⁸ “FINRA - Dispute Resolution Statistics.” *FINRA - Home Page*. Aug. 2010. Web. 10 Oct. 2010.

⁹ <http://www.finra.org/ArbitrationMediation/AboutFINRADR/Statistics/>

¹⁰ Lind, M. (2002). In the matter of: ADR v CPR. *New Law Journal*, 152.7049(1430).

¹¹ [2001] EWCA Civ 1935.

¹² [2001] EWCA Civ 1935.

¹³ [2001] EWCA Civ 1935.

¹⁴ [2002] 2 All ER 850.

[2002] 2 All ER 850.

[2002] 2 All ER 850.

[2002] 2 All ER 850.

He then referred to Rule 14 of the Civil Procedure Rules which states that:“(1) The court must further the overriding objective by actively managing cases. (2) Active case management includes ... (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure ...”¹⁵

He also referred to the notes to Rule 14 stated in the White Book, which states that,

“the parties ... have a duty to consider seriously the possibility of ADR procedures being utilised for the purpose of resolving their claim or particular issues within it when encouraged by the court to do so. The discharge of the parties’ duty in this respect may be relevant to the question of costs because, when exercising its discretion as to costs, the court must have regard to all the circumstances, including the conduct of all the parties.”¹⁶

He then observed that parties themselves and their lawyers both had a duty to further the overriding objective and recognized the importance of mediation. The Court, after considering all the circumstances of the case, ordered that there be no order as to costs of the appeal, i.e. the successful party could not recover their legal costs from the losing party¹⁷.

Dunnett v Railtrack plc (in administration) is the first case where a successful party was ‘punished’ by way of costs because they declined to mediate.¹⁸ It is worth noting that Brooke LJ stated in his judgment that “it is to be hoped that any publicity given to this part of the judgment of the court will draw the attention of lawyers to their duties to further the overriding objective in the way that is set out in CPR Pt 1 and to the possibility that, if they turn down out of hand the chance of alternative dispute resolution when suggested by the court, as happened on this occasion, they may have to face uncomfortable costs consequences.”¹⁹ The message from the Court of Appeal is clear – parties should seriously consider using alternative dispute resolution methods (usually mediation) to resolve their dispute.²⁰

Most of the cases following *Dunnett v Railtrack plc (in administration)* also adopt a pro-ADR approach – examples include *Hurst v Leeming*²¹, *Leicester Circuits v Coates Brothers*²² and *Royal Bank of Canada Trust Corporation v Secretary of State for Defence*²³. For example, in *Hurst v Leeming*, Mr Justice Lightman stated that,

“mediation is not in law compulsory, but alternative dispute resolution is at the heart of today’s civil justice system, and any unjustified failure to give proper attention to the opportunities afforded by mediation, and in particular in any case where mediation affords a realistic prospect of resolution ..., there must be anticipated as a real possibility that adverse consequences may be attracted.”²⁴

In *Halsey v Milton Keynes General NHS Trust*²⁵, the UK Court of Appeal appeared to have retreated from its pro-ADR stance. The question which required the Court of Appeal’s determination in the case was in what circumstances the court should impose a costs sanction against a successful litigant on the ground that he has refused to take part in an alternative dispute resolution procedure.

Lord Justice Dyson first commented on whether courts should order the parties to resort to mediation to resolve their disputes:

“It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so... If a judge takes the view that the case is suitable for ADR, then he or she is not, of course, obliged to take at face value the expressed opposition of the parties. In such a case, the judge should explore the reasons for any resistance to ADR. But if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it.”²⁶

¹⁵ Rule 14, UK Civil Procedure Rules, 1999.

¹⁶ Id.

¹⁷ It should be noted that the successful party can usually recover their legal costs because “costs follows the event”.

¹⁸ [2002] 2 All ER 850.

¹⁹ [2002] 2 All ER 850.

²⁰ [2002] 2 All ER 850.

²¹ [2002] All ER (D) 135 (May).

²² [2003] EWCA Civ 290.

²³ [2003] EWHC 1841.

²⁴ [2002] All ER (D) 135 (May).

²⁵ [2004] 1 WLR 3002.

²⁶ [2004] 1 WLR 3002.

Lord Justice Dyson then went on to address in what circumstances the court should impose a cost sanction against a successful party on the ground that he has refused to take part in mediation. He first pointed out that “in deciding whether to deprive a successful party of some or all of his costs on the grounds that he has refused to agree to ADR, it must be borne in mind that such an order is an exception to the general rule that costs should follow the event. In our view, the burden is on the unsuccessful party to show why there should be a departure from the general rule.”²⁷ He then stated that there was no general presumption in favour of mediation and that “the question whether a party has acted unreasonably in refusing ADR must be determined having regard to all the circumstances of the particular case.”²⁸ Lord Justice Dyson listed six non-exhaustive factors²⁹ which the court would consider when deciding whether a party has unreasonably refused ADR, namely: the nature of the dispute; the merits of the case; the extent to which other settlement methods have been attempted; whether the costs of ADR would be disproportionately high; whether any delay in setting up and attending the ADR would have been prejudicial; and whether ADR had a reasonable prospect of success.³⁰ All of these factors have to be considered and no single factor can be regarded as decisive.

The Court of Appeal also explained why the burden of proving an unreasonable refusal should lie on the unsuccessful party. As Lord Justice Dyson stated,

“in our judgment, it would not be right to stigmatise as unreasonable a refusal by the successful party to agree to a mediation unless he showed that a mediation had no reasonable prospect of success... It seems to us that a fairer balance is struck if the burden is placed on the unsuccessful party to show that there was a reasonable prospect that mediation would have been successful. This is not an unduly onerous burden to discharge: he does not have to prove that a mediation would in fact have succeeded. It is significantly easier for the unsuccessful party to prove that there was a reasonable prospect that a mediation would have succeeded than for the successful party to prove the contrary.”³¹

This case provides some guidelines on what the court will consider when deciding whether a cost sanction should be imposed on a successful party on the ground that he has refused to take part in mediation. The UK Court of Appeal also appears to recognize that mediation is not suitable for every single case and that a party should be given the right of refusal when faced with a mediation proposal. Cases decided after *Halsey v Milton Keynes General NHS Trust*, however, appear to have switched back to a pro-ADR approach. For example, in *Burchell v Bullard & Ors*³², the Court of Appeal maintained a robust approach and supported the use of mediation – Lord Justice Ward, after considering whether the *Halsey* factors applied to that case, stated that,

“Halsey has made plain not only the high rate of a successful outcome being achieved by mediation but also its established importance as a track to a just result running parallel with that of the court system. Both have a proper part to play in the administration of justice. The court has given its stamp of approval to mediation and it is now the legal profession which must become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediate. The parties cannot ignore a proper request to mediate simply because it was made before the claim was issued. With court fees escalating it may be folly to do so... These defendants have escaped the imposition of a costs sanction in this case but *defendants in a like position in the future can expect little sympathy if they blithely battle on regardless of the alternatives* [emphasis added].”³³

Although the Court did not impose a costs sanction in this case because the defendant’s refusal to mediate predated major cases on costs sanctions such as *Dunnett v Railtrack* and *Halsey*, the Court of Appeal made it clear that courts would impose costs sanctions on parties who unreasonably refuse to mediate after the Woolf Reforms. With such a message in mind, it is indeed not surprising that the number of people who are willing to use and who actually use mediation to resolve disputes in civil and commercial cases is on the rise³⁴.

²⁷ [2004] 1 WLR 3002.

²⁸ [2004] 1 WLR 3002.

²⁹ [2004] 1 WLR 3002.

³⁰ [2004] 1 WLR 3002.

³¹ [2004] 1 WLR 3002.

³² [2005] EWCA Civ 358.

³³ [2005] EWCA Civ 358.

³⁴ According to the Fourth Mediation Audit published by the Centre for Effective Dispute Resolution, the mediation market in the UK has “*continued to grow with approximately 6,000 mainstream commercial and civil cases mediated in the last year* [i.e.2009].”

Hong Kong – Recent Reforms

Reform of Hong Kong's civil justice system has come into force on 2 April 2009. Among the most significant reforms is the introduction of "underlying objectives" in the Rules of the High Court (Cap. 4A). These underlying objectives aim at, amongst other things, increasing the cost-effectiveness of any practice and procedure to be followed in relation to proceedings before the Court, ensuring that a case is dealt with as expeditiously as is reasonably practicable and facilitating the settlement of disputes. In order to implement these underlying objectives, the Court is now expected to encourage parties to use an alternative dispute resolution procedure if the Court considers that appropriate. Further, a new Practice Direction on Mediation has come into force in Hong Kong on 1 January 2010. It sets out the procedures for commencing mediation and provides for adverse costs consequences if a party unreasonably refuses to attempt mediation. It is expected that mediation will be increasingly popular in Hong Kong with the implementation of this Practice Direction and related changes in the court rules.

Reform of Hong Kong's civil justice system has been discussed since the turn of the century, and changes to the relevant legislation were finally implemented in April 2009. These changes are very detailed, lengthy and numerous. However, the most fundamental one is the introduction of "underlying objectives" in the Rules of the High Court (Cap. 4A). The following "underlying objectives" have been added to the Rules of the High Court³⁵: increasing cost-effectiveness; ensuring that a case is dealt with as expeditiously as is reasonably practicable; promoting a sense of reasonable proportion and procedural economy in the conduct of the proceedings; ensuring fairness between the parties; facilitating settlement of disputes; and ensuring that the resources of the court are distributed fairly.³⁶ Similar "overriding objectives" were introduced in the revised UK Civil Procedure Rules as a result of the civil justice reform in the UK. It should be noted that courts in the UK are given discretion to interpret these overriding objectives and to apply them liberally to individual cases. A similar approach is expected to be adopted by the Hong Kong courts.

In order to implement these objectives, courts in Hong Kong are expected to actively manage cases. Examples of how the courts can actively manage cases include³⁷: encouraging the parties to cooperate with each other in the conduct of the proceedings and to use an alternative dispute resolution procedure if the Court considers that appropriate, and facilitating the use of such a procedure; fixing timetables or otherwise controlling the progress of the case; helping the parties to settle the whole or part of the case; and giving directions to ensure that the trial proceeds quickly and efficiently.³⁸

It is also stated in Order 1B, rule(1)(2)(l) that the Court may take any other steps or make any other orders for the purpose of managing the case and furthering the underlying objectives set out in Order 1A. With the implementation of these underlying objectives, parties to a dispute are now encouraged to use alternative dispute resolution methods to settle their dispute. Among the more popular methods is mediation. Mediation is a voluntary process in which a trained and impartial third person, the mediator, helps the parties in dispute to reach an amicable settlement that is responsive to their needs and acceptable to all sides³⁹. In view of the underlying objective to facilitate the "settlement of disputes" and the court's case management power to encourage the parties to "use an alternative dispute resolution procedure", it is expected that the court will increasingly encourage the use of mediation.⁴⁰ As stated above, a new Practice Direction on Mediation has come into force in Hong Kong on 1 January 2010. This Practice Direction provides clear guidelines on what the parties should do to enable the Court to exercise its active case management powers and to further the implementation of the underlying objectives. Firstly, in proceedings where the parties are legally represented, it is now mandatory for solicitors of both parties to file a "Mediation Certificate"⁴¹ setting out whether the party whom the solicitor is representing is willing to attempt mediation or the reasons it is not willing to do so.

³⁵ Rule 1A of the Rules of the High Court.

³⁶ Rule 1A of the Rules of the High Court.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Hong Kong Judiciary, *Mediation FAQs*, retrieved from http://mediation.judiciary.gov.hk/en/mediation_faq.html#01.

⁴⁰ Hong Kong Judiciary, *Mediation FAQs*, retrieved from http://mediation.judiciary.gov.hk/en/mediation_faq.html#01.

⁴¹ Appendix B to the Practice Direction on Mediation.

Secondly, the Practice Direction spells out the steps a party (the applicant) should take to commence mediation – the applicant should serve a “Mediation Notice”⁴² on the other party (the respondent) informing the respondent that the applicant wishes to use mediation to resolve the dispute (or part of it) between the parties. The Mediation Notice should also include proposals as to who the mediator should be, when and where the mediation should take place, what qualifies as a minimum level of participation,⁴³ and whether the applicant’s willingness to mediate is conditional upon an interim stay of the court proceedings being granted.⁴⁴ Upon receiving the Mediation Notice, the respondent should respond by way of a “Mediation Response”⁴⁵ within 14 days. This Mediation Response should state whether the respondent agrees to use mediation to attempt to resolve the dispute (or part of the dispute) and whether the respondent agrees with the proposals put forward by the applicant in relation to the choice of mediator, time and venue of the mediation session and stay of proceedings.

If the parties agree on the conduct of the mediation, they then record their agreement in the form of a “Mediation Minute,” which should be signed by the parties or their solicitors. However, if agreement cannot be reached between the parties, they may apply to the Court jointly⁴⁶ for directions. The mediation contemplated by the Practice Direction is, therefore, not an entirely court-free process, as the parties may apply to the Court for directions in relation to the mediation. Further, the parties are required to file the Mediation Notice, Mediation Response and the Mediation Minute with the Court.⁴⁷

Thirdly, the Practice Direction provides for adverse cost consequences if a party unreasonably refuses or fails to attempt mediation.⁴⁸ Paragraph 5 of the Practice Direction elaborates on what “unreasonable failure to engage in mediation” means:

If a party has engaged in mediation to the minimum level of participation agreed to by the parties or as directed by the Court prior to the mediation in accordance with paragraph 13 of the Practice Direction, the Court will not make any adverse costs order against a party on the ground of unreasonable failure to engage in mediation; Further, the Court will not make an adverse costs order if a party has a reasonable explanation for not engaging in mediation, for example, if active without prejudice settlement negotiations are progressing between the parties or if the parties are actively engaged in some other form of alternative dispute resolution method to resolve the dispute.⁴⁹

In a recent Hong Kong Court of Appeal case⁵⁰, *iRiver Hong Kong Limited v Thakral Corporation (HK) Limited*⁵¹, the Court of Appeal made a comment on the use of alternative dispute resolution methods. Yeung JA stated at the end of his judgment that “before we leave this case, we wish to observe that this is a typical case where parties should have explored resolution of their disputes by mediation. The total damages are just over \$1 million. However, we are told that the total legal costs incurred by the parties, including costs of this appeal, run up to about \$4.7 million. Apart from the usual attempts in settlement negotiation conducted by solicitors’ correspondence, the parties have not tried other means of alternative dispute resolution...”⁵² Yeung JA referred to several leading English cases which had commented on the benefits of mediation and stated that: “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... A mediator may be able to provide solutions which are beyond the powers of the court to provide.”

⁴² Appendix C to the Practice Direction on Mediation.

⁴³ This is relevant to the question of costs as will be explained below.

⁴⁴ Appendix C to the Practice Direction on Mediation.

⁴⁵ Appendix D to the Practice Direction on Mediation.

⁴⁶ If one of the parties is unwilling to apply to the Court for directions, the other party may apply to the Court for directions himself/herself - but in such circumstances, the Court may only make directions in respect of the time for filing a Mediation Response, the venue of the mediation session, the arrangement for payment of fees and costs of the mediation, the minimum level of participation and the time for commencing the mediation (Paragraph 13(2) of the Practice Direction on Mediation).

⁴⁷ Paragraph 15 of the Practice Direction on Mediation.

⁴⁸ Paragraph 4 of the Practice Direction on Mediation.

⁴⁹ Paragraph 4 of the Practice Direction on Mediation.

⁵⁰ The decision of this case was handed down on 8 August 2008, i.e. before the implementation of the new Orders 1A and 1B of the Rules of the High Court.

⁵¹ [2008] 4 HKLRD 1000.

⁵² [2008] 4 HKLRD 1000.

(*Dunnett v Railtrack*⁵³); mediation has “established importance as a track to a just result running parallel with that of the court system” (*Burchell v Bullard*⁵⁴); “all members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR” (*Halsey v Milton Keynes General NHS Trust*⁵⁵); and “mediation as a means to settle disputes has increasingly been recognised”. Mediation is a constructive process which can narrow down the differences between the parties although not all mediations eventually result in full settlement of the dispute between the parties – an example in which a mediation serves to narrow down the differences between the parties is *Chun Wo Construction & Engineering Co Ltd v China Win Engineering Ltd*⁵⁶. After citing these cases, Yung JA commented that “it is indeed regrettable that the parties in the present case have not had the good sense of trying to resolve their commercial dispute by a much more cost effective means.”⁵⁷

When referring to the Civil Justice Reform, in particular Orders 1A (relating to the new underlying objectives explained above) and 1B (relating to the Court’s case management powers) which would come into force in 2009, Yeung JA reminded that parties to a dispute and their lawyers should “have the above comments on ADR in mind in making attempts to resolve their dispute effectively.”⁵⁸ Although this case did not lay down any principles as to when the Courts will make adverse costs orders against parties who unreasonably refuse to mediate or when parties are expected to attempt mediation to resolve their disputes, the comments made by Yung JA demonstrate the attitude that the Court holds with respect to the use of mediation as an alternative dispute resolution method. The Court places great emphasis on the use of mediation and it is expected that the Court will take a strict approach when deciding whether to make an adverse cost order.

Canada

Canada, unlike the United Kingdom, has a federal system in which jurisdiction is divided between the federal government and its various states.⁵⁹ Both the federal government and the state governments can make laws within their assigned jurisdictions. Laws made by the state governments, however, only apply within the province’s borders. Each province in Canada has its own Rules of Civil Procedure. For the purpose of this paper, only the recent civil justice reform in the province of Ontario will be discussed. In 1994, Ontario established a Civil Justice Review Task Force “to develop an overall strategy for the civil justice system in an effort to provide a speedier, more streamlined and more efficient structure which will maximize the utilization of public resources allocated to civil justice.”⁶⁰ A review of the civil justice system in Ontario was needed because civil litigation in Ontario was too expensive and too slow. The time to trial for a civil case was on average five to seven years. Further, the average legal costs borne by each party was as much as CAD38,000.⁶¹

After extensive consultation, the Task Force published its First Report in March 1995 and a Supplemental and Final Report in November 1996 in which the Task Force made many recommendations on how to improve the civil justice system in Ontario.⁶² As regards to the use of alternative dispute resolution, the Task Force recommended, amongst others, “that there be mandatory referral of all civil, non-family, cases to a three hour mediation session, to be held following the delivery of the first statement of defence, with a provision for “opting-out” only upon leave of a Judge or Case Management Master...”⁶³

⁵³ [2002] 2 All ER 850.

⁵⁴ [2005] Build LR 330.

⁵⁵ [2004] 1 WLR 3002.

⁵⁶ HCCT 37 of 2006, 12 June 2008.

⁵⁷ [2002] 2 All ER 850.

⁵⁸ [2008] 4 HKLRD 1000.

⁵⁹ Department of Justice, Canada. *Canada’s system of justice*. Retrieved from <http://www.justice.gc.ca/eng/dept-min/pub/just/05.html>.

⁶⁰ Ontario Civil Justice Review. First Report of the Civil Justice Review (Toronto: Ontario Civil Justice Review, 1995) at pp3-4; Ontario Civil Justice Review. Supplemental Report and Final Report of the Civil Justice Review (Toronto: Ontario Civil Justice Review, 1996) at p2.

⁶¹ Beaudoin, Robert N. (March, 2006). Special Topic: Alternative Dispute Resolution: University of Windsor Mediation Services 10th Anniversary: Remarks on the Civil Justice Review Task Force. *Windsor Review of Legal and Social*, 21(5).

⁶² Ministry of the Attorney General. *Executive Summary*. Retrieved from <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/suppreport/exesummary.asp>.

⁶³ Ministry of the Attorney General. *List of Recommendations*. Retrieved from <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/suppreport/recommendations.asp>.

In January 1999, a new Rule 24.1 was introduced to Ontario's Rules of Civil Procedure on a trial basis. Rule 24.1 mandates early mediation for all non-family, civil case-managed cases filed in the Ontario Superior Court of Justice in Ottawa and Toronto, Ontario. This mediation pilot project was to carry on for 23 months, and thereafter evaluated on the following four major objectives of mandatory mediation under Rule 24.1⁶⁴: 1) does Rule 24.1 improve the pace of litigation?; 2) does Rule 24.1 reduce the costs to the participants in the litigation process?; 3) does Rule 24.1 improve the quality of disposition outcomes?; 4) does Rule 24.1 improve the operation of the mediation and litigation process? The key overall finding of the evaluation exercise was that:

“In light of its demonstrated positive impact on the pace, costs and outcomes of litigation, Rule 24.1 must be generally regarded as a successful addition to the case management and dispute resolution mechanisms available through the Ontario Superior Court of Justice in both Toronto and Ottawa.”⁶⁵

In addition to the improvements identified in some specific areas, the evaluation recommended that⁶⁶: 1) The Rule be extended for the current types of cases covered beyond July 4, 2001; 2) The Rule be amended, or other procedural changes be made in line with the findings in this report, as part of a process of continuous improvement of Rule 24.1; 3) The Rule be extended to other civil cases in Toronto and across the province as part of the expansion of case management.”⁶⁷ As a result of this evaluation, Rule 24.1, entitled “Mandatory Mediation”, was formally enacted into Ontario's Rules of Civil Procedure. The introduction of Rule 24.1, however, has had different impacts on different jurisdictions within Ontario.

In Toronto, the introduction of mandatory mediation caused undesirable effects in the first few years after implementation. As the Honourable Warren K. Winkler, the Chief Justice of Ontario, commented in a speech delivered at the University of Ottawa's Faculty of Law on 12 September 2007 entitled “Civil Justice Reform – The Toronto Experience,”⁶⁸

“the case management rules prescribed extremely short deadlines for conducting the mediation⁶⁹. However, in practice the parties would frequently not communicate or cooperate in scheduling the mediation session...As stated, a failure to agree to conduct the mediation within the time limits set out in the rule resulted in court staff assigning a mediator to the case... Not surprisingly, the vast majority of these forced early mediations did not result in settlement. The upshot of all of this was that the mediation became an unavoidable, costly and useless obstacle in the path of the party who wanted to move the lawsuit forward (normally the plaintiff).”⁷⁰

A Case Management Implementation Review Committee was established by the Toronto Regional Senior Justice to review the results of the mandatory mediation program in Toronto. The Committee suggested that mediation should only take place “when litigants have sufficient information to make an informed decision as to a fair resolution of the litigation and before legal costs preclude early and fair resolution.”⁷¹

⁶⁴ Hann, Robert G. and Baar, Carl (2001). *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Executive Summary and Recommendations* at p1.

⁶⁵ Hann, Robert G. and Baar, Carl (2001). *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Executive Summary and Recommendations* at p1. More specifically, the evaluation provides strong evidence that:

- Mandatory mediation under the Rule has resulted in significant reductions in the time taken to dispose of cases.
- Mandatory mediation has resulted in decreased costs to the litigants.
- Mandatory mediation has resulted in a high proportion of cases (roughly 40% overall) being completely settled earlier in the litigation process – with other benefits being noted in many of the other cases that do not completely settle.
- In general, litigants and lawyers have expressed considerable satisfaction with the mediation process under Rule 24.1.
- Although there were at times variations from one type of case to another, these positive findings applied generally to all case types – and to cases in both Ottawa and Toronto.”

⁶⁶ [2008] 4 HKLRD 1000.

⁶⁷ [2008] 4 HKLRD 1000.

⁶⁸ The Honourable Warren K. Winkler (2007). The Warren Winkler Lectures on Civil Justice Reform: Civil Justice Reform – The Toronto Experience. *Ottawa Law Review*, 39, p99.

⁶⁹ The old Rule 24.1.09 provides that “A mediation session shall take place within 90 days after the first defence has been filed, unless the court orders otherwise”.

⁷⁰ The Honourable Warren K. Winkler (2007). The Warren Winkler Lectures on Civil Justice Reform: Civil Justice Reform – The Toronto Experience. *Ottawa Law Review*, 39, p99.

⁷¹ Goldschmid, Robert M. (January, 2006). *Discussion Paper: Major Themes of Civil Justice Reform*, pp 16-17.

Retrieved from http://www.bcjusticereview.org/working_groups/civil_justice/cjrwg_paper_01_18_06.pdf.

The Committee also published statistics relating to the use of mediation. The statistics indicated that: the rate for partially settled cases dropped from about 20% to about 7% in 2003 and; the use of 60-day consent postponements of mediation increased from 31% in 1999 to about 54% in 2003 and orders for extensions increased from about 4% in 1999 to 40% in 2003⁷² As a result of the report published by the Committee and after extensive consultations with lawyers, judges, masters, mediators and court administrators both inside and outside of Toronto, the Superior Court of Justice of Toronto issued a new Practice Direction. This Practice Direction came into force on 31 December 2004 and provided that,

“mandatory mediation remains an integral component of the Ontario case management regime. Mediation continues to be mandatory for all cases but the timeframes for conducting them have been significantly extended, reflecting the adage that mediation is about “timing, timing, timing”. Parties are expected to conduct their mediations at the earliest stage in the proceeding at which it is likely to be effective, and in any event, no later than 90 days after the action is set down for trial by any party.”⁷³

After the implementation of the Practice Direction, the success rate of mandatory mediations had almost doubled.⁷⁴ It should be noted, however, that the experience in Ottawa was quite different from Toronto’s experience. Master Beaudoin of the Superior Court of Justice of Ottawa stated in March 2006 that,⁷⁵

“the implementation of these measures [including mandatory referral to mediation] has transformed our court from one with the worst delays to one of the most efficient courts in the province... Referral to mediation has consistently resulted in the settlement of 42.5% of our cases at the mediation session. If I take into account the “mediation factor,” 50% of our cases are resolved between the time of filing of the first defence and the settlement conference. While these settlement rates are important, they should not obscure an even more significant result. Whereas fewer than 10% of the litigants had any opportunity to participate in the dispute resolution process in the past, now, nearly 100% of all parties to a defended dispute have an opportunity to participate in a 3 hour mediation session where they do, in fact, get to tell their story... In summary, the case management system and mandatory referral to mediation in Ottawa have delivered faster, less costly and earlier resolution of civil disputes.”⁷⁶

After another round of civil justice reforms in December 2008, the time limit for conducting mediation was formally amended⁷⁷ – Rule 24.1.09 of the Ontario Rules of Civil Procedure now provides that, “a mediation session shall take place within 180 days after the first defence has been filed, unless the court orders otherwise.”⁷⁸ Further, there is no longer a restriction on the time allowed to postpone a mediation session by consent of the parties.⁷⁹ It remains to be seen whether these reforms will further increase the success rate of mediations in Ontario.

⁷² Goldschmid, Robert M. (January, 2006). *Discussion Paper: Major Themes of Civil Justice Reform*, pp 16-17. Retrieved from http://www.bcjusticereview.org/working_groups/civil_justice/cjrwg_paper_01_18_06.pdf.

⁷³ The Honourable Chief Justice Warren K. Winkler (February, 2008). *Evaluation of Civil Case Management in the Toronto Region – A Report on the Implementation of the Toronto Practice Direction and Rule 78*. Retrieved from <http://www.ontariocourts.on.ca/coa/en/ps/reports/rule78.pdf>.

⁷⁴ The Honourable Warren K. Winkler (2007). The Warren Winkler Lectures on Civil Justice Reform: Civil Justice Reform – The Toronto Experience. *Ottawa Law Review*, 39, p99.

⁷⁵ Beaudoin, Robert N. (March, 2006). Special Topic: Alternative Dispute Resolution: University of Windsor Mediation Services 10th Anniversary: Remarks on the Civil Justice Review Task Force. *Windsor Review of Legal and Social*, 21(5).

⁷⁶ Beaudoin, Robert N. (March, 2006). Special Topic: Alternative Dispute Resolution: University of Windsor Mediation Services 10th Anniversary: Remarks on the Civil Justice Review Task Force. *Windsor Review of Legal and Social*, 21(5).

⁷⁷ The new Rule 24.1.09 came into effect on 1 January 2010.

⁷⁸ Courts of Justice Act. Retrieved from http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_900194_e.htm.

⁷⁹ Rule 24.1.09(3). There used to be a time limit of 60 days.

Australia

Australia, like Canada, adopts a federal system in which each state has its own independent court system. For the purpose of this paper, only the civil justice reform in the State of New South Wales will be discussed. It is worth noting that New South Wales is one of the jurisdictions that has the most developed systems for settling disputes.⁸⁰

In October 1993, the Attorney-General and the Minister for Justice of Australia appointed the Access to Justice Advisory Committee to “make recommendations for reform of the administration of the Commonwealth justice and legal system in order to enhance access to justice and render the system fairer, more efficient and more effective.”⁸¹ The appointment was in response to a ‘crisis of confidence’ in the legal system.⁸² The Committee made a number of recommendations on how to improve access to justice, including encouraging the use of alternative dispute resolution methods.

Starting in late 1994, there were changes in the legislation in New South Wales to encourage the use of alternative dispute resolution methods. In November 1994, the Courts Legislation (Mediation and Evaluation) Amendment Act 1994 introduced Part 7B into the Supreme Court Act 1970. The case of *Idoport Pty Ltd v National Australia Bank Ltd*⁸³ contains a concise summary of why Part 7B was introduced into the Supreme Court Act 1970 in 1994,

The 1994 amendments introducing Part 7B to the Act reflected the Government’s growing interest in alternative dispute resolution as a means to improving legal services and providing greater access to justice.⁸⁴

At the time, the government cited mediation as the most popular form of alternative dispute resolution, and was mindful of its very high success rate. It was suggested that this reality resulted from the safe, neutral and confidential environment in which the circumstances surrounding the dispute are disclosed within the mediation process; and the mediator’s role is in assisting the parties to produce a workable result without imposing a solution.⁸⁵

A contrast was also drawn between the speedy and effective “win-win” outcome that is produced through mediation; and the “win-lose” situation that results from the lengthy litigation process. Furthermore, mediation encourages settlement at an earlier stage of the procedure, precluding the investment of hefty legal costs which would otherwise arise. Mediation was also said to allow the relationship between the parties to remain intact following the resolution of the matter.⁸⁶

It was against this background that court-referred mediation was introduced into the Supreme Court Act 1970.⁸⁷ Following the addition of Part 7B, the Supreme Court of New South Wales was able to refer a matter to mediation if it considered the circumstances appropriate and the parties consented to the referral and agreed to the mediator.⁸⁸ Attendance at and participation in mediation sessions were voluntary, and parties could withdraw at any time.⁸⁹

Six years after the introduction of court-referred mediation, there were further changes to the Supreme Court Act 1970. The old section 110K, which permitted the Supreme Court to refer matters for mediation only with the consent of the parties, was replaced by the following provision,

⁸⁰ National Australian Dispute Resolution Advisory Council. *ADR Statistics 2003*. Retrieved from http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate_ADRStatistics2003.

⁸¹ Parliamentary Research Service (9 May 1995). *Access to Justice – An Action Plan*. Retrieved from <http://www.aph.gov.au/library/pubs/rn/1994-95/95rn30.pdf>.

⁸² As the Minister for Justice, the Hon Duncan Kerr MP, stated in his address to the Annual Regional Conference of the Law Society of New South Wales on 28 October 1993, there were problems relating to the legal profession’s work practices and the costs of using the courts in Australia.

⁸³ [2001] NSWSC 427.

⁸⁴ Courts Legislation (Mediation and Evaluation) Amendment Bill, Second Reading Speech, The Hon RJ Webster, 4 May 1994

⁸⁵ Courts Legislation (Mediation and Evaluation) Amendment Bill, Second Reading Speech, The Hon RJ Webster, 4 May 1994

⁸⁶ Courts Legislation (Mediation and Evaluation) Amendment Bill Second Reading Speech, The Hon RJ Webster, 4 May 1994.

⁸⁷ Similar provisions providing for court-referred mediation were also introduced into the Compensation Court Act 1984 No. 89, the District Court Act 1973 No. 9, the Industrial Relations Act 1991 No. 34, the Land and Environment Court Act 1979 No. 204 and the Local Courts (Civil Claims) Act 1970 No. 11.

⁸⁸ Section 110K(1) of the Supreme Court Act 1970 No. 52.

⁸⁹ Section 110L of the Supreme Court Act 1970 No. 52.

“(1) If it considers the circumstances appropriate, the Court may, by order, refer any proceedings, or part of any proceedings, before it (other than any or part of any criminal proceedings) for mediation or neutral evaluation, and may do so either with or without the consent of the parties to the proceedings concerned [emphasis added].⁹⁰

(2) The mediation or neutral evaluation is to be undertaken by a mediator or evaluator agreed to by the parties or, if the parties cannot agree, by a mediator or evaluator appointed by the Court, who (in either case) may, but need not, be a person whose name is on a list compiled under this Part.”⁹¹

Hence, there are two forms of mediation in New South Wales – court annexed mediation and private mediation.⁹² As Einstein J. stated in *Idoport Pty Ltd*, “The legislative introduction of mandatory mediation in 2000 appears to have been primarily motivated by the perceived efficiencies associated with ADR...The amendments raised some debate surrounding the appropriateness of mandatory mediation. Some view this notion as a contradiction in terms, opposing the culture of ADR which generally encompasses a voluntary, consensual process. It is important to note however, that whilst parties may be compelled to attend mediation sessions, they are not forced to settle and may continue with litigation without penalty. Furthermore, Part 7B requires that referrals follow a screening process by the Court, and that mediation sessions are conducted by qualified and experienced mediators.”⁹³

It should be noted that the courts in New South Wales adopted different approaches in deciding whether to order mediation. In *Morrow v Chinadotcom*⁹⁴, Barrett J. refused to order mediation on the ground that if a party is unwilling to participate, the process would likely be a time and money consuming undertaking. In this case, one of the parties sought an order for compulsory mediation pursuant to section 110K of the Supreme Court Act 1970⁹⁵ because the other party refused to participate in mediation because they believed the matter to be urgent and best dealt with by the ordinary processes of the Court.

Barrett J. began his analysis by endorsing what Perry J. stated in *Hopcroft v Olsen*⁹⁶ – “Be that as it may, it does not appear to me that precedent is of much assistance in determining the present application. Every case involves different circumstances. What might be an appropriate procedure in one case, may clearly be inappropriate in another.”⁹⁷ He then looked at the particular circumstances of the present case and concluded that,

“the clearly stated preference of one party to continue with the litigation which that party sees as the most appropriate means of dispute resolution must cause a Court to think very carefully before compelling what, on the face of things, may well turn out to be an exercise in futility attended by delay and expense...If, with the benefit of that knowledge and the advice of their solicitors, they do not all see sufficient value in resort to some alternative procedure of their own choosing there is, it seems to me, very little, if anything, that is likely to be gained by the Court compelling them to pay at least lip service to it.”⁹⁸

In consequence, Barrett J. dismissed the applicant’s application for court-ordered mediation.

In *Idoport Pty Ltd v National Australia Bank Ltd*⁹⁹, however, the Supreme Court of New South Wales ordered mediation despite the objection of one of the parties. In this case, the Court held that because of the statutory requirement to negotiate in good faith during mediation and the fact that the hearing need not be disrupted, the proceedings should be sent to mediation. Further, the public interest in promoting mediation outweighed the objections by one of the parties.¹⁰⁰

⁹⁰ Section 110K of the Supreme Court Act 1970 No. 52.

⁹¹ Section 110K of the Supreme Court Act 1970 No. 52.

⁹² Supreme Court of New South Wales. *Mediation – Supreme Court : Lawlink NSW*. Retrieved from http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_mediation#4. It should be noted that for court-annexed mediation, there is no charge for the mediation or the use of rooms; whereas for private mediation, there are usually fees for the mediator and the use of rooms

⁹³ Paragraphs 21 and 24 of *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 427.

⁹⁴ [2001] NSWSC 209.

⁹⁵ The wording of section 110K of the Supreme Court Act 1970 is identical to section 26 of the Civil Procedure Act 2005.

⁹⁶ [1998] SASC 7009.

⁹⁷ [1998] SASC 7009.

⁹⁸ [1998] SASC 7009.

⁹⁹ [2001] NSWSC 427.

¹⁰⁰ [2001] NSWSC 427.

Einstein J., in deciding whether to order mediation, considered different materials, including Part 1 rule 3 of the Supreme Court Rules, the provisions of Part 7B of the Supreme Court Act, Practice Note 118, and the extra-curial statements of the Chief Justice, notably a speech delivered on the LEADR Dinner held on 9 November 2000, and his restatement of that speech in the Law Society Journal (NSW, Australia).¹⁰¹ In particular, Einstein J., when referring to the extra-curial statements of the Chief Justice, placed much emphasis on, amongst others, the following statements,

“§ No doubt it is true to say that at least some people, perhaps many people, compelled to mediate will not approach the process in a frame of mind likely to lead to a successful mediation. There is, however, a substantial body of opinion – albeit not unanimous – that some persons who do not agree to mediate, or who express a reluctance to do so, nevertheless participate in the process often leading to a successful resolution of the dispute.

§ It appears that, perhaps as a matter of tactics, neither the parties nor their legal representatives in a hard-fought dispute are willing to suggest mediation or even to indicate that they are prepared to contemplate it... Nevertheless, the parties are content to take part in the mediation conference if directed to do so by a Judge.

§ There is a category of disputants who are reluctant starters, but who become willing participants. It is to that category that the new power is directed...”¹⁰²

Turning back to the development of mediation legislation in New South Wales, there were further changes made in 2005. Schedule 5 of the Civil Procedure Act 2005 omitted provisions in the Supreme Court Act 1970 and the District Court Act 1973 relating to mediation and replaced them with section 26 of the Civil Procedure Act 2005, which is identical to section 110K of the Supreme Court Act 1970 cited above and section 164A of the District Court Act 1973.

The Civil Procedure Act 2005 of New South Wales, which applies to all civil proceedings in the Supreme, District and Local Courts and the Dust Diseases Tribunal, contains relatively comprehensive provisions on mediation. It should first be noted that, unlike many other countries, this Act provides a definition of mediation as “a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute.”¹⁰³

The Act expressly provides that there is a duty on the parties to participate in court-annexed mediation in good faith.¹⁰⁴ Further, there are provisions regarding the costs of court-annexed mediation. Section 28 states that,

“The costs of mediation, including the costs payable to the mediator, are payable:

- (a) if the court makes an order as to the payment of those costs, by one or more of the parties in such manner as the order may specify, or
- (b) in any other case, by the parties in such proportions as they may agree among themselves.”¹⁰⁵

This is an important provision – as the court may order mediation without the consent of the parties¹⁰⁶, it is important to have clear guidelines on how the costs of such court-ordered mediation are payable by the parties.

The Court of Appeal of the Supreme Court of New South Wales recently held in *Newcastle City Council and others v Paul Wieland and Janine Wieland*¹⁰⁷ the costs of the proceedings should include the costs of mediation. In this case, the mediation between the parties was ordered by the court in accordance with section 26 of the Civil Procedure Act 2005. As such, it was not possible on the facts of the case to contend that the mediation did not form part of the court’s procedures. Further, the Court considered that there were compelling policy reasons to support that the costs of mediation should be included in the costs of the proceedings.¹⁰⁸

¹⁰¹ March 2001, Supreme Court: Mediation (2001) 39 (2) LSJ 63, p63.

¹⁰² March 2001, Supreme Court: Mediation (2001) 39 (2) LSJ 63, p63.

¹⁰³ Section 25 of the Civil Procedure Act 2005.

¹⁰⁴ Section 27 of the Civil Procedure Act 2005.

¹⁰⁵ Section 27 of the Civil Procedure Act 2005.

¹⁰⁶ Section 26(1) of the Civil Procedure Act 2005.

¹⁰⁷ [2009] NSWCA 113.

¹⁰⁸ The Court of Appeal referred to the cases of *Higgins v Nicol (No 2)* (1972) 21 FLR 34 and *Charlick Trading Pty Ltd v Australian National Railways Commission* [2001] FCA 629.

However, the Court also noted that “there may be cases where, even though the costs of the proceedings will generally include the costs of a court-ordered mediation under Pt 4 of the CPA [i.e. Civil Procedure Act], a pre-existing agreement so strongly conveys that the costs of the mediation are to be treated entirely separately from other costs of the proceedings as to justify a conclusion that a later consent order (or possibly even a judge-impose order where the judge knows of the pre-existing agreement) concerning the costs of the proceedings was not intended to include the costs of the mediation.”¹⁰⁹ Finally, section 30(4) of the Act provides that “evidence of anything said or of any admission made in a mediation session is not admissible in any proceedings before any court or other body,”¹¹⁰ and that “a document prepared for the purposes of, or in the course of, or as a result of, a mediation session, or any copy of such a document, is not admissible in evidence in any proceedings before any court or other body.”¹¹¹ This provides a guarantee to parties participating in court-annexed mediations that what they say or produce during the mediation sessions will, under general circumstances, not be used against them in future court proceedings¹¹².

United States

The United States, while a common law system, nevertheless has seen the development of fundamental mediation reforms at the Federal level. Since 1974, federal appellate courts have increasingly integrated alternate dispute resolution (ADR) methods into their procedures.¹¹³ This has included a growing integration of mediation programs based upon Rule 33 of the Federal Rules of Appellate Procedure.¹¹⁴ Beginning with the Second Circuit, the first appellate ADR program, called the Civil Appeals Management Plan (“CAMP”) was initiated in 1974.¹¹⁵ Since then, all 12 regional courts of appeal have established mediation programs under Rule 33 and local circuit rules--most of which mandate participation.¹¹⁶

The rationale behind the growth in institutionalized mediation programs at the Federal level, according to Robert W. Rack, Jr., Chief Circuit Mediator, Sixth Circuit Court of Appeals, is “based on the appellate judges’ recognition of the efficacy of these programs and their value to the courts in terms of docket relief, case management assistance, and good service to litigants.”¹¹⁷ In 2005, following the lead of the 12 U.S. regional Courts of Appeals, the U.S. Court of Appeals for the Federal Circuit which is defined by subject matter and includes all appeals from patent infringement cases tried anywhere in the country, appeals of patent and trademark matters from the U.S. Patent and Trademark Office, and appeals involving other non-IP areas of law, also introduced a pro bono appellate mediation program.¹¹⁸ According to the Mediation Guidelines, a party representative with actual settlement authority must attend the initial mediation session.¹¹⁹ This means that the individual must not simply be one who can accept or offer a minimum or maximum dollar amount, but rather this must be a person “who can make independent decisions and has the knowledge necessary to generate and consider creative solutions.”¹²⁰ Following the implementation of the Federal Circuit program, a significant caseload has been successfully settled by the mediation program.¹²¹

¹⁰⁹ Per Hodgson JA.

¹¹⁰ Section 30(4) of the Civil Procedure Act 2005.

¹¹¹ Section 30(4) of the Civil Procedure Act 2005.

¹¹² Examples of the exceptions to section 30(4) include consent of the parties (section 30(5)(a)) and for proving that an agreement or arrangement has been reached in the mediation sessions and as to the substance of the agreement or arrangement (section 29(2)).

¹¹³ Kevin R. Casey, “Time for Mandatory Mediation at Federal Circuit”, IP Law Bulletin, March 2005. Available at: <http://www.stradley.com/articles.php?action=view&id=146>

¹¹⁴ Id.

¹¹⁵ Kevin R. Casey, “Time for Mandatory Mediation at Federal Circuit”, IP Law Bulletin, March 2005. Available at: <http://www.stradley.com/articles.php?action=view&id=146>

¹¹⁶ Id.

¹¹⁷ Id.

¹¹⁸ Robert Rose, “Successful Fed Circuit Mandatory Mediation Program Takes a Patent Dip in First Half of ‘09”, LexBlog, July 24, 2009. Available at: <http://www.ipadrblog.com/2009/07/articles/ip-adr/successful-fed-circuit-mandatory-mediation-program-takes-a-patent-dip-in-first-half-of-09/>

¹¹⁹ Id.

¹²⁰ Id.

¹²¹ According to Robert Rose, “Successful Fed Circuit Mandatory Mediation Program Takes a Patent Dip in First Half of ‘09”, LexBlog, July 24, 2009. Available at: <http://www.ipadrblog.com/2009/07/articles/ip-adr/successful-fed-circuit-mandatory-mediation-program-takes->

Part – 3: Lessons Learned

The use of mediation as an alternative dispute resolution method to resolve civil and commercial cases has only been recently introduced and promoted in a number of jurisdictions including the United Kingdom, Hong Kong, Australia, Canada and the United States. It is too early to evaluate the results of the reforms, as it is too early to tell if mediation will be more widely used by parties to a dispute and in particular commercial and financial disputes, and whether mediation can help the parties to settle their disputes or improve the access of the civil justice system.

It will be important to monitor the implementation of these mediation-promoting initiatives and to evaluate the results of such initiatives from time to time. Ontario is an example that demonstrates how regular evaluation can help to fine-tune mediation rules in order to maximize their effectiveness. Without the establishment of the Case Management Implementation Review Committee in Toronto as mentioned above, it would not be apparent that the mandatory mediation program in Toronto was in fact non-effective, and that the time limit for conducting mediation was not long enough. It is also important to keep track of the results of such initiatives. A useful evaluation model developed to evaluate the 23-month mediation pilot project in Ontario can be examined as a useful framework. Efforts should be made to collect data for evaluating whether the use of mediation has improved the pace of litigation, reduced the costs borne by the parties, improved the quality of disposition outcomes and improved the operation of the mediation and litigation process.

Besides the importance of regularly evaluating the impact of mediation-promoting initiatives, another lesson to be learnt from the countries discussed above is that it takes time to promote the use of mediation as an alternative dispute resolution method. For example, when court-referred mediation was first introduced in New South Wales in 1994, courts in New South Wales were only able to refer a case to mediation if the parties consented to the referral. It was only after the perceived efficiencies of mediation were known to the general public, and in New South Wales's case, six years after the introduction of court-referred mediation, that mandatory mediation (in a sense that mediation can be ordered without the consent of the parties) was introduced to New South Wales. Progressively developing mediation-promoting initiatives appears to be the more effective option. It should be remembered that encouraging the use of mediation to resolve disputes does not require compelling parties to opt for mediation.

While there are clear advantages to promoting the use of mediation to resolve commercial disputes (for example, saving legal costs and encouraging the early settlement of disputes), it is important to acknowledge that not all cases are appropriate for mediation. As stated in the "Evaluation of Civil Case Management in the Toronto Region – A Report on the Implementation of the Toronto Practice Direction and Rule 78"¹²², one of the overarching observations of the civil justice reform in Toronto was that "mediation has become an integral part of our justice system. Yet, not every type of case is amenable to mediation."¹²³ Ultimately, the aim of mediation is to assist parties to civil, commercial and financial disputes to arrive at just and equitable settlements, and not just settlement.

[a-patent-dip-in-first-half-of-09/](#) The Federal Circuit posts both quarterly and annual statistics for the program, reported by patent versus non-patent cases. From 2007 to 2008, the overall success rate, measured as the percentage of cases settled that were selected for mediation, rose from 42% to 52%. Patent cases make up most of cases in the program, with 84% of the cases in 2007, and 78% in 2008. The patent case settlement rate rose from 44% in 2007 to 51% in 2008. For the first half of 2009, however, the overall success rate has dropped back to 42% overall, and patent case settlements have dropped to 31%. Second quarter 2009 patent results look especially dismal at 21%. (Chief Circuit Mediator Amend has identified eight impediments to settlement of patent cases on appeal, which the IP ADR Blog lists) Nevertheless, the program's overall success still compares favorably with other circuits, which report between a 35% and 45% settlement rate.

¹²² The Honourable Chief Justice Warren K. Winkler (February, 2008). *Evaluation of Civil Case Management in the Toronto Region – A Report on the Implementation of the Toronto Practice Direction and Rule 78*. Retrieved from <http://www.ontariocourts.on.ca/coa/en/ps/reports/rule78.pdf>.

¹²³ The Honourable Chief Justice Warren K. Winkler (February, 2008). *Evaluation of Civil Case Management in the Toronto Region – A Report on the Implementation of the Toronto Practice Direction and Rule 78*. Retrieved from <http://www.ontariocourts.on.ca/coa/en/ps/reports/rule78.pdf>.

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