

1 Court-connected mediation practice in perspective

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Introduction

Court-connected mediation has steadily expanded its scope in many Anglo-American jurisdictions over the past 20 years.¹ Its growth has been spurred by diverse factors that include mediations' greater perceived cost-effectiveness when compared with conventional civil litigation, coupled with corresponding public, judicial and legal professional interest in the greater participant control mediation permits. This growth has been particularly evident in commercial dispute resolution, where business pragmatism is a further spur to finding mediated solutions.

Using the England and Wales (EW hereafter) civil procedure rules (CPR) mediation provisions as a commencement point,² this opening chapter critically assesses the widening range of court-connected mediation possibilities available within the commercial disputes resolution sphere. In the first section, key mediation theory principles are identified and explained. From here, the EW commercial mediation-rules framework is considered, as a means to introduce other comparative Anglo-American jurisdiction analyses. Cases and commentaries provide additional support for the contention that court-connected mediation boundaries are limitless, in the sense that no commercial mediation dispute is likely unsuited to a mediation attempt. The third section offers a brief prediction concerning mediation's likely future scope, where mediation will be the accepted first formal step in every commercial dispute. The conclusions section affirm the proposition that those cases where mediation fails are now regarded by many commentators as exceptions that tend to prove the rule asserted in this assessment.

Key mediation principles

Mediation may be defined as any process devised to seek settlement of a disputed issue or controversy through an independent person placed between the two contending parties to assist them. Mediation success is measured in two ways: i) where the entire dispute is settled between the parties; ii) the parties move closer to settlement ('narrowing of issues') where the foundation is established for future settlement. Mediation forms part of the now well-entrenched dispute

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resolution (DR) continuum. DR has evolved from its ‘alternative dispute resolution’ (ADR) literature references, especially when one appreciates how this formerly ‘alternative’ form now dominates family, tort, and commercial dispute resolution mainstreams.

The further mediation description, ‘negotiating in the shadow of the law’ is especially appropriate when the Heading II mandatory CPR provisions are evaluated.³ The continuum is best understood with reference to the relative degree of formality each dispute resolution element involves. Informal, unstructured *negotiations* initiated between the two disputing parties are the crucial DR continuum commencement point.⁴ Its opposite terminus is a contested *trial* proceeding, one conducted in accordance with all applicable civil justice system procedural rules.⁵ Within this continuum, mediation is a middle-ground location. A mediation invariably preserves the parties’ confidentiality, where each party proceeds without any commitment to reach settlement.

Mediation affords the parties opportunities for more structured information exchanges than usually occurs in privately conducted negotiation, but within a forum (and its independent third-party mediator influencing the pace and intensity of the process) with fewer procedural requirements than those governing arbitrations or trials.⁶

Mediation never forecloses the parties from abandoning its processes (consistent with fundamental disputing parties’ autonomy),⁷ if it is seen as likely fruitless for the respective participants, or where the parties decide to continue to a concluded settlement without mediator assistance.⁸ In this important sense, mediation is an extension of its DR continuum neighbour, negotiation. Ongoing negotiation between the parties is consistent with the overarching DR commitment to promote effective, honest communication between the two parties, where an ‘exchange of information, potentially leading to common understanding and joint decision-making’ is a core principle.⁹

Mediation is thus concerned with effective information exchanges between the parties to permit the mediation to focus on the parties *interests*, as opposed to what legal *positions* they may have adopted prior to mediation being initiated.¹⁰

The first issue a mediator must isolate is the specific party interest each seeks to safeguard. Each of the mediation variants outlined here is premised on this crucial ‘position versus interests’ distinction.¹¹ As with all other dispute resolution options, mediation has distinct variants that can be further modified (or purpose-built) to suit specific dispute resolution problems.

These variants are also best understood from a DR continuum perspective. *Narrative mediation* encourages the parties to candidly ‘tell their story’, with the mediator using each story to construct a possible resolution pathway.¹² *Facilitative mediation* gives the mediator more scope within which to bring the parties closer to possible resolution. Confidential, ‘without prejudice’ joint mediation sessions are a frequently employed facilitative tool, ones designed to bring the parties’ interests into closer alignment.¹³

In *evaluative mediations*, a subject matter expert mediator approaches the dispute issues from a pragmatic perspective. This mediator provides non-

binding advice to the parties regarding what would likely result if their dispute proceeded to civil trial.¹⁴ *Directive mediation* demands the greatest mediator personal engagement with the parties and the dispute issues.¹⁵ Where the first three variants ensure the mediator remains largely above the fray, the directive mediator is expected to steer the dispute to settlement.¹⁶ While remaining neutral, this mediator gives the parties express advice concerning what results the parties may confidently expect at trial.¹⁷

As suggested above, the well-recognized mediation advantages over conventional litigation or other dispute resolution methods (both through individual comparisons and where mediation is combined with arbitration, known as ‘med-arb’¹⁸), are readily summarized. Mediation provides highly cost-effective, less formal (thus less intimidating) opportunities for the parties to meaningfully engage with each other in a neutral setting without litigation risks. Just as importantly, the fresh perspective on the dispute a mediator can provide from his or her neutral, non-binding opinion perspective can often shift the antagonistic dispute participants’ attitudes.

A well-trained, issues-specific mediator can often assist the parties in getting past their emotional barriers to settlement, and encourage them to reasonably consider their settlement opportunities.¹⁹ The disadvantages attributed to mediation are few. The most common ones cited in the mediation literature are connected to the fact that parties usually provide their opponent with insights regarding how their position will be advanced if the case is not resolved through mediation.²⁰

Notwithstanding mediation’s confidential, without prejudice nature, a party participating in an unsuccessful mediation knows more about their prospective litigation opponent’s case than they would know otherwise.²¹ Del Ceno notes that some EW civil practitioners have been resistant to mediation being imposed under CPR auspices, on the basis that such mandated DR offended a client’s European Convention right of access to the courts.²² It seems doubtful that such concerns can displace the cost-benefit and related mediation benefits cited here.²³ Specific commercial mediation concepts are now considered.

Commercial mediation has its own unique features: ones that underscore how the terms ‘business’, ‘commercial dealings’, and ‘settlement’ have particularly important commercial term of art characteristics that do not always apply in other DR circumstances. Bamford’s 1997 article that strongly questioned commercial mediation’s longer-term DR staying power seems quaint almost 20 years later, as commercial mediation has attained its niche, specialist DR status.²⁴

As early as 1993, EW commercial court judges were issuing ‘ADR’ orders at an early stage in many large commercial disputes.²⁵ The 1998 CPR amendments that implemented many of Lord Woolf’s 1996 ‘Access to Justice’ report’s²⁶ recommendations merely formalized a strongly held ‘on the ground’ practitioner and judicial attitude that assertive, properly structured commercial mediation tends to produce sound results.²⁷

Commercial mediation has all of the advantages and disadvantages noted in the second section of this chapter, with one additional point of emphasis requiring attention.²⁸ The advantages are particularly apparent when compared with

international commercial arbitration, the forum where most international DR is advanced.²⁹

As various commentators have observed, commercial arbitration has become increasingly ‘judicialized’: twenty-first century commercial arbitration has evolved from a ‘flexible, expedited, and less costly means of dispute settlement to a mechanism that mirrors the traditional (more costly and cumbersome) judicial process’.³⁰ For parties interested in commercial arbitration as a more cost-effective DR option than civil trials, there are now two uncomfortable realities. The first is that arbitration is no longer faster than litigation.³¹

The second is connected to the first, as arbitrators (unlike judges) are directly remunerated by the DR parties. As a consequence, while arbitration will often involve highly qualified expert adjudicators, it is frequently more expensive than litigation.³² By contrast, mediation encourages a ‘win-win’ settlement discussions environment, where: i) mediators are less expensive than arbitrators; ii) the procedural timelines are shortened; and iii), the commercial parties’ ability to potentially preserve their business relationship though a mediator’s assistance is significantly enhanced.³³ The prevailing EW commercial mediation framework is now highlighted.

The EW commercial mediation framework

The CPR general provisions regarding case management apply to all EW civil proceedings, including commercial litigation.³⁴ The CPR establishes as its ‘overriding objective’ that of enabling EW courts to deal with cases justly and at proportionate cost.³⁵ This general CPR DR encouragement is supported by various other Rules provisions. CPR rule 1.4(1) obliges the court to further the overriding objective of enabling the court to deal with cases justly by actively managing cases.³⁶

Rule 1.4(2)(e) defines ‘active case management’ as including the need to encourage the parties ‘... to use an alternative dispute resolution procedure if the court considers that appropriate and facilitates the use of such procedure’.³⁷ Rule 26.4(1) confirms that any civil litigation party may make a written request for the proceedings to be stayed while the parties attempt to settle their case by DR or other means.³⁸

Rule 3.1(2) defines the court’s general powers of management in broad, judicial discretion-rich terms.³⁹ Except where the CPR otherwise provides, the court may ‘... take any other step or make any other order for the purpose of managing the case and furthering the overriding objective’.⁴⁰ Such steps may include the court hearing an Early Neutral Evaluation (ENE) with the aim of helping the parties settle their case.⁴¹

The scholarly commentaries suggest that there has been some confusion in the minds of EW civil practitioners generally that the noted ENE and other DR procedures depended upon the parties’ providing their consent to participate.⁴² Two other reasons are cited for ENE lack of use: (i) lack of clarity regarding the basis on which courts may (with or without party consent), direct an ENE hearing

be convened; (ii) under-appreciation by the judiciary and legal profession of ENE merits.⁴³ This reluctance has not been evident in EW commercial court practice, as there has been significant enthusiasm for ENE and other mediation-related approaches to aggressively pursue commercial claim settlements since the 1998 CPR enactments.⁴⁴

Neville offers a brilliant assessment of commercial mediation's strengths in a specific partnership dispute context.⁴⁵ He explains how the 'reflective analysis' mediators may use in approaching a dispute between business partners provides often invaluable DR assistance, irrespective of whether the disputing parties' business is conducted within a formal partnership framework, or where the partnership is constructed as a closely held corporation.⁴⁶ Neville notes that even a seasoned mediator can find it exceptionally challenging to interact with business partners in conflict to assist them in achieving effective DR. He describes the exercise as potentially as '... daunting as Rubik's Cube and [can] make the mediator envious at the swiftness with which Alexander the Great solved the riddle of the Gordian Knot'.⁴⁷ It is the fact that EW commercial mediation growth has been steady since the 1998 Rules amendments designed to promote effective DR that confirms how readily all EW mediation stakeholders are prepared to meet the challenges Neville describes.⁴⁸

Costs consequences

A controversial EW court-connected mediation issue is whether courts may impose cost sanctions on parties that did not meaningfully engage in mediation which the court directed under its case management mandates. This is an important issue that requires consideration of two seemingly antithetical concepts. On one hand, as outlined in the first section, *party autonomy*, mediation participation based on mutual consent is one of mediation's acknowledged strengths.⁴⁹ On the other hand, CPR rule 3 and the related Commercial Practice directions permit judges to compel the parties to participate in any mediation or other DR process the court deems appropriate.⁵⁰ These conflicting propositions have been tested in the following cases.

*Halsey v. Milton Keynes*⁵¹ is the first EW appellate court consideration of whether a reluctant mediator should be punished for their deliberate decision not to fully engage with the court-directed mediation process. The interesting feature of the case which the Court of Appeal considers in this context is the fact that the reluctant party was also the ultimately successful litigator.⁵² The court held that the unsuccessful party bears the onus to demonstrate why the court should sanction any departure from the general rule on costs (costs follow the event, where the successful litigant recovers their costs).⁵³

Such departure would take the form of an order to deprive the successful party of some or all of their costs on the grounds that they had refused to agree to ADR.⁵⁴ The court held that, as a fundamental costs principle, a departure from the general rule was not justified unless the unsuccessful party could show the successful party had acted unreasonably in refusing to agree to DR.⁵⁵ The court (through Dyson L.J.)

offers what Rix later criticizes as a less than fulsome endorsement of mediation.⁵⁶ In his two-pronged observation, Dyson L.J. first states that all EW practitioners conducting civil litigation should now routinely consider with their clients whether their disputes are amenable to a DR option. His second point is more controversial, as Dyson L.J. asserts that the court's role is to encourage DR participation (and it may encourage the parties by robust means), but the court cannot compel it.⁵⁷

From this perspective, *Halsey* appears to endorse party autonomy, and accepted consensual mediation participation over a CPR interpretation where judges are empowered to mandate mediation at all costs.⁵⁸ The subsequent cases suggest the Court of Appeal is now prepared to sanction CPR costs orders made against parties that plainly do not agree with a case management order to proceed with mediation.

In *PGF II SA v. OMFS*, the Court of Appeal extended its *Halsey* guidelines concerning whether a refusal to engage in DR amounted to 'unreasonable conduct' that ought to attract a costs penalty.⁵⁹ The Court establishes this revised *Halsey* proposition as its general rule: silence in the face of an 'invitation' to participate in DR is inherently unreasonable litigation-party conduct, irrespective of whether the party advances a good reason for its DR-participation refusal.⁶⁰ The court expressly found that this commercial lease dispute was eminently suited to mediation, and that the proposed mediation had a reasonable prospect of success when it was offered by the other party.⁶¹ In this important way, the court gives fuller meaning to what constitutes 'court-connected' mediation.

Such mediation is both DR, as expressly defined in CPR rule 3 case management, as well as mediation which a party seeks to initiate within the larger ongoing civil litigation framework.⁶²

When these various EW commercial mediation points are distilled into a single impression, it is clear that the CPR framework actively encourages mediation within its broader DR parameters. The authorities suggest the EW CPR system works reasonably well, and with *Halsey* now modified by *PGF II SA* and its imposed costs consequences, meaningful mediation participation is being more than merely encouraged by EW courts. Two comparative Anglo-American jurisdiction approaches are now briefly considered.

Canadian and Australian examples contribute to a fuller understanding of how the EW court-connected mediation approaches are now reflective of clear international trends. Ontario and New South Wales are the selected jurisdictions.

Ontario

The Ontario *Rules of Civil Procedure* ('Ontario Rules')⁶³ provide straightforward DR direction. Under Ontario rule 24, *mandatory mediation* exists for all case-managed civil, non-family actions, including all commercial claims.⁶⁴ Mediation may only be avoided where a party secured a court order to this effect; such orders are rarely granted.⁶⁵ A private-sector mediator is selected to conduct the proceedings, with the selection made from the Ontario Rules mediation program roster of approved mediators; the parties may agree on a non-roster mediator of their choice.⁶⁶ The Ontario procedure places some pressure on the parties, with its

fixed mediation timelines. The mediator must be selected within 30 days of the first Statement of Defence being filed; the mediation *must* occur within 90 days from this filing date, unless the court determines otherwise.⁶⁷

The mediation parties must provide the mediator and all other parties to the proceedings with their ‘Statement of Issues’, a document akin to an EW ‘skeleton argument’, that i) identifies the issues in dispute, and ii) sets out the respective parties’ positions and interests.⁶⁸ This Statement must include all pleadings filed in the proceeding, as well as any other documents of central importance to the dispute.⁶⁹ The relatively strict Ontario rules have proven effective, with over 95 percent of claims eventually settling (either at mediation, or prior to trial).⁷⁰

Ontario also endorses an equally emphatic costs regime regarding reluctant or obstructive mediation participants. In its 2010 *Keam v. Caddey* reasons,⁷¹ the Ontario Court of Appeal ruled that where the defendant’s insurer twice refused to participate in mediation, it would bear significant costs consequences. As Moroknovets observes, the court’s additional \$40,000 ordered in costs for failure to mediate ‘makes it clear’: mediation is not an option but a legitimate alternative to lengthy civil trials.⁷²

New South Wales

New South Wales (NSW) establishes arguably the most comprehensive of the three jurisdictional approaches to commercial mediation cited in this analysis. In addition to its general civil procedure rules that provide for court-connected mediation on similar bases to those enacted in EW and Ontario,⁷³ the NSW *Commercial Arbitration Act 2010* encourages mediation as part of its larger commercial arbitration scope.⁷⁴ The NSW courts have adopted an approach to encouraging mediation that appears more aligned to the EW than Ontario experience, a point made that recognizes there is not a wide gulf in these respective approaches in any event. The NSW Supreme Court ruling in *Idoport Pty v. National Australia Bank* supports this assertion.⁷⁵

The court found that while it has the power under the NSW rules to undertake compulsory mediation, with a corresponding parties obligation to participate ‘in good faith’, these rules do not mean that the parties are forced to settle.⁷⁶ The court states that if the mediation fails, the parties may continue litigation without penalty, as the NSW enactments are designed to encourage settlement rather than force it upon parties.⁷⁷ The EW, Ontario and NSW commercial mediation approached share obvious common features, most notably the respective procedural rules reinforcement of mediation’s accepted importance in all modern DR processes. The likely way ahead for commercial mediation is now briefly considered.

Commercial mediation – the way ahead

Like the old expression, the ‘genie is out of the bottle’, there is little likelihood that the DR advances made in the past 20 years (taking a 1996 Woolf Report commencement point) will be reversed. While there may be instances where

parties may have honestly held reservations concerning mediation, such as the tactical concerns outlined in previous sections, arguments underscoring collective mediation strengths are the best possible indication of future directions for court-connected mediation.

Based on how the respective EW, Ontario, and NSW jurisdictions have variously endorsed mediation, with further specific rules that assist commercial parties to more readily achieve dispute settlements, it has been predicted that it is likely that these jurisdictions will move even more assertively into mandatory mediation. It is also anticipated, as based on the authorities cited in Heading II, that each jurisdiction will enact mediation provisions that ensure mediation is the rule, with trial proceedings reserved for the truly exceptional cases. A dispute that involves a novel legal point that the parties require to be litigated, and perhaps one that should be litigated in the public interest, is the type of exceptional situation that may fall outside the ever-widening mediation ambit.

Conclusions

The cost-effective resolution of virtually any dispute is possible under court-connected mediation. This answer applies with even greater force in commercial disputes, where the parties are usually eager to ensure their business interests are not compromised by having to needlessly commit time and resources to DR processes (such as trials and their current procedure arbitration counterparts). Mediation can be tailored to suit any dispute, and the court-connected feature provides the parties (and the civil justice system administration) with a sufficiently robust process that maintains an effective balance between mediation's fundamentally consensual nature and the need to ensure disputes are brought to a timely, effective conclusion. The need to ensure that mediation is given even greater prominence is clear after careful consideration of the first section's conceptual frameworks and the second section's examples. The disputes where mediation will not succeed are very few, as long as the underlying mediation principles are matched in practice by willing parties and skilled mediators leading the process forward.

Notes

- 1 See i) Anthony Connerty, 'Mediation: a scheme in operation at the Mayor's and City of London Court' (2010) 76(2) *Arbitration* 265; ii) Anne Brady, 'Court-connected mediation' (2006) 72(2) *Arbitration* 141, 142.
- 2 *Civil Procedure Rules 1998* (CPR 1998) Practice Direction 'Pre-Action Conduct and Protocols' (2015) [Online] Available: www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct#3.1 [24 April 2016], [3], [6].
- 3 Ronald Mnookin and Lorne Kornhauser 'Bargaining in the Shadow of the Law: The case of Divorce' (1979) 88 *Yale Law Journal* 950, 953.
- 4 Michael Supperstone 'ADR and public law' (2006) *Sum P.L.* 299, 301–302.
- 5 Bernard Rix, 'The interface of mediation and litigation' (2014) 80(1) *Arbitration* 21, 23.
- 6 *Ibid.* 22.

- 7 Rita Drummond, 'Court-Connected Mediation in England: Foundations for an Independent and Enduring Partnership (2007) [Online] Available: <http://ssrn.com/abstract=962122> [24 April 2016], footnote 9.
- 8 Rix, (note 5), 23.
- 9 Drummond (note 7).
- 10 See e.g. D Scott DeRue, and Donald Conlon, et al., 'When Is Straightforwardness a Liability in Negotiations? The Role of Integrative Potential and Structural Power' (2009) 94(4) *Journal of Applied Psychology* 1032, 1036, 1037.
- 11 Ibid.
- 12 John Winslade and Gerald Monk, 'Narrative mediation: a new approach to conflict resolution' (Jossey-Bass, 2000), 7–8.
- 13 (i) Roger Fisher and William Ury, *Getting to Yes: Negotiating an agreement without giving in* (3rd edn, Random Business, 2012), xviii.
- 14 See John Wade, 'Evaluative and Directive Mediation: All Mediators Give Advice-Part 1 of 2' (2011) *Mediate.com* [Online] Available: www.mediate.com/articles/WadeJ3.cfm [24 April 2016].
- 15 Ibid.
- 16 Shirley Shipman. 'Compulsory mediation: the elephant in the room' (2011) 30(2) *C.J.Q.* 163, 166–169.
- 17 See John Wade, 'Evaluative and Directive Mediation: All Mediators Give Advice-Part 1 of 2' (2011) *Mediate.com* [Online] Available: www.mediate.com/articles/WadeJ3.cfm [24 April 2016].
- 18 Program on Negotiation 'Arbitration vs Mediation: Undecided on Your Dispute Resolution Process? Combine Mediation and Arbitration with Med-Arb' (2015) Harvard Law School [Online] Available: www.pon.harvard.edu/daily/mediation/deciding-on-arbitration-vs-mediation-try-combining-them [24 April 2016].
- 19 As discussed by Joshua Smilovitz, 'Emotions in Mediation' (2012) Netherlands Institute of International Relations [Online] Available: www.clingendael.nl/sites/default/files/20080100_cdsp_diplomacy [24 April 2016].
- 20 Shipman (note 14).
- 21 Drummond (note 7).
- 22 Julian Sidoli del Ceno, 'Compulsory mediation: civil justice, human rights and proportionality' (2014) 6(3) *I.J.L.B.E.* 286-2, citing *European Convention on Human Rights 1950*, Article 6(1).
- 23 Del Ceno (note 20).
- 24 Richard Bamforth, 'Mediation: a genuine alternative or just a passing trend?' (1997) 141(28) *S.J.* 688, 689.
- 25 Tamara Oyre 'Civil Procedure Rules and the use of mediation/ADR' (2004) 70(1) *Arbitration* 19.
- 26 Lord Harry Woolf, *Access to Justice Final Report*, (1996), [Online] Available: <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/final/index.htm> [24 April 2016].
- 27 Ibid. 21.
- 28 Markus Petsche, 'Mediation as the preferred method to solve international business disputes? A look into the future' (2013) 4 *I.B.L.J.* 251.
- 29 i) Richard Hill, 'Adversarial Mediation' (1995) 12(4) *J. Int. Arb.* 135; (ii) Richard Hill, 'The Theoretical Basis of Mediation and Other Forms of ADR: Why They Work' (1998) 14(2) *Arb. Int.* 173.
- 30 Petsche, 252.
- 31 Ibid.
- 32 Ibid. 253.
- 33 Tony Allen, 'The place of mediation in England & Wales in 2014' (2014) 25(4) *E.B.L. Rev.* 517, 520, citing Directive 2008/52 on mediation in civil and commercial matters.

- 34 Justice, 'Practice Direction: Part 58 – Commercial Court' (2016) [Online] Available: www.justice.gov.uk/courts/procedure-rules/civil/rules/part58#IDAPP3HC [24 April 2016], Rule 58.3.
- 35 CPR 1998, r.1(1)
- 36 *Ibid.* r. 1(4) (1).
- 37 *Ibid.* r. 1(4)(20, as summarised by Rix (note 5).
- 38 *Ibid.* r. 26.4(1).
- 39 *Ibid.* r. 3.1(2).
- 40 *Ibid.* Rule 3.1(2)(m).
- 41 *Ibid.*
- 42 Civil Procedure News 'Early neutral evaluation' (2015) 8(Sept) *Civil Procedure News* 7, 8.
- 43 *Ibid.*
- 44 Khawar Qureshi, 'Money walks?' (2010) 160(7436) *N.L.J.* 1361, 1362.
- 45 William Neville, 'Facing the enigma: mediation and the troubled partnership' (2012) 78(1) *Arbitration* 15, 16.
- 46 *Ibid.*
- 47 *Ibid.*
- 48 A point taken from Peter Kelly, 'Alternative dispute resolution and the Commercial Court' (2010) 2 *A. and ADR Rev.* 92.
- 49 See (note 7).
- 50 See (n 32).
- 51 *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002 (CA (Civ Div)).
- 52 *Ibid* [12], [13].
- 53 *Ibid.*
- 54 *Ibid.* [8].
- 55 *Ibid.* [80].
- 56 Rix (note 5), 25.
- 57 *Halsey* (note 48), [11], [30].
- 58 Rix (note 5); see also Janey Draper, 'Halsey – mediation one year on' (2005) 155(7176) *N.L.J.* 730, 731.
- 59 *PGF II SA v OMFS Co 1 Ltd* [2013] EWCA Civ 1288; [2014] C.P. Rep. 6 (CA (Civ Div)).
- 60 *Ibid.* [51].
- 61 *Ibid.* [48].
- 62 A point taken from Patrick Taylor, 'Failing to respond to an invitation to mediate' (2014) 80(4) *Arbitration* 470, 472.
- 63 *Rules of Civil Procedure 1990*, as amended.
- 64 *Ibid.* Rule 24.1.
- 65 *Ibid.* see also Sue Prince, 'Mandatory mediation: The Ontario experience' (2007) 26(Jan) *C.J.Q.* 79, 82–85.
- 66 Ontario Rules, r. 24.1
- 67 See also Ontario Attorney General 'Mandatory Mediation Program' (2015) [Online] Available: www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/notice.php [24 April 2016].
- 68 Ontario Rules, r. 24.1.
- 69 *Ibid.*
- 70 Shahla Ali and Felicia Lee, 'Lessons learned from a comparative examination of global civil justice reforms' (2011) 53(4) *Int. J.L.M.* 262, 274 (re Ontario Rules).
- 71 *Keam v. Caddey*, 2010 ONCA 565 (CA).
- 72 Diane Morokhovets, 'Refusal to Mediate Attracts a Remedial Penalty in *Keam v. Caddey*' The Court (2011) [Online] Available: www.thecourt.ca/2010/09/refusal-to-mediate-attracts-a-remedial-penalty-in-keam-v-caddey [24 April 2016].

73 *Civil Procedure Act 2005* (New South Wales), Part 4.

74 *Commercial Arbitration Act 2010* (New South Wales), s.27D.

75 *Idoport Pty Ltd v National Australia Bank Ltd* [2001] N.S.W.S.C. 427 (SC).

76 *Civil Procedure Act* (note 72), s.27.

77 *Idoport*, (note 74), [24]; see also Brenda Tronson, 'Mediation orders: do the arguments against them make sense?' (2008) 25(Jul) *C.J.Q.* 412, 414.