

## **A tale of two jurisdictions: mediation case law in England & Wales and Scotland<sup>1</sup>**

### **Introduction**

This article focuses on mediation case law that has arisen in recent years across two distinct jurisdictions within the UK, namely: England & Wales; and Scotland. Since the Act of Union in 1707, the legal system in Scotland has remained separate and distinct from that in England & Wales, albeit that over the years there has been significant harmonisation of law through UK parliamentary legislation and also, to a lesser extent, by dint of the appeal court function of the Judicial Committee of the House of Lords (now UK Supreme Court). That said, many areas of common law – and statute<sup>2</sup> – are founded upon different principles and espouse differing rules across the two jurisdictions. The law relative to mediation is no different where both commonalities and divergences across the divide can be found. The court system in Scotland is also distinct from its southern neighbours, leading to different procedural rules – provisions within which the promotion of mediation as a court-connected activity may be found. As a general point it can be said that the law pertaining to mediation across both England & Wales and Scotland can be classified as both the law *of* mediation (that is specific legal rules that were crafted for mediation practice) and the law *in* mediation (general legal concepts that have application in the context of mediation)<sup>3</sup>.

### **Mediation case law**

Prior to analysing some of the main case law that subsists as regards mediation, as a general point, the reader should note that the balance of judicial decisions set out below is not in any way even in coverage across Scotland and England & Wales respectively. That this is so is down to two principal reasons. On the one hand, the development of mediation in England & Wales can be seen as at a more mature stage than that in its northern neighbour. Scotland received mediation slightly later than England & Wales and the process has been slower to take hold, not least because of the more limited linking between courts and mediation that that has occurred north of the border<sup>4</sup>. Secondly, England & Wales simply dwarfs Scotland in terms of sheer scale with a population more than 10 times the size and a resultant, proportionately higher volume of litigation producing case judgements on different facets of mediation. It should hence be noted that judicial decisions in respect of mediation in Scotland are rare beasts indeed. Where appropriate the article will discuss the likelihood that Scottish courts may follow the decisions of their English counterparts.

The areas of case law that this article focuses on are as follows: recourse to mediation through mandatory means or other pressures to mediate; confidentiality and evidential privilege in mediation; the enforceability of mediation clauses; and liability of mediators and legal advisers in respect of mediation.

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<sup>1</sup> Prof Bryan Clark, Law School, University of Strathclyde, Glasgow

<sup>2</sup> Not least through legislation of the devolved Scottish Parliament.

<sup>3</sup> See N Alexander 'What's law got to do with it? Mapping modern mediation movements in civil and common law jurisdictions' (2001) 15(2) *Bond Law Review* 1

<sup>4</sup> For a discussion of the historical development of mediation across the two jurisdictions see B. Clark, *Lawyers and Mediation* (Springer, 2012) Chapter 1.

## Mandatory mediation and pressures to mediate

It is generally said (in theory at least) that compulsory mediation is not found in the English jurisdiction<sup>5</sup>, although there are a range of views as to whether the practice is legitimate in law or indeed for that matter desirable.<sup>6</sup> English judges in early court decisions flirted with the notion of mandatory mediation. For example, in *Shokusan v Danovo*<sup>7</sup> it was viewed by Blackbourne J. that a court had the power to order mediation even if one party was unwilling to take part<sup>8</sup>. This journey into compulsion was stopped in its tracks, however, by the seminal Court of Appeal decision in *Halsley v Milton Keynes Trust NHS*<sup>9</sup> In which Dyson, LJ held that compulsory referral by a court to mediation was in violation of Article 6 of the European Convention on Human Rights. Dyson, LJ's view was based on his interpretation of a decision by the European Court on Human Rights in *Deweere v Belgium*<sup>10</sup> where it was held that in circumstances in which a shopkeeper alleged to have infringed pricing laws was offered the chance to make payment in a 'friendly settlement' rather than going to trial, this amounted to an infringement of Article 6(1). Although technically Dyson, LJ's view can be seen as merely an *obiter*<sup>11</sup> proposition, *Halsley* left an indelible imprint on the field as regards compulsory mediation.<sup>12</sup> It is worth noting that the view expressed in *Halsley* regarding mandatory mediation was subsequently attacked by a range of commentators<sup>13</sup>, on the basis that reference to mediation with no obligation to settle within the process would not *per se* amount to an infringement of Article 6. This view has since gathered support from the decision of the European Court of Justice (ECJ) in *Allassini*<sup>14</sup> in which a mandatory mediation programme was held not to infringe Article 6 ECHR in so are

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<sup>5</sup> By contrast, compulsory reference to mediation information sessions (as opposed to mediation itself) can be found in the English family sphere – see the Family Procedure Rules Pt 3, as amended; Practice Direction 3A – Family Mediation Information And Assessment Meeting (MIAMS), [https://www.justice.gov.uk/courts/procedure-rules/family/practice\\_directions/pd\\_part\\_03a](https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_03a). Scotland has recently launched a pilot scheme to replicate the English approach – see “A more collaborative planning system: what can mediation offer?” (21<sup>st</sup> Feb 2017) details available at <http://www.scottisharbitrationcentre.org/?p=2579>

<sup>6</sup> See for example, D De Girolamo Rhetoric and Civil Justice: a commentary on the promotion of mediation without conviction in England and Wales (2016) 35(2) CJQ 162; M Ahmed, Implied compulsory mediation (2012) 31 C.J.Q. 151; S Shipman, Court approaches to ADR in the civil justice system (2006) 25 C.J.Q. 181; A.K.C. Koo, "Ten years after Halsey" (2015) 34 C.J.Q. 77 S Shipman, Compulsory mediation: the elephant in the room (2011) 30 C.J.Q. 163.

<sup>7</sup> [2004] All ER (D) 61 (Aug)

<sup>8</sup> Such a power was seen to be consonant with the terms of the 1998 Civil Procedural Rules – see rule 1.1 requiring the court to deal with the case justly, fairly, expeditiously and proportionately and rule 1.4 which sets out the requirement for courts to encourage the use of mediation and other forms of ADR.

<sup>9</sup> [2004] EQCA (Civ) 576.

<sup>10</sup> (A/35) [1980]E.C.C, 169 (ECHR)

<sup>11</sup> Not directly relevant to the case at hand and hence not binding on other courts.

<sup>12</sup> One immediate consequence was that a high profile pilot compulsory mediation scheme in the London County Court which had sought to test mandatory recourse to mediation had to alter its terms of engagement through the introduction of an 'opt out' for parties –see H. Genn, *Twisting Arms: Court Referred and Court Linked Mediation under Judicial Pressure* (2007: Ministry of Justice)

<sup>13</sup> See for example Sir Anthony Clarke MR *Speech given to the 2<sup>nd</sup> Conference of the Civil Mediation Council* available at [file:///C:/Users/igs04166/Downloads/mr\\_mediation\\_conference\\_may08.pdf](file:///C:/Users/igs04166/Downloads/mr_mediation_conference_may08.pdf); Sir Gavin Lightman *Mediation: an approximation of justice* SJ Berwin speech available at <https://www.cedr.com/articles/?item=Mediation-an-approximation-to-justice-a-speech-by-The-Honourable-Mr-Justice-Lightman>

<sup>14</sup> Joined Cases C-317/08, C-318/08, C-319-08 and C-320-08.

as it did not result in decisions binding against the parties, or is subject to excessive delay or cost.<sup>15</sup> Equally the EU Directive on mediation itself supported the notion of mandatory mediation.<sup>16</sup>

Despite the judicial eschewing of mandatory mediation, courts have resorted to other methods by which parties' arms may be twisted into attempting mediation. Although the English courts generally subscribe to the 'loser pays' principle in the apportionment of costs, the conduct of litigating parties may dictate a departure from the normal rules. In this sense, the bulk of more recent case law in England and Wales pertains to operation of rules that exert pressure on parties to mediate by way of cost penalties that might be imposed on those who 'unreasonably refuse' to have resorted to mediation. A voluminous amount of case law has arisen in this area. As a general point, it should be noted that the jurisprudence here is not especially consistent.

One of the first cases to deal with this issue was *Dunnet v Railtrack*.<sup>17</sup> This case involved an appeal made against a failed compensation claim against Railtrack. Although the appellant subsequently lost the appeal, the Court of Appeal did not award Railtrack its costs in relation to the appeal because it had failed to follow a judicial recommendation to attempt to resolve the dispute by mediation.

After a series of further cases,<sup>18</sup> the broad guidelines governing the circumstances in which a party may be deemed to have unreasonably refused to mediate were formulated authoritatively in *Halsley*.<sup>19</sup> The Court of Appeal stated that for a cost penalty to be applied against a winning party, the unsuccessful party would have to prove that mediation had been unreasonably refused by their opponent. In terms of the factors that should be taken into account when determining if a refusal to mediate was unreasonable or not, the court set out the following (non-exhaustive) factors:

- (1) the nature of the dispute;
- (2) the merits of the case;
- (3) whether previous attempts had been made to settle the claim;
- (4) whether the costs of ADR would be disproportionately high;
- (5) whether an ADR process would delay the proceedings;
- (6) the prospects of success of such a process; and
- (7) whether the court had encouraged use of ADR.<sup>20</sup>

This area of law is one that can be seen to have been in state of flux over the years. By the beginning of the current decade, the judicial environment arguably seemed to be one in which costs sanctions amounted to compulsion 'by the back door', or what Ahmed has termed, "implied compulsory mediation"<sup>21</sup> The high watermark of this notion could be found in a range of decisions in the early part

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<sup>15</sup> Dyson, LJ has since amended his views post *Halsley* echoing the approach of the ECJ in *Alassini - ss Dyson* (2010) ref

<sup>16</sup> Mediation Directive (2008/52/EC) states that "[t]his directive is without prejudice to national legislation making the use of mediation compulsory...."

<sup>17</sup> [2002] EWCA Civ 303

<sup>18</sup> Including *Hurst v Leeming* [2002] EWHC 105 (Ch); *Royal Bank of Canada v Secretary of State for Defence* [2003] EWCA 1841 (Ch)

<sup>19</sup> *Supra* n. 9

<sup>20</sup> At para [16]

<sup>21</sup> M Ahmed, Implied compulsory mediation (2012) 31 C.J.Q. 151

of the current decade - the combined effect of which may have struck fear into the hearts of the most hardened litigators. In *PGF II SA v OMFS Co*<sup>22</sup>, for example, it was held that a party's refusal to respond to an offer of mediation from the other side itself amounted to unreasonable behaviour and led to liability in terms of costs sanctions. Similarly in *Rolf De Guerin*<sup>23</sup>, Rix LJ in a stringent pro-mediation judgement stated that 'spurned offers to enter into settlement negotiations or mediation were unreasonable'. Consequently, in *Garritt-Critchley and others v Ronnan and another*,<sup>24</sup> a refusal to mediate on the grounds that the defendant believed that the parties could not be reconciled was held to be unreasonable. Furthermore, in *Thacker v Patel*<sup>25</sup>, a costs order requiring defendants who had dragged their feet in agreeing to implement mediation, to pay 75% of the claimants' costs was upheld on appeal. Nonetheless, swimming against the tide of this pro-mediation case law, a more recent Appeal Court decision has reiterated that there remain cases when it will be right and proper to refuse to mediate. In *Gore v Naheed and Ahmed*<sup>26</sup> the Court of Appeal allowed the successful claimant his costs despite the fact that he had refused an offer to mediate made by the defendant. Delivering the leading judgement, Patten LJ arguably departed from previous approaches in three ways: first, by gauging the reasonableness of an refusal to mediate by reference to the success of an action he noted that he had "*difficulty in accepting that the desire of a party to have his rights determined by a court of law in preference to mediation can be said to be unreasonable conduct particularly when, as here, those rights are ultimately vindicated.*" Secondly, Patten LJ placed a greater emphasis on the discretionary nature of the adverse costs order than hitherto could be found, remarking that even in a case of an unreasonable refusal to mediate the court did not require to penalise a party as to costs. Finally, he noted with approval comments made by the trial judge in the case that the complex nature of the legal issues involved in the case made it unsuitable for mediation.

### Scotland

By contrast to the morass of decisions in this area in England & Wales at present the Scottish landscape is somewhat barren as regards case law. Unlike their English counterparts, Scottish judges have not developed general rules to direct parties into mediation on pain of adverse costs orders,<sup>27</sup> although there do exist common law precepts as they pertain to the power of judges to vary awarding expenses<sup>28</sup> at the end of proof<sup>29</sup> which would arguably encompass penalising parties who unreasonably refuse to mediate.<sup>30</sup> No reported cases exist on this point at present, however, as regards financial penalties for a refusal to mediate. Nonetheless, judicial decisions exist that suggest that refusal to mediate could give rise to expenses sanctions. So for example, where an action brought by successful pursue is deemed by the court to be unnecessary<sup>31</sup> or when one party has failed to provide sufficient information so as to preclude the other party from making a settlement offer<sup>32</sup>,

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<sup>22</sup> *PGF II SA v OMFS Co* [2013] EWCA Civ 1288, [2014] 1 All ER 970.

<sup>23</sup> *Rolf De Guerin* [2011] EWCA Civ 78, [2011] All ER (D) 169 (Feb).

<sup>24</sup> [2014] EWHC 1774 (Ch)

<sup>25</sup> [2017] EWHC Civ 117

<sup>26</sup> [2017] EWHC Civ 369

<sup>27</sup> The recent Scottish civil justice review broadly rejected this approach – see Lord Gill *Report of the Scottish Civil Courts Review* (2009) vol 1, p 173

<sup>28</sup> The Scottish equivalent of costs

<sup>29</sup> 'Proof' is the Scottish term for trial.

<sup>30</sup> Discussed in the Gill Review supra n. 27

<sup>31</sup> *Austin Taylor & Co v Borthwick* 1990 SCLR 44, Sh Ct

<sup>32</sup> *Neilson v Motion* 1992 SLT 124

expenses penalties may be granted. Moreover, at the time of writing new court rules have bolstered the presence of mediation within Scottish civil justice<sup>33</sup> and it may be that in the near future similar provisions as to those which apply in England & Wales regarding cost penalties begin to emerge through judicial innovation in Scotland.

### Confidentiality and privilege in mediation

Another especially active area in terms of case law in the UK is that of confidentiality and evidential privilege in mediation. The main issues in the case law have concerned the extent that information tendered in and around mediation may be disclosed in consequent litigation as well as the compellability of mediators to give evidence in court. Unlike the situation as regards cross border mediation where a bespoke legal regime implementing the terms of the EU Directive on Mediation applies,<sup>34</sup> the rules regarding the application of confidentiality and privilege in respect of all domestic mediation in England & Wales are derived from common law principles. There is no special privilege that exists at common law for mediators in England & Wales.<sup>35</sup> Confidentiality can be sought through general contractual means<sup>36</sup> and/or through operation of the general 'without prejudice' rules that apply to negotiations. In relation to the effectiveness of contractual provisions against the admissibility in consequent litigation as to what occurred in a mediation or the compellability of mediators as witnesses, it is well settled that such mere contractual rights would not stand in the way of greater public policy interests in favour of the disclosure of evidence or compellability of witnesses.<sup>37</sup> In this sense, in *Farm Assist Ltd (In Liquidation) v The Secretary of State for the Environment, Food and Rural Affairs (No2)*,<sup>38</sup> Ramsey J held that the parties' own agreement as to confidentiality will not be the deciding factor in whether information received during a mediation *will in fact* be considered confidential.<sup>39</sup>

The more important rules in practice then, and those that have generally come before the courts in the context of determining the extent that mediation proceedings can be opened up to scrutiny, are the without prejudice rules. Essentially, without prejudice rules protect statements made in the pursuance of a negotiated settlement from subsequent disclosure in litigation. The premise behind the without prejudice rules as they apply to negotiations is to further the policy of encouraging settlement through providing the confidentiality necessary to promote candour in discussions. As set out by Oliver LJ in *Cutts v Head*,<sup>40</sup> 'parties should be encouraged as far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations could be used to their prejudice in the course of the proceedings'.<sup>41</sup> There are a range of recognised exceptions to the rule, however, including

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<sup>33</sup> Primarily through the Court Reform (Scotland) Act 2014

<sup>34</sup> The enacting provisions bringing the EU directive into force in the UK, unlike the case in many other EU states, only applies in respect of cross border disputes, and not domestic matters.

<sup>35</sup> Or in Scotland

<sup>36</sup> Confidentiality clauses are of course commonplace in commercial mediation agreements. See for example, the CEDR Model Mediation Agreement (2016) available at <http://uk.practicallaw.com/0-584-6305>

<sup>37</sup> See A K C Koo 'Confidentiality of Mediation Communications' (2011) 30 Civil Justice Quarterly 192

<sup>38</sup> *Farm Assist Ltd (In Liquidation) v The Secretary of State for the Environment, Food and Rural Affairs (No2)* [2009] EWHC 1102 per Ramsey J at [21]

<sup>39</sup> *ibid*

<sup>40</sup> *Cutts v Head* [1984] Ch 290

<sup>41</sup> *ibid* at [306]

unequivocal admissions or statements made<sup>42</sup> or where fraud, impropriety or misrepresentations in the negotiations are alleged.<sup>43</sup>

The English case law analysing the interaction between mediation and operation of the without prejudice rules is voluminous. As a starting point, it is clear from the decision in *Rush and Tompkins Ltd v Greater London Council*,<sup>44</sup> that the without prejudice rules will be applicable in mediation as a matter of public policy in terms of encouraging parties to settle disputes without litigation,<sup>45</sup> thus confirming the principle outlined in *Cutts v Head*, above. One must not conflate, however, everything that may have been disclosed in a mediation with statements made in a genuine attempt to resolve a dispute. Despite what may be believed by mediating parties, only the latter are subject to the without prejudice privilege. It was made clear in *Rush* that the question of whether disclosures will actually be considered without prejudice rests not on the assertions of the parties, but instead on the consideration of whether the particular disclosures were made in a genuine attempt to reach a settlement, rather than mere disclosures which happened to be made during the process of a mediation.<sup>46</sup>

Moreover, the general exceptions operating in respect of without prejudice negotiations discussed above can also be found in the mediation context which may undermine parties' confidence in the integrity of the process. These caveats, as they pertain to mediation, were set out most prominently in *Unilever v Proctor and Gamble*<sup>47</sup> where Robert Walker LJ held that where there is doubt over whether an agreement has been reached, disclosure is permissible.<sup>48</sup> Disclosure may also occur in cases of misrepresentation, fraud, undue influence,<sup>49</sup> estoppel<sup>50</sup> or where there has been 'unambiguous impropriety'.<sup>51</sup> Disclosures may also be made to explain delay,<sup>52</sup> to provide evidence as to whether a 'claimant has acted reasonably as to his loss in conduct'<sup>53</sup> or in making an assessment of costs.<sup>54</sup>

A range of recent cases in England have shown the limits to operation of confidentiality and privilege in the English context and the uncertainty that remains in determining exactly when courts will lift the lid on what has occurred in mediation sessions. In *Earl of Malmesbury v Strutt and Parker*<sup>55</sup> in which both parties waived their privilege as to confidentiality as to what had occurred in the mediation, it was held by the court that where a party acted in an unreasonable fashion in the mediation, evidence may be adduced to that effect leading to that party being penalised in respect of their costs. In *Farm*

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<sup>42</sup> *Cutts v Head* [1984] Ch 290; *Daks Simpson Group Plc v Kuiper* 1994 SLT 689

<sup>43</sup> *Unilever v Proctor and Gamble* [2001] 1 All ER 783, CA

<sup>44</sup> *Rush and Tompkins Ltd v Greater London Council* [1989] AC 1280

<sup>45</sup> *ibid* per Lord Griffiths at [1299]

<sup>46</sup> *ibid*. For a recent case (not involving mediation) in which the Court of Appeal supported a broader interpretation of what is meant by a 'genuine' attempt to settle see *Suh v Mace (UK) Limited* [2016] EWCA Civ 4.

<sup>47</sup> [2001] 1 All ER 783

<sup>48</sup> *ibid* at [2444]

<sup>49</sup> *ibid*

<sup>50</sup> *ibid*

<sup>51</sup> *ibid*

<sup>52</sup> *ibid* at [2445]

<sup>53</sup> *ibid*

<sup>54</sup> *ibid*

<sup>55</sup> [2008] EWHC 424 (QB)

*Assist Limited (in liquidation) v The Secretary of State for Environment, Food and Rural affairs (No. 2)*<sup>56</sup>, again where both parties waived their privilege, in a case of a settlement agreed under alleged duress, the mediator was compelled to give evidence as to the conduct of the parties at the mediation despite a non-compellability clause in the mediation contract. In *Cattley v Pollard*<sup>57</sup> parties to mediation were ordered to disclose to the court certain documents furnished in the course of mediation discussions to allow the court to assess the level of damages in a subsequent case. Finally, in *Brown v Patel*<sup>58</sup> despite the existence of a confidentiality provision, the court allowed evidence of parties' conduct at a mediation to ascertain if the case had settled or not.

The issue of whether documents produced by experts for use in a mediation were privileged was examined in *Aird v Prime Meridian*.<sup>59</sup> The mediation which concerned a dispute over the construction of a house was not successful, and upon the recommencement of proceedings, the defendants sought to include the joint statements of experts which had been used as part of the mediation.<sup>60</sup> The claimants asserted that such statements were covered by privilege as part of the confidential nature of mediation, and were thus inadmissible.<sup>61</sup> At first instance, it was held that the expert statements were privileged for all purposes notwithstanding the fact that they were produced pursuant to Rule 35.12(3) of the Civil Procedure Rules.<sup>62</sup> However, reversing the decision in the Court of Appeal,<sup>63</sup> May LJ observed that where documents 'were obviously produced for other purposes, which were needed for and produced at the mediation',<sup>64</sup> confidentiality would not apply. This case is illustrative of the difficulties that can arise when mediation is comingled with ongoing litigation processes.

The courts have also recently addressed the exception to without prejudice privilege in mediation arising from the unambiguous impropriety of one of the parties. In *Ferster v Ferster*<sup>65</sup> the Court of Appeal upheld the decision at first instance and found that a settlement offer constituted 'unambiguous impropriety' when it included a threat which amounted to blackmail and as such was not protected by without prejudice privilege. The offer for settlement in this case tendered by the respondents (through the hands of the mediator) in an unfair prejudice petition<sup>66</sup> stipulated that if it were not accepted they would instigate criminal proceedings against the petitioner, ruin his reputation and ensure that he could not operate in the online business industry again. Moreover, threats were also made to the petitioner's partner, who was not a party to the action. The court consequently held that because of the nature of the threats, the without prejudice privilege that would otherwise have attached to the contents of the offer was waived and the terms of the offer could be led in evidence in support of the petitioner's unfair prejudice case.

### *Scotland*

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<sup>56</sup> [2009] EWHC 1102 (TCC)

<sup>57</sup> 2007 Ch 353

<sup>58</sup> [2007] EWHC 625

<sup>59</sup> *Aird v Prime Meridian* [2006] EWHC 2338

<sup>60</sup> *ibid* per HH Judge Peter Coulson QC at [3]

<sup>61</sup> *ibid*

<sup>62</sup> Rule 35.12(3) of the Civil Procedure Rules

<sup>63</sup> *Aird v Prime Meridian* [2006] EWCA Civ 1866

<sup>64</sup> *ibid* per May LJ at [5]

<sup>65</sup> [2016] EWCA Civ 717

<sup>66</sup> A minority protection remedy in company law under s 994 of the Companies Act 2006

Akin to many other areas of mediation law in Scotland there is a dearth of case law as regards confidentiality and privilege in mediation. Scotland mirrors England & Wales in that there is no general mediation privilege as regards domestic mediation.<sup>67</sup> So again the confidentiality as to what occurred in a mediation in any consequent litigation is broadly governed by the without prejudice rules as they apply to genuine attempts to settle the dispute made in a mediation. The general without prejudice rules are recognised in Scotland in a similar fashion to England and Wales. In Scotland, it is well understood that communications made between parties in attempts to settle disputes are generally privileged and cannot be founded upon as evidence in any subsequent court actions<sup>68</sup>. In line with its southern neighbours, the provisions of the European Directive as they have been brought into Scottish law only apply to cross border disputes.<sup>69</sup>

By contrast, however, Scotland does benefit from bespoke statutory provisions governing confidentiality and privilege that apply to family mediation.<sup>70</sup> This Act applies to all types of family mediation<sup>71</sup> but only with regard to mediation conducted “by a person accredited as a mediator in family mediation to an organisation which is concerned with such mediation and which is approved for the purposes of this Act by the Lord President of the Court of Session”.<sup>72</sup> The central premise of the Act is encapsulated in s 1(1) which holds that “no information as to what occurred during the family mediation to which this Act applies shall be admissible as evidence in any civil proceedings”. Any reference to what occurred during family mediation includes a reference to what was said, written or observed during such mediation.<sup>73</sup> . In terms of the exceptions to the general rule regarding non admissibility, aside from particular caveats that apply to consequent child protection proceedings, further exceptions bear significant similarity with those that might arise under operation of without prejudice rules. They include evidence as to the existence or otherwise of any agreement reached in mediation; in the event of any challenge to a contract forged in mediation, information as to the contract that relates to this challenge; information as to what occurred in the mediation if all parties (but not necessarily the mediator) agree to this effect; information arising where proceedings are raised against the mediator or any party at the mediation in respect of damage to property or personal injury allegedly carried out by that person; or information arising out of proceedings arising from the mediation to which the mediator is a party.<sup>74</sup>

One notable recent case exemplifies the uncertainties that can arise in respect of the exception which pertains to the establishing the existence or otherwise of agreements forged in mediation. *FJM v GMC*<sup>75</sup> involved a married couple with two children who had lived in Australia until their separation.

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<sup>67</sup> See *Confidentiality in Family Mediation* (Scot Law Com Discussion Paper No. 92) (1991) para 1.3.

<sup>68</sup> *Fyfe v Miller* (1835) 13 S 809; *Williamson v Taylor* (1845) 7 D 842; *Bell v Lothiansure Ltd* 1990 SLT 58

<sup>69</sup> Cross-Border Mediation (Scotland) Regulations 2011, SSI 2011/324, reg 3

<sup>70</sup> Civil Evidence (Family Mediation) Scotland Act 1995

<sup>71</sup> S 1(2) (a)-(e) including matters affecting the residence, guardianship or welfare of a child or any issues concerning matters arising from breakdown of marriage, civil partnership or cohabitation

<sup>72</sup> Under ss 1(3-6) the Lord President is empowered to approve bodies to act as mediation organisations under the terms of this Act for a time period at his discretion and subject to the provision of information that he sees fit. There are currently two such bodies – the Law Society of Scotland and Relationships Scotland – approved by the Lord President. For some of the policy debates behind the Act see

<http://hansard.millbanksystems.com/lords/1995/feb/02/civil-evidence-family-mediation-scotland>

<sup>73</sup> S 1(9)

<sup>74</sup> S 2

<sup>75</sup> *FJM v CGM* [2015]CSOH 130

The father petitioned the court under the provisions of the Hague Convention on Abduction that his spouse had unlawfully removed their children to Scotland<sup>76</sup>. The wife accepted that she had contravened the terms of the Convention but argued that the petitioner had acquiesced in their removal. More importantly for our purposes, although the mediation could not have been said to have settled all issues between the parties, she argued that he had agreed in their discussions in mediation that the children could remain in Scotland and that he would not invoke his rights seeking the return of the children under the Convention. The father claimed that any such information disclosed in the mediation was not admissible in any subsequent court proceedings by way of s 1 of the Civil Mediation Evidence Act. The petitioner's case fell at the first hurdle as the court held that the Act did not in fact apply to cross border Hague Convention disputes of this nature<sup>77</sup>. Although not germane to the decision in the case, Lord Stewart then proceeded to remark *obiter* that even if the legislation did apply it was unlikely that the statements of the petitioner would have been protected given that one of the recognised exceptions in the Act related to "evidence as to the existence or otherwise of any agreement reached in mediation."<sup>78</sup> The statements regarding the agreement of the petitioner in this sense were recorded in series of emails between the mediator and the parties and in this case recorded in a note of the outcomes by the mediator.<sup>79</sup> This case then highlights the uncertainties that can arise in respect of agreements that might be made by the parties in a complex mediation regarding a range of issues presented that may be disclosed in consequent litigation.

### Enforcement of mediation clauses

Another relatively active area of case-law that bears examination pertains to the enforcement of contractual agreements to mediate. By virtue of such clauses in commercial contracts parties may agree to first attempt to resolve a dispute by mediation prior to proceeding to the adjudicative means of arbitration or litigation. For some time, however, it was doubted that such clauses were in practice enforceable in the UK. This view stems from the common law principle that agreements to negotiate<sup>80</sup> are themselves unenforceable for want of certainty.<sup>81</sup> For England & Wales, the enforceability of mediation clauses was first affirmed, however, in the seminal case of *Cable and Wireless v IBM United Kingdom Ltd*<sup>82</sup> in which a defined mediation process set out in the clause, establishing how the mediator was to be selected and paid for, could be distinguished from mere negotiations. In this vein, the court viewed that "[the mediation clause in question] 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

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<sup>76</sup> Article 12, Convention on the Civil Aspect of International Child Abduction 1980

<https://www.hcch.net/en/instruments/conventions/full-text/?cid=24>

<sup>77</sup> The Act is silent on the specific issue of Hague Convention cases. Whether the court's assertion in this regard is correct or not has been debated since by scholars. For a discussion see for example, J. Macrae 'Mediation Minefield' (2015) *Journal of the Law Society of Scotland* available at <http://www.journalonline.co.uk/Magazine/60-11/1020976.aspx>

<sup>78</sup> § 2.

<sup>79</sup> 133 para 21

<sup>80</sup> What can be termed 'agreements to agree'

<sup>81</sup> *Courtney and Fairbairn Ltd v Tolani Bros (Hotels) Ltd* [1975] 1 All ER 716, [1975] 1 WLR 297, CA; *Walford v Miles* [1992] 2 AC 128, [1992] 1 All ER 453, HL.

<sup>82</sup> [2002] EWHC 2059 (Comm)

him. There can be no serious difficulty in determining whether a party has complied with such requirements".<sup>83</sup>

The importance of drafting clearly defined processes for mediation if contractual provisions are to be enforceable is exemplified in later case law. In the case of *Balfour Beatty Construction Northern Ltd v Modus Corovest (Blackpool) Ltd*<sup>84</sup> the relevant mediation clause was, *inter alia*, held to be unenforceable for want of precision. The clause in question, which made provision for a period of time to allow a party to agree to consider whether the case would be suitable for mediation, was held to be no more than an agreement to agree and hence unenforceable. Similarly in *WAH (aka Alan Tang) v Grant Thornton International Limited*<sup>85</sup> the court refused to uphold a clause providing for conciliation as a precursor to arbitration on the basis that the process as set out was 'equivocal' and 'nebulous' and concluded that it could not therefore be an enforceable condition preventing either side from commencing relevant arbitration procedures. The *Wah* case arguably sets out a high watermark in terms of the precision with which a clause must be drafted so as to render it enforceable. The court in *Wah* noted that for the provision to be enforceable a clause should amount to a sufficiently certain and unequivocal commitment to commence a process; b) set out, with sufficient clarity, what steps each party is required to take to put the process in place; c) articulate a sufficiently clear and defined process to enable the Court to determine objectively: i. what, under that process, is the minimum required of the parties to the dispute in terms of their participation in it; and ii. when or how the process will be exhausted or properly terminable without breach.

The law is not entirely settled, however, and courts in other cases have taken more liberal approaches to enforceability. This can be seen most notably in *Emirates Trading Agency Llc v Prime Mineral Exports Private Ltd*<sup>86</sup> in which a multi-tiered dispute resolution clause was found to be enforceable which required to parties to resort to as seemingly a nebulous concept of 'friendly discussions' before either side could invoke arbitration. In view of the need for clarity, it has been suggested that it is prudent drafting practice to ensure that any mediation clause should articulate how the mediator should be selected; how the mediator will be remunerated; the process to be followed in mediation, including reference to applicable rules; and indicating when the process will come to an end.<sup>87</sup>

Beyond the issue of clarity in drafting, there are other matters that may serve to limit the enforceability of mediation clauses in practice. In the family law case of *Mann v Mann*<sup>88</sup> the court viewed that the power to enforce the clause by the court was discretionary and that in particular the court would need to be mindful of its obligations to allow due legal process. The issues arising in this case are somewhat distinct from those involving mediation clauses in commercial contracts, however. In this instance a husband had failed to make payments to his wife agreed under a Court of Appeal mediation scheme. The wife issued a statutory demand in respect of the payment but henceforth agreed to suspend this action to allow the matter to be resolved by further mediation. The mediation subsequently did not take place with both parties blaming the other for the non-occurrence. At a later date the wife issued her application to enforce the debt which the husband opposed on the basis of

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<sup>83</sup> *Ibid* at 29

<sup>84</sup> *Balfour Beatty Construction Northern Ltd v Modus Corovest (Blackpool) Ltd* [2008] EWHC 3029 (TCC).

<sup>85</sup> *WAH (aka Alan Tang) v Grant Thornton International Ltd* [2012] EWCH 3198

<sup>86</sup> [2014] EWHC 214 (Comm)

<sup>87</sup> D Joseph QC *Jurisdiction and Arbitration Agreements and their Enforcement* (2005) 18.11

<sup>88</sup> [2014] EWHC 537 (Fam)

her prior agreement to mediate. The court stated that although the agreement to mediate was a valid one (in that it met the strict criteria for precision as set out in *Wah*) and hence *prima facie* binding upon the parties, nonetheless “it is clear that the agreement cannot be given effect so as to prevent the wife from applying for enforcement until and unless mediation has taken place. A bar of that nature would operate as a restriction on the right to apply to the court.”<sup>89</sup>

### *Scotland*

There are no reported Scottish cases at present but the general approaches set out above are likely to be followed.

### Mediator liability

There are no known successful legal claims against mediators in either England & Wales or Scotland. It is possible that an action could be brought against a mediator in negligence, breach of fiduciary duty or breach of contract arising from any errors or impropriety by a mediator which results in a loss to a mediating party. Standard mediator agreements may seek to exclude such liability although these kinds of contracts are likely to be seen as ‘standard form’ contracts under the terms of the Unfair Contracts Act 1977 and hence any such exclusions would require to be ‘fair and reasonable’ if they were to be rendered enforceable.<sup>90</sup> Additionally, as a matter of contractual interpretation, any exclusion clause expressed in general terms might, depending on the facts and circumstances of the case, be held by the court not to provide the mediator from the consequences of his own negligence, and as a matter of public policy is most unlikely to protect the mediator from the consequences of his own deliberate wrongdoing.<sup>91</sup> So far as the species of liability which might arise are concerned, a mediator may be found, for example, to have breached contractual confidentiality, exhibited bias, provided erroneous advice to parties, or drafted an agreement which does not give effect to the intention of the parties.<sup>92</sup>

### Liability of lawyers in and around mediation

Given the professional responsibility of lawyers to serve the best interests of their clients and meet established professional standards<sup>93</sup>, it is possible for lawyers to incur liability in and around mediation. Although there is a paucity of case law at present in either England & Wales or Scotland it seems at least possible that lawyers could become liable for failure to inform parties about mediation or promote its use, inadequate professional advice tendered within a mediation or in respect of the drafting of agreements forged within the mediation session. There is one reported English case on

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<sup>89</sup> per Mr Justice Mostyn at para 34.

<sup>90</sup> Unfair Contract Terms Act 1977, s 17.

<sup>91</sup> See *HIH Casualty and Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 3, [2003] in which the court held a clause seeking to exclude liability for a party’s own fraudulent action was not enforceable for public policy reasons.

<sup>92</sup> One interesting English case that settled out of court is *Clay v Lenkiewicz Foundation* (Plymouth County Court 9PL05124) in which a party argued that a mediator had misrepresented the value of a painting which was to be transferred by the other party in part payment of a claim. For a discussion see S. Trahair and A Learmonth ‘Can you trust a mediator?’ 161 NLJ 1288 (23 September 2011)

<sup>93</sup> See the SRA code of conduct for solicitors in England and Wales at <http://www.sra.org.uk/solicitors/handbook/code/content.page> In Scotland there are particular rules that require lawyers to consider the use of ADR for their clients – see Law Society of Scotland Practice Rules 2011 available at <https://www.lawscot.org.uk/rules-and-guidance/>.

this latter point in which the solicitors subject to the action were not held liable by the court. In *Frost v Wake Smith & Tofields*,<sup>94</sup> a case which concerned a family business dispute, a mediation was held that ultimately resulted in an agreement between the parties. This agreement was subsequently written up in a contractual form by the defendant solicitors. The Court of Appeal held that the solicitors were not liable for professional negligence even though they had captured the agreement in such a way as to render it legally enforceable. In this particular case the court observed that the parties themselves had not crafted an agreement complete enough to be legally enforceable and that it was not the role of solicitors to fill the gaps. Given the heavy involvement of lawyers in mediation in the UK, as the process progresses within both jurisdictions it can be expected that this area of litigation will develop.

### Conclusion

As mediation has become more entrenched in the UK over recent years the volume of case law arising from different facets of its operation has increased. It is one of mediation's great ironies that although it is concerned with eschewing adjudicative decisions in courts, the process has spawned a wide range of satellite litigation. As noted in this article, the vast majority of case law has thus far arisen in the England & Wales jurisdiction rather than Scotland and this largely reflects the greater use of the process south of the border and the more established bonds forged between mediation and the courts. In the aftermath of recent reforms to the Scottish civil justice system which has placed more emphasis upon the use of mediation within the civil court system<sup>95</sup>, we may be entering a new era, however, in which mediation becomes more established and case law arising from its use becomes more commonplace.

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<sup>94</sup> [2013] EWCA Civ 772

<sup>95</sup> Primarily through the Court Reform (Scotland) Act 2014 and in particular the new 'simple procedure' for small claims in Scotland that places mediation centre stage – see Act of Sederunt (Simple Procedure) 2016, Schedule 1.