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The Progress from Void to Valid for Agreements to Mediate

By

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1. INTRODUCTION

In the United States, “the Federal Rules of Civil Procedure. . . evidence an intent to encourage private settlement”.¹ Similarly in the United Kingdom the courts and the rules of civil procedure encourage the use of mediation.² In a number of states in the United States the requirement is put even higher and the courts can order mediation without needing the consent of the parties.³ In Canada there is compulsory court annexed mediation. In Europe, in Belgium and Greece⁴ for example, there are compulsory court mediation schemes. In the United Kingdom, whilst the courts have a duty under the overriding objective to “encourage ADR where appropriate”,⁵ it is not, as yet, compulsory⁶; although Sir Anthony Clarke M.R. has recently suggested that the English courts do have power to order compulsory mediation.⁷ Why in light of these court driven pressures to use mediation, one might ask, should there be any question at all as to why the courts should not enforce mediation agreements?

2. THE ISSUES WITH ENFORCEMENT OF MEDIATION AGREEMENTS

The starting point is that traditionally the common law courts have refused to enforce mediation agreements. The arguments against enforcement are fourfold:

“First . . . that the clause is unenforceable for uncertainty. [S]econd. . . a mediation clause may seek to oust the jurisdiction of the courts. . . [T]hird that. . . the court will not enforce

* The author gratefully acknowledges the initial direction provided by Dr Tatiana Kyselova of Queen Mary University of London, which led him to write this article.

¹ See FED. R. CIV. P. 16 (Supp. 1985) and FED. R. CIV. P. 68 (1982); also *Marek v Chesny* 473 U.S. 1, 6–7 (1985); Lucy Katz, “Enforcing an ADR Clause—Are Good Intentions All You Have?” (1988) 26 Am Bus L.J. 575, 582.

² See Civil Procedure Rules 1998 r.1.4(2)(e); *Cable & Wireless Plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm); [2002] 2 All E.R. (Comm) 1041; *Dunnett v Railtrack Plc* [2002] EWCA Civ 303; [2002] 1 W.L.R. 2434.

³ e.g. Holly Streeter-Schaefer, “A Look at Court Mandated Civil Mediation” (2001) 49 Drake L. Rev. 367.

⁴ Greek Civil Code art.214.

⁵ Civil Procedure Rules 1998 (SI 1998/3132) r.1.4(2)(e).

⁶ The Court of Appeal in *Halsey v Milton Keynes General Trust NHS* [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002 held that to make mediation mandatory would be in breach of art.6 of the European Convention on Human Rights (the right to a fair trial). They held that courts should “explore the reasons for any resistance to ADR” procedures but where a party remains, “intransigently opposed to ADR . . . it would be wrong for the court to compel them to embrace it” (at [10]).

⁷ Sir Anthony Clarke M.R., The Second Civil Mediation Council National Conference, The Future Of Civil Mediation (May 8, 2008), para.16 where Sir Anthony doubts the correctness of the *Halsey* [2004] EWCA Civ 576 decision insofar as it suggests that compulsory ADR would be a breach of art.6 of the European Convention on Human Rights and suggests that the *Halsey* decision in this regard was obiter (now (2008) 74 *Arbitration* 419).

[a mediation clause] because it would be a futile gesture. [F]ourth... is... that equity will only provide a remedy where [damages are] inadequate.”⁸

Uncertainty

To be enforceable a contract term must be sufficiently certain. *Courtney and Fairbairn Ltd v Tolaini Bros (Hotels) Ltd*⁹ has traditionally been relied on as *the* authority for the proposition that an agreement to negotiate is unenforceable. As Lord Denning M.R. held:

“If the law does not recognise a contract to enter into a contract (where there is a fundamental term yet to be agreed) it seems to me it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force... It seems to me that a contract to negotiate, like a contract to enter into a contract, is not a contract known to the law... I think we must apply the general principle that when there is a fundamental matter left undecided and to be the subject of negotiation, there is no contract.”¹⁰

The term in question in *Courtney* was in a letter proposing:

“[A] financial arrangement acceptable to both parties. [Y]ou will be prepared to instruct your Quantity Surveyor to negotiate fair and reasonable contract sums in respect of each of the three projects as they arise. (These would, incidentally be based upon agreed estimates of the net cost of work and general overheads with a margin for profit of 5%) which, I am sure you will agree, is, indeed reasonable.”

This letter was agreed to by the other party. Looking at this in light of Lord Wright’s earlier judgement in *Hillas & Co Ltd v Arcos Ltd*,¹¹ that commercial contracts should be upheld and that “reasonableness” should be the line drawn by the courts where negotiation failed, it is difficult to see why the Court of Appeal in *Courtney* decided differently. A more obvious case of uncertainty, which approved the decision in *Courtney*, was *Walford v Miles*.¹² In that case a company agreed to be locked into negotiations with one other company and to be locked out of negotiations with any third party. There was no indication of how long the two companies were obliged to continue to negotiate for. There was no indication of what, if anything, would end that obligation. The clear ratio of the House of Lords was that an agreement to negotiate for an unspecified period was not enforceable. But the House also opined that a lock-out agreement, under which one party agreed for good consideration, that they would not negotiate with anyone except the other party for a specified period of time, could constitute an enforceable agreement.¹³

In *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*¹⁴ the parties had entered into an agreement under which an independent expert was to provide a determinative decision on the dispute that arose between them. Lord Mustill in the House of Lords upheld the contract’s provisions both under the Arbitration Act 1975 and under the court’s

⁸ Joel Lee, “The Enforceability of Mediation Clauses in Singapore” (1999) Singapore J. of Legal Studies 229, 231; Lucy Katz, “Enforcing an ADR Clause—Are Good Intentions All You Have?” (1988) 26 Am Bus L.J. 575, 583 who suggests only the futility and damages arguments (i.e. common law provides sufficient remedies).

⁹ *Courtney and Fairbairn Ltd v Tolaini Bros (Hotels) Ltd* [1975] 1 W.L.R. 297 CA.

¹⁰ *Courtney* [1975] 1 W.L.R. 297 at 301–302.

¹¹ *Hillas & Co Ltd v Arcos Ltd* [1932] All E.R. 494 HL.

¹² *Walford v Miles* [1992] 2 A.C. 128; [1992] 2 W.L.R. 174 [1992] 1 All E.R. 453 HL.

¹³ *Walford* [1992] 1 All E.R. 453 at 461, per Lord Ackner whose judgement was agreed by all the other Law Lords.

¹⁴ *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] A.C. 334 HL.

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inherent jurisdiction to adjourn matters pending alternative dispute resolution.¹⁵ But the ADR processes contracted for in *Channel Tunnel* would provide a final decision on the case. In the case of a contractual mediation clause, of course, although mediation might provide a resolution to the case by agreement, it does not lead to any decision being made by the mediator and it will not necessarily lead to a resolution of the case.

In *Halifax Financial Services Ltd v Intuitive Systems Ltd*¹⁶ McKinnon J. stated that a clause which provided for a time limited and specific set of steps involving negotiations and mediation or the intervention of a neutral advisor was not binding. It was no more than:

“[A] provision for the parties to negotiate, hopefully towards an agreement. Only if the negotiations fail does any question of arbitration arise and only then if the parties at that stage agree to arbitration. The parties have, in fact, in no sense bound themselves to any method of determining any dispute between them.”

Although *Walford v Miles*¹⁷ was cited in this case there is no reference to Lord Ackner’s observations on the enforceability of time limited negotiation.¹⁸ McKinnon J. distinguished both the *Channel Tunnel* case and *Cott UK Ltd v FE Barber Ltd*,¹⁹ a case which followed it.

“The difficulty about applying [the *Cott*] case to the instant case is that the relevant clause in that case provided for disputes to be referred to a person who ‘shall act as an expert and not as an arbiter and his decision shall be final and binding on the parties’ (see p.543c-d). That was a case, like the *Channel Tunnel* case, where the parties had chosen a method alternative to Court proceedings of determining any dispute between them, i.e. a determinative procedure, unlike the non-determinative procedures provided for in Clause 33 [in the instant case].”²⁰

The difficulty in squaring the circle between the court system on the one hand pushing litigants towards mediation at the risk of being faced with a costs bill if they refuse²¹ and on the other hand declining to enforce contractual agreements to mediate on grounds of uncertainty was finally tackled head on by Colman J. in *Cable & Wireless Plc v IBM UK Ltd*.²² The agreement between the parties contained a provision:

“If the matter is not resolved through negotiation, the parties shall attempt in good faith to resolve the dispute or claim through an Alternative Dispute Resolution (ADR) procedure as recommended to the Parties by the Centre for Dispute Resolution. However, an ADR procedure which is being followed shall not prevent any Party or Local Party from issuing proceedings.”

Cable & Wireless did not want to go through the ADR process. IBM did and sought a stay of the litigation to enable the ADR process to take place. It was assumed in this case that the “ADR process” which had been agreed to was mediation, although this was not

¹⁵ Arbitration Act 1996 s.9(2) gave statutory support to Lord Mustill’s opinion; providing that a party’s right to a stay of proceedings brought in the face of an arbitration agreement should not be affected by a provision that the dispute be referred to arbitration only after exhaustion of other dispute resolution procedures.

¹⁶ *Halifax Financial Services Ltd v Intuitive Systems Ltd* [1999] 1 All E.R. (Comm) 303 HC.

¹⁷ *Walford* [1992] 2 A.C. 128; [1992] 1 All E.R. 453 HL.

¹⁸ *Walford* [1992] 1 All E.R. 453 at 461, per Lord Ackner.

¹⁹ *Cott UK Ltd v FE Barber Ltd* [1997] 3 All E.R. 540 HC.

²⁰ *Cott* [1997] 3 All E.R. 540 HC.

²¹ e.g. *Halsey v Milton Keynes General Trust NHS* [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002 and *Dunnett v Railtrack Plc* [2002] 1 W.L.R. 2434 CA.

²² *Cable & Wireless Plc v IBM UK Ltd* [2002] All E.R. (D) 277 HC.

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explicit in the agreement. Colman J.'s decision to grant the stay was based on three essential considerations:

- (i) the clear intention of both parties was that litigation should be the last resort (despite the contractual provision allowing for proceedings to be issued prior to the ADR process being completed);
- (ii) the ADR clause was not just an agreement to negotiate; and
- (iii) public policy supported enforcing the ADR clause.

It is clear from the judgment that the public policy argument and the irrationality of declining to enforce ADR agreements on grounds of uncertainty when this stance was so obviously inconsistent with the courts' policy of promoting mediation weighed heavily in this decision. As Colman J. put it:

“For the courts now to decline to enforce contractual references to ADR on the grounds of intrinsic uncertainty would be to fly in the face of public policy as expressed in the Civil Procedure Rules and as reflected in the judgment of the Court of Appeal in *Dunnett v Railtrack*.”²³

Colman J. dealt with the question of uncertainty summarily:

“[I]n the present case I conclude that clause 41.2 includes a sufficiently defined mutual obligation upon the parties both to go through the process of initiating a mediation, selecting a mediator and at least presenting that mediator with its case and its documents and attending upon him. There can be no serious difficulty in determining whether a party has complied with such requirements.”²⁴

But the contract must be sufficiently clear in general terms to be enforceable.²⁵

In Australia, in *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd*,²⁶ Giles J. held that an agreement to conciliate was sufficiently certain to be enforceable. He too held that agreements to negotiate will not automatically fail for lack of certainty and in reaching this conclusion he too expressly considered the comparison with court-ordered mediation:

“In my view it would be open to the Court to adjourn the proceedings on the application of Hooper Bailie, over the opposition of Natcon, in aid of the agreement to conciliate which I have found to exist. The Court can do so in aid of mediation ordered under the legislation which I have mentioned, the power to do so must accompany the power to order mediation, and the same power must exist where the conciliation or mediation is consensual and the agreement to conciliate or for mediation is enforceable in the manner I have described.”²⁷

So in Australia too the law has simply moved position to hold that agreements to negotiate or to conciliate are not automatically void for uncertainty if they are, in general terms, certain.²⁸

²³ *Cable & Wireless* [2002] All E.R. (D) 277 HC.

²⁴ *Cable & Wireless* [2002] All E.R. (D) 277 HC.

²⁵ In *Flight Training International v International Fire Training Equipment Ltd* [2004] EWHC 721 (Comm), for example, Creswell J. was faced with a commercial mediation clause which provided for reference of the mediation to ACAS. ACAS does not deal with commercial disputes. It was held that it was too uncertain and could not be rectified to make it valid.

²⁶ *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 N.S.W.L.R. 194.

²⁷ *Hooper Bailie* (1992) 28 N.S.W.L.R. 194 at 211 examined in depth by Michael Pryles, “Multi-Tiered Dispute Resolution Clauses” (2001) 18 *Journal of International Arbitration* 159, 164.

²⁸ Compare *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 N.S.W.L.R. 709, 716–717 where Giles J., the judge in the *Hooper Bailie* (1992) 28 N.S.W.L.R.

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In *Aiton v Transfield*,²⁹ in looking at the requirements for a mediation clause to be enforceable, Epstein J. “quoted with approval” a paper written by L. Boule and R. Angyal who stated that the minimum requirements for an enforceable dispute resolution clause were:

- It must be in the form described in *Scott v Avery*.³⁰ That is, it should operate to make completion of the mediation a condition precedent to commencement of court proceedings.
- The process established by the clause must be certain. There cannot be stages in the process where agreement is needed on some course of action before the process can proceed because, if the parties cannot agree, the clause will amount to an agreement to agree and will not be enforceable due to this inherent uncertainty.
- The administrative processes for selecting a mediator and in determining the mediator’s remuneration should be included in the clause and, in the event that the parties do not reach agreement, a mechanism for a third party to make the selection will be necessary.
- The clause should also set out in detail the process of mediation to be followed or incorporate these rules by reference. These rules will also need to state with particularity the mediation model that will be used.³¹

Ouster of jurisdiction of the courts

In his article³² on enforcement of mediation clauses, Joel Lee goes into considerable depth in exploring this ground for courts refusing to enforce mediation agreements.³³ It seems that this tight legal analysis has been overtaken since he wrote the article in 1999.

In *Halsey v Milton Keynes General NHS Trust*³⁴ Dyson L.J., giving the judgment of the court, whilst holding that the courts should encourage ADR robustly, held that compulsory court-ordered ADR would breach the right to fair trial as it would amount to an unacceptable constraint on the right of access to the court.³⁵ This statement, it has been suggested, fails

194 case, found a mediation agreement not to be enforceable, holding: “Mediation is a valuable means of resolution of disputes, and agreements to mediate should be recognised and given effect in appropriate cases. Even assuming the incorporation of ACDC’s guidelines, however, the contracts in this case do not in my opinion meet the requirements considered in *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd*.”

²⁹ *Aiton v Transfield* [1999] N.S.W.S.C. 996.

³⁰ *Scott v Avery* (1856) 10 E.R. 1121.

³¹ See Australian Law Reform Commission, *Review of the Adversarial System of Litigation, Issues Paper 25* (June 1998), Ch.6, para.6.20. But, in relation to the need for the procedure to be identified see Colman J. in *Cable & Wireless Plc v IBM United Kingdom Ltd* [2002] All E.R. (D) 277: “[C]ontractual references to ADR which did not include provision for an identifiable procedure would not necessarily fail to be enforceable by reason of uncertainty. An important consideration would be whether the obligation to mediate was expressed in unqualified and mandatory terms... where there is an unqualified reference to ADR, a sufficiently certain and definable minimum duty of participation should not be hard to find.” Quoted from Pryles, “Multi-Tiered Dispute Resolution Clauses” (2001) 18 *Journal of International Arbitration* 159, 168–169.

³² Joel Lee, “The Enforceability of Mediation Clauses in Singapore” (1999) *Singapore J. of Legal Studies* 229.

³³ Lee, “The Enforceability of Mediation Clauses in Singapore” (1999) *Singapore J. of Legal Studies* 229, 234–239.

³⁴ *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002 CA.

³⁵ *Halsey* [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002 at [9]–[11].

to take into account the fundamental difference between mediation and arbitration.³⁶ Whilst both arbitration and mediation require the consent of the parties to begin the process, once the parties have initiated an arbitration they are bound by the arbitrator's decision. The participants in a mediation, on the other hand, retain the right to terminate the process at any time.³⁷ Because they can terminate the process and go back to the court to litigate their case if mediation has been unsuccessful, there is no ouster of the court's jurisdiction.

Lightman J. in a speech given at SJ Berwin³⁸ suggested that the Court of Appeal in *Halsey* had been wrong to suggest that even compulsory mediation would oust the jurisdiction of the courts.

“[T]he court appears to have been unfamiliar with the mediation process and to have confused an order for mediation with an order for arbitration or some other order which places a permanent stay on proceedings. An order for mediation does not interfere with the right to a trial: at most it merely imposes a short delay to afford an opportunity for settlement and indeed the order for mediation may not even do that, for the order for mediation may require or allow the parties to proceed with preparation for trial.”³⁹

Sir Anthony Clarke M.R., on May 8, 2008, gave a speech⁴⁰ in which he considered the suggestion in *Halsey* that a compulsory requirement for parties to mediate would be in breach of art.6 European Convention on Human Rights. He referred to Lightman J.'s criticisms of this part of the *Halsey* decision that:

“[M]ediation... does not interfere with the right to fair trial but simply imposes a short delay on the trial process; and second that a number of other jurisdictions have compulsory mediation processes.”⁴¹

He looked, as Lightman J. had done, at some of the other jurisdictions both in Europe and in the United States which have compulsory mediation provisions and concluded:

“Taken together, what could be described as the European and US approach to ADR, appears to demonstrate that compulsory ADR does not in and of itself give rise to a violation of Article 6 or of the equivalent US constitutional right of due process”⁴²

He went on to consider whether compulsory mediation would lead to the parties waiving the right to a fair trial:

“Does mediation require parties to waive their rights to a fair trial? The answer is surely no... In fact all a mediation does is at worst delay trial if it is unsuccessful and it need not do that if it is properly factored into the pre-trial timetable. If the mediation is successful it does obviate the need to continue to trial, but that is not the same as to waive the right to fair trial. If it were, any consensual settlement reached either before or during civil process could arguably amount to a breach of Article 6, which clearly cannot be the case.”⁴³

³⁶ Gavin Lightman, “Mediation: An Approximation to Justice”, speech given at SJ Berwin (June 28, 2007).

³⁷ E.E. Deason, “Procedural Rules for Complementary Systems of Litigation and Mediation—Worldwide” (2005) 80 Notre Dame L. Rev. 553, 589.

³⁸ Lightman J., “Mediation: An Approximation to Justice”.

³⁹ Lightman J., “Mediation: An Approximation to Justice”, para.8.

⁴⁰ Sir Anthony Clarke M.R. “The future of Civil Arbitration” (2008) 74 *Arbitration* 419.

⁴¹ Sir Anthony Clarke M.R. (2008) 74 *Arbitration* 419.

⁴² Sir Anthony Clarke M.R. (2008) 74 *Arbitration* 419.

⁴³ Sir Anthony Clarke M.R. (2008) 74 *Arbitration* 419.

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If there is no objection on grounds of “ouster of the jurisdiction of the Courts” to court-mandated mediation, then there can be no such objection to mediation which is compelled by contract. (Although it is worth noting in passing that the suggestion that court-mandated mediation can be made compulsory is at odds with—or at best a significant progression from—the views of the designer of the CPR, Lord Woolf who cautioned against compelling parties to use ADR.⁴⁴)

Futility and damages

The arguments in respect of futility and damages are treated separately by both Lucy Katz⁴⁵ and Joel Lee.⁴⁶ The difficulty with this approach is that the arguments in relation to each inevitably overlap.

The futility argument is based on the equitable maxim that “equity, like nature, does nothing in vain”.⁴⁷ Since the response of an unwilling party to a mediation is that they will simply withdraw from the mediation at the earliest stage, an order for specific performance of an agreement to mediate, it is argued, would just be a waste of time and money. And a court of equity will not grant specific performance which wastes time and money.⁴⁸ Nor will a court generally order specific performance where that performance would need to be supervised by the court; although the supervision requirement is not always fatal to claims for specific performance where the performance required is closely specified by the contract itself.⁴⁹ In the United States the supervision criterion seems to be expressed slightly differently: “equity will not grant specific performance of a contract requiring continuing acts and co-operation between the parties”.⁵⁰ Added to this an order for specific performance will only be granted where damages would not be an adequate remedy. Lucy Katz⁵¹ suggests that specific performance should be granted for refusal to go through mediation, but at the same time also suggests that punitive damages would be available in both contract and tort for a “bad faith” breach of contract if a party to the contract refused to comply with a mediation clause.⁵² Nayar deals with the punitive damages element of this suggestion by saying that in Texas (as is the case in the United Kingdom) such punitive damages are not available for a breach of good faith in breaching a contract.⁵³ In cases where punitive damages are

⁴⁴ Lord Woolf, *Access to Justice-Final Report* (July 1996), Ch.5, para.18.

⁴⁵ L.V. Katz, “Enforcing an ADR Clause—Are Good Intentions All You Have?” (1988) 26 Am. Bus. L.J. 575, 583–584—although she does later deal with both together (585–588).

⁴⁶ Lee, “The Enforceability of Mediation Clauses in Singapore” (1999) Singapore J. of Legal Studies 229, 239–244.

⁴⁷ See, e.g. *Seeley v Jago* (1717) 1 P. Wms. 389; *Walker v Denne* (1793) 2 Ves. 170, 182; *Walrond v Rosslyn, New Brunswick and Canada Rly. and Land Co. Ltd v Muggeridge* (1859) 4 Drew. 686, 699, per Kindersley V.-C.; *Walrond v Fulford* (1879) 11 Ch.D. 640; *Brunner v Greenslade* [1971] Ch. 993, 1006; [1970] 3 All E.R. 833 at 842, per Megarry J.; *Udall v Capri Lighting Ltd (In Liquidation)* [1988] Q.B. 907; [1987] 3 All E.R. 262. In the US see, e.g. Restatement (Second) of Contracts 1979 ss.357–359 and *Lorch Inc v Bessemer Hall Shopping Center Inc* 294 Ala. 17, 310 So.2d 872 (1975).

⁴⁸ *Tito v Waddell (No.2)* [1977] Ch. 106 at 326; [1977] 3 All E.R. 129 at 311.

⁴⁹ *Posner v Scott-Lewis* [1987] Ch. 25; [1986] 3 All E.R. 513 (landlord covenanted to employ resident porter to carry out duties clearly defined by the lease—specific performance granted. It was held that the difficulty faced by the court in supervising execution was not conclusive against ordering specific performance).

⁵⁰ *Copylease Corp of America v Memorex Corp* 408 F.Supp. 758 (S.D.N.Y. 1976), per L.V. Katz at [583].

⁵¹ *Copylease* 408 F.Supp. 758, per L.V. Katz at [575].

⁵² *Copylease* 408 F.Supp. 758, per L.V. Katz at [595].

⁵³ D.R. Nayar, “Texas ADR 101: Analyzing the Use of Compulsory Mediation Clauses in Commercial Contracts: Advantages, Enforceability, and Drafting Guidelines” (2004) 40 Tex. J. Bus. L. 257, 279.

available, however, it is difficult to see how damages would not be an adequate remedy for breach of an agreement to mediate.

The amount of supervision required to ensure a mediation clause is complied with is, of course, relatively little. In *Cable & Wireless Plc v IBM UK Ltd*,⁵⁴ for example, Colman J. considered all that was needed was included within the agreement itself:

“[C]ause 41.2 includes a sufficiently defined mutual obligation upon the parties both to go through the process of initiating a mediation, selecting a mediator and at least presenting that mediator with its case and its documents and attending upon him. There can be no serious difficulty in determining whether a party has complied with such requirements.”⁵⁵

Again, provided that the contract is drafted with sufficient clarity, there should be no difficulty in the court’s being able to enforce it and to supervise its enforcement.

Would it be futile to enforce a mediation clause?

It is generally accepted by commentators that:

“[T]he futility argument is a flawed one . . . the experienced legal practitioner will be familiar with the situation that just because parties have declared that settlement is impossible does not necessarily mean that it is. Otherwise, the number of pre-trial settlements cannot be explained . . . Very often, parties who start out hostile and in disagreement end up finding common ground and settling.”⁵⁶

“[Those who support the futility argument] do not recognize that the ADR processes are designed to deal with parties who do not believe that resolution of their dispute is possible.”⁵⁷

“A major flaw in the futility argument is its assumption that because one party does not want to settle through ADR, settlement will not occur. This argument has virtually no logical or empirical support. In fact, it is difficult to imagine any experienced litigator or trial judge taking it seriously.”⁵⁸

The judges too are sceptical about the futility of mediation: recording the US experience Amy Schmitz notes:

“[I]t is inappropriate to assume ADR agreements are not specifically enforceable because they are merely futile ‘agreements to agree’. This is why courts have become more open to ordering parties to negotiate or mediate in good faith.”⁵⁹

⁵⁴ *Cable & Wireless Plc v IBM UK Ltd* [2002] All E.R. (D) 277 HC.

⁵⁵ *Cable & Wireless Plc v IBM UK Ltd* [2002] All E.R. (D) 277 HC.

⁵⁶ Lee, “The Enforceability of Mediation Clauses in Singapore” (1999) *Singapore J. of Legal Studies* 229, 241.

⁵⁷ M. Shirley, “Breach of an ADR Clause—A Wrong Without Remedy?” (1991) 2 *Australian Dispute Resolution Journal* 117, 118.

⁵⁸ *Copylease* 408 F.Supp. 758, per L.V. Katz at 584.

⁵⁹ *Fluor Enters. Inc v Solutia Inc* 147 F. Supp. 2d 648 (S.D. Tex. 2001) (compelling mediation as prescribed in the parties’ contract); *Marshall v US Home Corp* 2002 W.L. 274457 (Ohio App. 9 Dist. Feb. 27 2002) (staying proceeding to enforce mediation and arbitration provisions) quoted from A.J. Schmitz, “Refreshing Contractual Analysis of ADR Agreements by Curing Bipolar Avoidance of Modern Common Law” (2004) 9 *Harv. Negot. L. Rev.* 1, 64–65 which looks at the situation in the US.

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In Australia Giles J. in *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd*,⁶⁰ although he found the mediation agreement not to be enforceable in that case, nonetheless held that, “[m]ediation is a valuable means of resolution of disputes, and agreements to mediate should be recognised and given effect in appropriate cases”.⁶¹ In the United Kingdom in *Dunnett v Railtrack Plc*⁶² the court stated:

“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 . . . it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live. A mediator may be able to provide solutions which are beyond the powers of the court to provide.”⁶³

Even where settlement is not possible, it has been noted in the Chancery Division that mediation can still assist parties on the path to resolution giving them an opportunity to assess the strengths and weaknesses of their case during mediation.⁶⁴ As Dyson L.J. pointed out in *Halsey*,⁶⁵ “mediation often succeeds where previous attempts to settle have failed”.⁶⁶ And, as Sir Anthony Clarke M.R. said:

“It is of course a cliché that you can take a horse to water but whether it drinks is another thing entirely. That it is a cliché does not render it the less true. But what can perhaps be said is that a horse (even a very obstinate horse) is more likely to drink if taken to water. We should be doing more to encourage (and perhaps direct) the horse to go to the trough. The more horses approach the trough the more will drink from it. Litigants being like horses we should give them every assistance to settle their disputes in this way. We do them, and the justice system, a disservice if we do not.”⁶⁷

Once it is recognised, as it clearly is by both commentators and the judiciary, that the enforcement of mediation clauses is not futile—because it often gets results even where the parties have expressed themselves unwilling to settle—then it follows that damages are not an adequate remedy. As one writer put it:

“[The] traditional reluctance to order specific remedies should not stymie courts’ specific enforcement of ADR agreements. Indeed, damages often are inappropriate and inadequate to remedy breach of ADR agreements.”⁶⁸

It is perhaps also inherent in Sir Anthony Clarke’s speech, when he talks about “direct[ing] the horse to go to the trough”,⁶⁹ that damages, whether in terms of contractual damages or in terms of the costs sanctions which are available to the courts if litigants refuse to mediate

⁶⁰ *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 N.S.W.L.R. 709 at 716–717.

⁶¹ Giles J. had enforced the agreement to mediate in *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 N.S.W.L.R. 194 holding that such an agreement should be enforced if sufficiently certain.

⁶² *Dunnett v Railtrack Plc* [2002] EWCA Civ 303; [2002] 1 W.L.R. 2433 CA.

⁶³ *Dunnett v Railtrack Plc* [2002] EWCA Civ 303; [2002] 1 W.L.R. 2433 CA at [14].

⁶⁴ *Hurst v Leeming* [2002] EWHC 1051 (Ch); [2003] 1 Lloyd’s Rep. 379.

⁶⁵ *Halsey v Milton Keynes General Trust NHS* [2004] EWCA Civ. 576; [2004] 1 W.L.R. 3002.

⁶⁶ *Halsey* [2004] EWCA Civ. 576; [2004] 1 W.L.R. 3002 at [20].

⁶⁷ *Halsey* [2004] EWCA Civ. 576; [2004] 1 W.L.R. 3002 at [22], per Sir Anthony Clarke.

⁶⁸ Schmitz, “Refreshing Contractual Analysis of ADR Agreements by Curing Bipolar Avoidance of Modern Common Law” (2004) 9 Harv. Negot. L. Rev. 1, 64.

⁶⁹ Sir Anthony Clarke, taken from longer quotation above.

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are not seen as an adequate remedy; it therefore follows that mediation should be ordered where appropriate.

So it appears that all the reasons which led to the courts' general refusal to enforce mediation agreements have been won over by a combination of the effectiveness of mediation and the manifest absurdity of exhorting and cajoling parties into "CPR mediation" whilst at the same time declining to enforce voluntary, non-CPR, agreements to mediate. But even in these times, where agreements to mediate seem much more likely to be enforced, it is still essential to ensure that contractual mediation clauses are drafted in the clearest terms to ensure that they do not fail for uncertainty.⁷⁰

⁷⁰ The author explores the impact of the courts' move towards enforcing mediation agreements in Erich Suter, "Discussion Required; the Move Towards Enforced Mediation" (2008) 158 N.L.J. 1525, 1526 and 1562–1563.