

Arbitration and Mediation of Trust and Probate Disputes:
Obstacles Removed (or Non-Existent)

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1. The benefits of ADR generally are well rehearsed, and much debated. I am an ADR advocate. Adversarial litigation is, even at its best, an expensive and yet very crude zero-sum game for the resolution of disputes, which is particularly brutalizing when applied to the most personal and emotionally charged areas of life: family relationships, private property and death.
2. Alternative Dispute Resolution – ADR – generally refers to arbitration and/or mediation procedures. ADR affords disputants an opportunity to escape some (or all) of the most cumbersome, ineffective and costly elements of traditional civil litigation.
3. Nevertheless, it is often said that particular substantive and procedural features of trust and probate disputes render them unsuitable for ADR.
4. The first purpose of this presentation is to review the points generally considered to be obstacles to effective ADR in trust and probate matters. My thesis is that the material already exists to overcome perceived impediments to ADR, particularly in light of the ever more encouraging attitude of the modern Chancery court.
5. The second part of the presentation will look at examples of court mandated ADR, and considers whether court (and institutionalised) ADR can overcome some of the prevailing disincentives to ADR as a true alternative to civil litigation. I argue that it cannot.

6. The last section of the presentation advances a new, party-driven system for initiating ADR at the outset of a dispute, and proposes an innovative and flexible approach to modern dispute resolution.

PART I: Obstacles to ADR in Will and Trust Disputes

7. The successful resolution of a trust or probate dispute by arbitration or mediation is said to require
 - a. a provision, or agreement, for ADR that does not oust the jurisdiction of the court;
 - b. a provision purporting to be an arbitration clause that constitutes an agreement to arbitrate and/or mediate and which is binding on all necessary parties to the dispute;
 - c. the proper representation of all interested parties (including unascertained, unborn and prospective beneficiaries); and
 - d. that the subject matter of the dispute is arbitrable, or otherwise capable of being resolved by binding agreement and/or order between those participating in the ADR process.
8. Ouster: Historical legal theory was that parties intending by agreement to create legal rights and obligations cannot contract out of the possibility of judicial enforcement of those rights by the court, conferring jurisdiction instead on a private tribunal.
9. The modern analysis, however, is that parties may contract into an acceptable form of ADR. ADR does not constitute extra-judicial proceedings. An arbitration agreement does not afford a defence to a court action, but entitles a party to apply for a stay the action, under section 9 of the Arbitration Act 1996.
10. The jurisdiction of the court is not, in any event, ousted in relation to the ADR process itself. The court retains its supervisory and facilitative jurisdiction

over the procedure, is the forum for appeal, and assists parties in the enforcement of settlements and awards.

11. A Binding Agreement for ADR: For a dispute to fall within the Arbitration Act 1996, the clause purporting to be an arbitration clause must constitute an agreement in writing. An arbitration agreement, in section 6(1) of the 1996 Act, extends to 'an agreement to submit to arbitration present or future disputes (whether they are contractual or not)'.
12. It appears, then, that it may not matter that an arbitration clause (like a trustee-charging clause in a trust deed) is not contractual so long as it is an agreement. But how can unborn or unascertained beneficiaries enter into an agreement? Section 82(2) of the 1996 Act further provides that a party to an arbitration agreement includes any person claiming 'under or through' a party to the agreement.
13. It is said that the fundamental basis of a trust or will is not contractual, or even consensual, but rather the unilateral transfer of assets to a person prepared to accept the office of trustee or executor for the benefit and on behalf of third party beneficiaries, with all the benefits and burdens attaching to such representative office.
14. David Hayton argues¹ that a settlor could, on behalf of himself and the beneficiaries deriving their interests through him, expressly contract in his trust deed with his trustee, on behalf of himself and his successors in title, in consideration of undertaking the office of trustee, to refer any dispute between the trustee and any of the beneficiaries to arbitration and/or mediation.
15. Lawrence Cohen, in *The Arbitration of Trust Disputes*² advances a principle of 'deemed acquiescence' in mandatory ADR provisions in trust instruments on

¹ *Problems In Attaining Binding Determinations of Trust Issues By Alternative Dispute Resolution*, <http://www.kozlaw.com/think/handouts/Hayton%20ADR%20Paper.pdf>.

² (1999) *Journal of International Trust and Corporate Planning* ITCP 7 4 (203).

the part of beneficiaries. All beneficiaries of a trust settlement, he says, claim under or through the settlor, who can be a party to the agreement with the trustee for ADR. Thus, the beneficiary must be taken to acquiesce in the arbitration agreement, because an agreement to arbitrate all matters arising out of or in connection with the trust is a condition precedent to benefiting from the trust.

16. My view is that equitable principles govern trust and testamentary instruments, and recourse is better made to these. In this context I refer to the equitable doctrine of election.
17. The foundation of election is that no one shall both approbate and reprobate³; that is, claim both under and in opposition to the same instrument. In its most basic form, the principle of equity giving rise to the doctrine of election is that a person who accepts a benefit under an instrument must adopt the whole, giving full effect to its provisions, and renouncing every right inconsistent with it: *Re Macartney* [1918] 1 Ch 300.
18. The doctrine was explained by Lord Hatherley in *Cooper v Cooper* (1874) LR 7 HL 53 (at p 70) as “The equitable duty which the law imposes on a person claiming under an instrument, of giving full effect to it, as far as it would be otherwise ineffective, except through his concurrence ... [or] by ... abandoning all his interest under the will ...”.
19. Thus, a person who elects to take under the will must confirm, so far as he is able, the whole instrument. This may be seen as constituting an implied agreement under the ADR clause, or as creating an obligation to enter into an agreement for ADR, in the terms of the clause contained in the trust deed or will, in relation to any dispute falling within the scope of the clause.

³ As referred to by Sir Christopher Slade in the Privy Council case (on appeal from the Court of Appeal of the Cayman Islands) in *Cleaver v Delta American Reinsurance Company* [2001] UKPC 6.

20. Can unborn and/or unascertained beneficiaries be put to an election, or be deemed to have elected in equity? Even if not, the court (as we will see below) can consent on their behalf to an agreement to resort to ADR in relation to any particular dispute, and to any resulting resolution of a dispute.
21. Some drafting problems may be resolved without recourse to litigation or ADR, by conferring a power on the trustees or another person (say a protector or enforcer) to amend the trust instrument, rather like the practice of pension trustees' powers to amend the trust instrument so as to promote the best interests of the beneficiaries as a whole.
22. This power of amendment can be made available where there is uncertainty or ambiguity in the construction of any provisions in the trust instrument and can be exercisable as the trustees (subjectively) think fit for furthering the intentions of the settler and preserving or advancing the interests of the beneficiaries, such exercise to be unchallengeable except in cases of bad faith.
23. Further problems can be dealt with by express provisions conferring on trustees power to agree to pay the costs of other parties' participation in ADR from the trust estate, and even power to charge recalcitrant beneficiaries' interests with costs where such party unreasonably fails or refuses to abide by ADR provisions in the trust or Will (including participating in good faith).
24. Representation of Unborn and Unascertained Beneficiaries in ADR: ADR requires all interested parties to be willing or legally obliged to submit a dispute to arbitration and/or mediation, and legally able to do so.
25. Submission to arbitration by trustees has long been authorised by statute. The first English statute codifying the common law of arbitration was enacted in 1698: *An Act for Determining Differences by Arbitration of 1698*, 9 & 19 Will. 3, c.15⁴. The Trustee Act 1893 gave statutory effect to the common law rule

⁴ The arbitrability of a dispute between trustee and beneficiary was considered in England in *Auriol v Smith* 37 Eng Rep 1041 (Ch 1823).

permitting trustees to submit claims in favour of or against the trust estate to arbitration. Now the Trustee Act 1925 section 15 has broadened scope of arbitrability of trust disputes.

26. The Trustee Act 1925 s.15 was considered in *Re Earl of Strafford* [1979] 2 WLR 459 CA. Although s.15 TA 1925 gives trustees and personal representatives wide discretion in settling claims by or against the trust or estate (and protect them from loss caused by anything done in the exercise of their powers under this section, provided it is done in good faith and after properly considering the matter) in cases of doubt or difficulty the trustees or personal representatives can apply to the court to sanction the compromise. The court will then consider what is best from the point of view of the beneficiaries as a whole and pay particular attention to the interest of minors see *re Earl of Strafford* [1980] Ch 28.

27. The exercise of the power of compromise under s.15 of the Trustee Act 1925 is now subject to the statutory duty of care under the Trustee Act 2000. Section 1(1) provides that, whenever the duty of care applies to a trustee, he must exercise such care and skill as is reasonable in the circumstances, having regard in particular:-

- a. to any special knowledge or experience that he has or holds himself out as having, and
- b. if he acts as a trustee in the course of a business or profession, to any knowledge or experience that it is reasonable to expect of a person acting in the course of that business or profession.

28. Schedule 1, paragraph 4, applies the duty of care to a trustee when exercising power under s.15 Trustee Act 1925 to do any of the things referred to in that section. The effect of s.35(1) Trustee Act 2000 is that that Act applies to

personal representatives administering an estate as it does to trustees carrying out a trust.

29. Trustees and personal representatives, as a matter of course in the administration of the estate, may not incur costs for the estate by engaging in litigation without authority. The same principles apply to ADR. Unless all beneficiaries are *sui juris* and agree to ADR, the court's authority should be sought. Proceedings seeking such authority are commonly known as Beddoe applications.
30. Beddoe applications (*Re Beddoe Downs v Cottam* [1893] 1 Ch 547) are a part of procedure in the Chancery Division least affected by Lord Woolf's reforms.
31. Trustees may obtain the consent of the court to expend trust funds on ADR. Further, the court has power to join to the Beddoe proceedings any party (including non-beneficiary parties) with an interest in the outcome of the application.
32. On occasion, the 'other party' may be a beneficiary of the trust who is in dispute with the trustee or with other beneficiaries against whom it is proposed to conduct or defend the ADR proceeding. In such circumstances, Beddoe relief may still be appropriate, as will the procedure outlined in *Re Moritz (In re Moritz (decd))* [1960] Ch 251 – the beneficiary against whom proceedings may be commenced, is joined as a party to the Beddoes application, but the evidence upon which the court will be required to evaluate the strength of the claim against him will not be served upon him and he will not be entitled to be present when the merits of that claim are debated before the court.
33. Sometimes the directions can be dealt with on paper without a hearing. There are, of course, provisions for the directions hearing to be held in private.

34. The rules of court enable unborn and unascertained persons to be represented. There is no requirement (under the Civil Procedure Rules Part 19.7 or otherwise) that representation can only be obtained within court proceedings⁵. The court can, and would if asked (I venture to say) authorise appropriate persons to represent unborn and unascertained beneficiaries in arbitrations and mediations.
35. The representation of children, and anyone else not capable of acting for himself/herself, are generally provided for in the rules. CPR Part 21 provides for the appointment of a Litigation Friend to conduct proceedings on behalf of children (*et al*). To that extent the procedure is not appropriate for ADR, but it also does not restrict the ability of parties who are not capable of representing themselves to participate in ADR relating to trust or probate disputes through suitable representatives.
36. What is envisaged here is an application to the court for directions relating to the conduct of ADR, to authorise trustees/personal representatives to expend funds on the process, appoint proposed representatives for unborn, unascertained beneficiaries and those incapable of representing themselves, affording them all due protection, and to give directions enabling the court to exercise a supervisory role during the ADR, and provide a mechanism for binding all interested parties to the resolution afforded by the process.
37. This procedure would enable arbitrations and/or mediations to be conducted by parties who were previously considered to fall outside the scope of these essentially consensual processes.
38. Settlements of trust and probate disputes involving representative parties require the approval of the court. This remains, in my view, a small price to pay for the savings in time and costs, and the privacy and flexibility afforded by ADR procedures.

⁵ CPR Part 19.7 refers to a claim and not an action or proceedings, and specifically permits an order to be made before any action is brought.

39. Representation of Tax Authorities: Tax authorities can represent themselves. It is common practice to invite HM Revenue & Customs to be joined in proceedings for the construction or rectification of a trust or Will. HMRC invariably decline the invitation, and agree to abide by an order made by the court (subject only to insisting that certain authorities are put before the court).
40. I maintain that there is no reason in principle why the same procedure could not operate in the ADR arena.
41. The question remains, however, how the product of ADR can be made to bind representative parties, and the HMRC. The answer lies in the court's power to approve variations of trusts.
42. Approval of ADR Settlements: The UK courts apply the rule in *Saunders v Vautier* (1841) Cr & Ph 240, under which beneficiaries who are together absolutely entitled to the property subject to the trust or the will may bring an end to the trusts, or direct the trustees/personal representatives as to the execution of the trusts, without the intervention of the court.
43. Where the parties participating in ADR are *sui juris*, this is basis for the settlement of trust and probate disputes by ADR.
44. Where this approach is not available, the court still has the requisite power to approve a settlement by way of a variation of a private trust, under the Variation of Trusts Act 1958.
45. Section 1 of the 1958 Act provides that "where property, whether real or personal, is held on trusts arising, whether before or after the passing of this Act, under any will, settlement or other disposition, the court may if it thinks fit by order approve on behalf of

- (a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting, or
- (b) any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons, so however that this paragraph shall not include any person who would be of that description, or a member of that class, as the case may be, if the said date had fallen or the said event had happened at the date of the application to the court, or
- (c) any person unborn, or
- (d) any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined

any arrangement (by whomsoever proposed, and whether or not there is any other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts Provided that except by virtue of paragraph (d) of this subsection the court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person”.

- 46. Very importantly for present purposes, Pennycuick J said, in *In re Remnant's Settlement Trusts* [1970] 2All ER 554, that the concept of “benefit” is not confined to financial benefit but that the court is entitled and bound to consider benefit of any other kind.
- 47. In *In re Michelham's Will Trusts* [1964] 1 Ch 550 Buckley J decided that when, looking at the scheme and the probable events as a whole, the scheme was calculated to confer a benefit on possible unascertained or unborn beneficiaries, the scheme was one which the court would approve.

48. I contend that the court's powers to approve variations, by statute and under the court's inherent jurisdiction, enable the court also to approve an agreement to submit a dispute to ADR, and to approve any settlement agreement resulting from ADR. This jurisdiction could also, in an appropriate case, introduce mandatory ADR provisions into a trust or will to govern future disputes, to include, where appropriate, provisions for the American style of 'virtual representation' of unborn, unascertained or incapable beneficiaries, without the intervention of the court.
49. Arbitrability: One of the principal impediments to ADR in trust and probate matters is said to be the nature of the dispute.
50. Questions of construction as to the future administration of the trust, which have fiscal consequences, can be submitted to arbitration and/or mediation. The tax authority can be invited to participate, but generally will not do so. Once a resolution is achieved, the tax authority can be invited to agree the result, or ask the court for a determination, at its own risk as to costs.
51. In general, even where past tax liabilities are to be disclaimed, and new liabilities avoided, HMRC would require a formal determination of the beneficiaries' rights and interests under the trust only where the situation will take effect as a precedent. But as ADR procedures are generally private and confidential, this problem is minimised.

PART II: Court Imposed ADR

52. Should the courts mandate ADR in trust and probate matters? Not long ago the Honourable Mr Justice Lightman (now retired) called for a formal direction to force litigating parties into mediation⁶. Lightman J said that the 2007 EU directive on mediation 'makes plain that the court can and should have the freestanding and independent power to order mediation ... There is, however,

⁶ *Access to Justice* (5th December 2007). Mr Justice Lightman's remarks were not, of course, directed specifically at trust or probate mediation.

a need for an authoritative pronouncement to this effect'. He said that the ability to order mediation regardless of parties' wishes is 'essential if mediation is to play its full part in our system of dispute resolution'.

53. The judge said that the need for mediation to be brought forcibly to the forefront of dispute resolution arises because the measures taken to replace public funding of legal representation are failing. 'It was all very well for the government to say, when it introduced the Human Rights Act, that it was "bringing rights home",' he said. 'But it was a hollow boast when those in most need of recourse to the law were at the same time being deprived of the necessary funding to protect and enforce them.'

54. Similarly, in May 2008⁷ the Master of the Rolls called for education of litigants and lawyers on the benefits of mediation, and active case management by the judiciary to 'render mediation part of the normal pre-trial case management process'. Sir Anthony Clarke defended court mandated mediation against the narrow interpretation of the Court of Appeal decision in *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002, that compulsory mediation contradicts the right to a fair trial under Article 6 of the European Convention of Human Rights ("ECHR")⁸.

55. The substantive issue in *Halsey* had nothing to do with compulsory mediation. The issue before the court was '*when should a court impose costs sanctions against a successful litigant on the grounds that he has refused to take part in an alternative dispute resolution ('ADR')*?' The Master of the Rolls asserts that the Court of Appeal's comments in *Halsey* regarding compulsory ADR were *obiter*

⁷ The Second Civil Mediation Council National Conference, *The Future of Civil Mediation*, 8th May 2008 Birmingham.

⁸ The European Court of Human Rights has stated that the right to fair trial must not be interpreted restrictively (*Airey v Ireland* (Application 6289/73) (1979) 2 EHRR 305). This was the point in the mind of Dyson LJ in the Court of Appeal in *Halsey v Milton Keynes General NHS Trust* when he said that an order for mediation must mean no more than a strong encouragement to mediate, as forcing a truly unwilling party to mediate, "would impose an unacceptable obstruction on their right of access to the court".

*dicta*⁹, and despite the *Halsey* decision he maintains that is strongly arguable that the court retains a jurisdiction to require parties to enter into mediation.

56. Sir Anthony points out that a number of European states, including Belgium and Greece (both signatories to the ECHR), have introduced compulsory ADR schemes without, as far as I am aware, any successful Article 6 challenges¹⁰.
57. The European Union itself acknowledges, in Article 3.2 of its Directive on Mediation, that the encouragement it offers to mediation is made ‘*without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not impede the right of access to the judicial system. . .*’
58. In the United States, compulsory ADR schemes have been introduced. New York has established mandatory arbitration for claims coming before a trial court wherever an official arbitration programme has been established for claims of a certain value. Similar schemes have been introduced in other states, for instance California. The federal district courts can also require parties to mediate disputes under a power granted by section 652 of the Alternative Dispute Resolution Act (28 USC).
59. As regards trust and probate disputes in the US, the vast majority of states give trustees power to use mediation and arbitration to resolve trust disputes, not dissimilar to section 15 of the Trustee Act 1925. A few states, including Alaska, Hawaii, Massachusetts, Michigan, New Jersey, and Washington, have formally adopted mediation and arbitration provisions governing probate disputes. Most of these states simply provide that “[t]he court may submit [disputes] to mediation, case evaluation, or other alternative dispute resolution

⁹ Although Sir Anthony also notes that these comments were subsequently summarised in, for instance, *Hickman v Blake Laphorn* [2006] EWHC 12 (QB) as establishing that compulsory ADR is contrary to Article 6 ECHR, but again only as *obiter dicta*.

¹⁰ See for instance Article 214 Greek Civil Code.

process,” or even more generally, “explor[e] the use of Alternate Dispute Resolution (ADR) processes.”

60. Washington State, however, has adopted specific provisions as part of the Trust and Estate Dispute Resolution Act (“TEDRA”)¹¹. TEDRA grants “any party the right to proceed first with mediation and then arbitration before formal judicial procedures may be utilized,” and provides detailed directions for arranging mediations and arbitrations.
61. Arbitration under TEDRA may be initiated either by the court or by notice served by one party on the other. Other parties then have 20 days to object, failing which the arbitration proceeds. If a party does object in time, the court will hear the reason but will derail the arbitration only for good cause. After the arbitrator decides the case, either party may appeal to the superior court within 30 days. If neither party appeals in time, the arbitrator's decision is conclusive and binding on all parties.
62. TEDRA also provides for parties to come to an agreement regarding the will, trust or other related matter which may be completely different from what the testator or settlor intended, or even embodying provisions the testator/settler expressly sought to preclude.
63. For this reason, TEDRA is cited as a radical use of court imposed ADR, because it allows interested persons to reach private settlements of disputes, outside of any court supervision, overriding the terms of the will or trust. The scheme is criticised for permitting parties to undo expensive estate plans and violate the intent of the settler or testator. This is, of course, not seen as surprising or undesirable in jurisdictions that apply the rule in *Saunders v Vautier* (1841) 4 Beav 115, including the UK.

¹¹ Recently, Idaho passed a nearly identical Act.

64. In 2005 the legislature of Hawaii enacted a mediation process for probate, trust, and guardianship of the property issues. The Hawaiian legislature gave a beneficiary the authority to move the court for mediation, and the court to mandate mediation on its own. Where the court motions for mediation, participation is mandatory. The stated purpose of the Hawaiian statute is to provide parties with an alternative to litigation in probate, trust, and guardianship matters. The legislature of Hawaii gave a party to a trust matter the authority to “cause the matter to be subject to mediation by service of written notice of mediation on all parties” and importantly, a party to a trust may be given the opportunity to arbitrate the matter if mediation fails.
65. A criticism of the Hawaii mediation system is the requirement that parties bear the cost of mediation. For those without sufficient resources, there are referrals to dispute resolution services that provide mediators for free or for a nominal rate.
66. Most of the criticisms of court sponsored ADR concern funding arrangements (for programs and mediators), setting appropriate standards for mediators, and the need for flexibility as to the timing of court directions to mediate.
67. There are, as yet, few controls or standards for mediators so this is, potentially, an area of concern for court sanctioned, or imposed, ADR.
68. I am, personally, very doubtful about the long term development and success of court administered mediation programmes. The effective abolition of public funding for civil litigation means that there is no political will for the proper public funding of ADR. Voluntary and pro bono involvement by mediators means that the necessary professional expertise will not generally be available, especially where it is needed most: in early ADR.
69. Even if court administered ADR is unsatisfactory, this is not to say that court mandated ADR is to be eschewed. The court already has sufficient powers to direct parties to take part in a mediation process or attend a mediation hearing

during the course of the pre-trial stage of any proceedings. The case management judge could direct the parties to meet on a fixed date to discuss settlement. The great advantage of directing such a meeting would be to ensure that both parties prepare for a discussion on the case at the same time. This is at least one of the reasons why cases settle at the door of the court. It is partly due to risk aversion, but also partly due to the fact that it may well be only then that both parties are thinking about the case at the same time.

70. It is then but a small step to order that they meet in the presence of a mediator. The power exists under a combination of the court's case management powers under CPR 1.4 (2) (e) which specifies that '*encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure*' and CPR 3.1 (2) (m), which enables the court to take any step in managing a case to further the overriding objective. It is, moreover, part of the parties' duty to assist the court in the furtherance of the overriding objective that they should take active steps to take part in mediation (CPR 1.3). The costs of mediation could, as a matter of general principle, ordinarily be treated as costs in the case. The party with the strong case will then be protected against the costs of a failed mediation if the action subsequently succeeds.

PART III: Mediation Comes of Age

71. To maximise the salutary effects of mediation and/or arbitration in the resolution of contentious trust and probate disputes, these procedures need to be undertaken at the earliest stage of the dispute, ideally at (or indeed before) the commencement of litigation. But at present, early ADR in contentious trust and probate matters is (even leaving aside more recherché problems of representation and arbitrability, etc) is virtually unknown.
72. There are no mandatory arbitration provisions in governing instruments, and at the earliest stage of such disputes, parties are least likely to agree to mediate.

73. Voluntary submission to mediation or arbitration in these cases needs encouragement. In short, parties need prodding.
74. The "stick" attached to early ADR, to accompany the "carrot", could take many forms. In England, we are increasingly aware that the attitude of the English court, when asked to consider a refusal to mediate (or to mediate in good faith) when exercising its discretion as to costs, is hardening.
75. Yet, "cost shifting" (as the Americans call it), is an imperfect tool. In *Hickman v Blake Laphorn* [2006] EWHC 12 (QB), [2006] All ER (D) 67 (Jan) the defendant's solicitors were attracted to the claimant's offers to settle, to save costs, but the defendant's barrister refused, contending that the claimant was seeking too much.
76. At trial the claimant did recover less than he had asked for, but the costs of defending the claim vastly exceeded (by £185,000) the amount for which the claim could have been settled, inclusive of costs. The defendant's solicitors sought an order that the barrister be responsible for a large proportion the parties' costs, for unreasonably refusing to settle. But this argument failed, as the judge recognized that it could hold a defendant to ransom, feeling bound to pay more than the claim is worth simply to avoid being vulnerable on costs.
77. Arguments on costs can also involve difficult issues of privilege and confidentiality. In *Chantrey Vellacott v Convergence Group plc* [2007] EWHC 1774 (Ch), [2007] All ER (D) 492 (Jul) the claimants, who won at trial, sought an order for their costs of a failed mediation three years earlier. The judge received evidence from both parties about what offers had been exchanged at the mediation and in the period between then and the trial, and awarded the claimants their mediation costs on the ground that the defendants had been intransigent and unrealistic in the mediation and at trial.
78. There is also recent US case law. In *In re Blumenkrantz*, 824 N.Y.S.2d 884 (Surrogate's Court Nassau County, New York, 2006) a trustee had delegated

his investment authority to an adviser under an agreement requiring arbitration of all claims and disputes. In a voluntary accounting proceeding, a beneficiary of the trust contended that she was not bound by the arbitration clause. The court held that if the state law requirement that a delegee submit to the jurisdiction of the state's courts requires a judicial determination of disputes, it is preempted by the Federal Arbitration Act and that the beneficiary is bound by the arbitration agreement. It was further held that if the trustee has a conflict of interest, the beneficiary may receive letters of limited trusteeship to represent the trust in the arbitration proceeding.

79. This burgeoning encouragement is, however, too little and (in most cases) too late. I propose a new mediation system ("NMS"), with two broad objectives:

- a. To attract an entirely new market for mediated settlements, viz. the market for disputes at their earliest stage, as a true alternative to litigation, between disputants who would benefit from mediation but are unlikely at that stage to agree to a traditional mediation; and
- b. To address some of the weaknesses and problems in traditional mediation procedures, and the most common ways in which the mediation process is abused.

80. NMS differs from traditional mediation, although both are consensual, non-binding, confidential processes facilitated by third-party neutral mediator(s)¹². NMS is flexible, multi-faceted and progressive. Most importantly, NMS can be initiated at the earliest stage of a dispute, by a single party.

81. NMS involves the unilateral initiation (by one party to a dispute) of a specialist mediation programme specifically designed to facilitate settlement of a dispute at its earliest stage, by introducing and advancing mediation considerations by legally experienced and qualified mediators.

¹² Traditional mediation is the familiar exercise performed at a single venue in the presence of all parties and the mediator, following an agreement to mediate.

82. The system is initiated by separate meetings between the parties and the mediator(s) to discuss (initially) the feasibility of mediation for the dispute in question, and then (hopefully) drawing parties towards mediation generally and settlement specifically. The mediation is conducted in stages over time, progressing towards a mediated settlement, whether by culminating in a traditional mediation proceeding or concluding a settlement without any joint mediation session.
83. NMS should not be resisted by litigation lawyers engaged to conduct the dispute, principally as it frees them to engage in the most useful and productive strategy for their client, whilst the mediator tackles the feasibility of ADR.
84. As NMS is (or can be) initiated by one party, it forms part of an overall tactical strategy to best protect that party in litigation costs, by creating a situation in which non-cooperation by other parties is prima facie unreasonable and inexcusable.¹³
85. NMS aims to introduce and encourage mediation, and overcome resistance, at the earliest stage, and then to advance mediation proposals progressively between parties who are not ready for a consensual joint mediation session.
86. Very importantly, NMS involves the mediator employing expert litigation experience, applying principles of commercial assessment of litigation risks and basic principles of decision theory as early settlement strategies, and drawing on knowledge and experience of litigation to recommend courses of action in the conduct of the dispute that would best facilitate the earliest mediated settlement¹⁴.

¹³ The developing case law is sympathetic to mediation initiatives, but will remain vulnerable to parties' arguments as to why traditional mediation was infeasible or unachievable at any given point in the dispute.

¹⁴ Many of the considerations that would encourage settlement at this stage of a dispute differ from those that become the focus of later, traditional mediations. Discussion of this important feature of NMS is outside the scope of this briefing note.

87. The settlement of disputes at their earliest stage is obviously advantageous to the parties, and eliminates the additional difficulty of resolving the burden of substantial accumulated legal costs. It nevertheless presents particular challenges to mediation.
88. A dispute at its earliest stage differs fundamentally from those that have reached the point at which the parties agree to undertake a traditional mediation. The parties' grievances are often at their highest. The lack (and disparity) of information (especially regarding the evidence available to resolve the dispute) and the abundance of misinformation obscure any realistic assessment of the merits of the dispute or the probable outcome of litigation.
89. Moreover, the most effective strategy for the initial conduct of the dispute involves parties maximising aggressiveness, uncompromising confidence in the strength of their case, unwavering willingness to go to trial and unwillingness to share information.
90. The combined effect of these features of the earliest stage of a dispute is to make it extremely unlikely that disputants would at this stage consider, or be encouraged by their representatives, to propose or agree to a traditional mediation. At this stage, whatever one side proposes, the other side resists, which is not merely instinctive, but an important strategic element in the conduct of the dispute, which nevertheless discourages traditional mediation.
91. The target (but not the exclusive) market for NMS is legal disputes at their inception, before litigation and even before implementing pre-action protocols. Indeed, it is envisaged that NMS mediators assist with the conduct of pre-action protocols (which are at present either ignored or abused).
92. Mediations are too often misunderstood or mistrusted: negotiations (it is believed) can be, and generally are, conducted through parties' lawyers; the non-binding nature of the process creates a substantial risk of abuse and

wasted expense; mediators do not generally have independent, verifiable reputations and confidence can be lacking.

93. The traditional process also has discouraging elements. The need for all parties to meet together with their advisors (and very few parties are prepared to participate without their legal team) is often logistically difficult and extremely expensive. Parties and lawyers necessarily spend considerable time scheduling sessions which then contain long periods of "down time" for some parties and their representatives whilst the mediator conducts private sessions with other parties.
94. There are, indeed, cases in which the parties not only do not have to meet, but their meeting is actually counter-productive. NMS enables the mediator to assess this in each individual case.
95. Mediations do not need to take place at a single venue but mediation meetings can be undertaken sequentially with different parties engaged at their convenience at different times. By separate sessions with the parties - the classic form of "shuttle diplomacy," a good mediator filters out the posturing, aggressiveness, and defensiveness.
96. Progressive NMS mediation occurs concurrently with (albeit independently of) the conduct of the dispute, and enables the mediator to develop settlement proposals over time.
97. NMS mediators can also propose steps in the conduct of the dispute that would facilitate early consensual resolution (such as focused early disclosure, without prejudice expert advice, access to key witnesses or agreement to the determination of a preliminary issue). Such proposals, when advanced by one of the parties, are generally refused, as they invite suspicion.
98. Mediators can be appointed by a single party, and if different mediators are appointed by different parties, the mediators can talk to each other. One party

invites the other(s) to agree to the appointment of an NMS mediator at the outset of a dispute, preferably before commencement of an action.¹⁵ The principal object of the appointment of the mediator at this stage is to meet with each party (with legal advisers), in separate sessions, to discuss the feasibility of mediation for the particular dispute in question.¹⁶

99. The other party (or parties) can

Agree to the joint appointment of a single mediator

Appoint their own, separate mediator(s), who will then perform the same exercise as the other(s), but instead of meeting with other parties, will engage with the other Mediator(s), or

Refuse the invitation to appoint any mediator.

If other parties do not agree to the joint appointment of a mediator, or the appointment of separate mediators, the initiating party can engage a mediator unilaterally, at that party's own expense, and invite the other party/parties to agree to meet with the mediator only to discuss the feasibility of mediation/ADR processes, on a confidential basis.¹⁷

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¹⁵ In the UK, even before pre-action protocol procedures are undertaken.

¹⁶ The secondary objectives of the NMS Mediator(s) at this stage include introducing the basic concepts and benefits of mediation to the uninitiated, to gain the confidence of the parties and their representatives, and to assess the appropriateness to the dispute of alternative (or combination) ADR procedures.

¹⁷ Under this scenario, the appointing, paying party reserves the right to address the question of sharing the mediator's fees as part of any subsequent settlement of the dispute, or on the determination of the question of costs in litigation.