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1 Introduction

3.01 Experiments with mediation began to take place in Canada in the 1970s and 1980s in response to widespread concern about access to justice and negative social impacts of adversarial disputing. At that time, most lawyers, legal scholars and members of the public knew nothing about mediation. Now, four decades later, mediation is a mainstay within Canada's legal system. Most lawyers have received exposure to negotiation and mediation theory and practice in law schools or continuing legal education programs. Considerable legislation now contains mediation provisions. This chapter traces some of the major developments and critiques of the field of mediation since the 1970s as they pertain to lawyers, law schools and laws in Canada. The main focus is on British Columbia ("BC"), but comments are also made about Alberta, Ontario, Quebec, and some federal initiatives. A fundamental question is posed: how has the dispute resolution movement affected Canada's culture of disputing?

2 Perceptions in the 1970s and 1980s: Overburdened Courts and Excessive, Adversarial Litigation

3.02 Mediation attracted interest during the 1970s at a time when critics of Canada's justice system[2] were concerned about delays in

2 Canada is a federal state. The Canadian legal system has federal jurisdiction and provincial jurisdictions, and each has exclusive jurisdiction to exercise its constitutionally mandated powers. The provinces have jurisdiction over the administration of justice and the licensing of lawyers. Canada's provinces are common law jurisdictions except Quebec, which is primarily a civil law jurisdiction.

overburdened courts[3] and costs of litigation, especially for people who could not afford lawyers. Governments were concerned about the costs of running courts and legal aid programs.[4] Some critics saw Canada's custom of court-centred disputing as excessively adversarial, causing harms to litigants during lengthy and complex proceedings fraught with pre-trial discoveries and interlocutory motions. There was concern about the wellbeing of litigants in family law cases, especially children caught between parents who were sometimes embattled in the courts for years. The culture of adversarial lawyering was at the centre of these concerns; lawyers in charge[5] of the disputing process were often criticised as a profession for creating expense and delay along the "litigation highway."

3.03 The concerns were not unique to Canada. Scholars and jurists in the United States ("the US") had a strong influence on the Canadian search for "faster, cheaper and better"[6] methods of disputing. The 1976 Pound Conference on Perspectives on Justice for the Future in the US[7] piqued Canadian interest, as did statements by US Supreme Court Chief Justice Warren Burger, who

3 The fear of excessive litigation was based on concerns in the US, which some scholars found to be exaggerated when examining litigation rates that proved to be fairly stable during the 19th and 20th centuries. See Andrew J Pirie, "Manufacturing Mediation: The Professionalization of Informalism" in Catherine Morris and Andrew Pirie (eds), *Qualifications for Dispute Resolution: Perspectives on the Debate* (UVic Institute for Dispute Resolution 1994), who cites (among others) Marc Galanter, "Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society" (1983) 31 UCLA Law Review 4, and Wayne McIntosh, "50 Years of Litigation and Dispute Settlement: A Court Tale" (1980-1981) 15 Law and Society Review 823.

4 Canadian Bar Association, "A Short History of Federal Funding for Legal Aid" <http://www.cba.org/cba/advocacy/legalaid/history.aspx> accessed 6 June 2013; Melina Buckley, "Moving Forward on Legal Aid: Research on Needs and Innovative Approaches" 2010 <http://www.cba.org/cba/advocacy/PDF/CBA%20Legal%20Aid%20Renewal%20Paper.pdf> accessed 6 June 2013.

5 Julie Macfarlane, *The New Lawyer: How Settlement Is Transforming the Practice of Law* (UBC Press 2007) 47-65.

6 For an American discussion of this vaunted trilogy of benefits of ADR, see Christopher Honeyman, "Two Out of Three" (1995) 11 Negotiation Journal 5.

7 A Leo Levin and Russell R Wheeler (eds), *The Pound Conference: Perspectives on Justice for the Future* (West Publishing 1979).

suggested in 1982 that settling out of court was a "better way" for lawyers to fulfill their role as "healers of human conflict."[8]

3 Benchmarks in the History of Mediation in Canada

3.04 There was no single "founder" of the mediation field in Canada. It emerged as a central part of the interdisciplinary social movement towards alternative dispute resolution ("ADR"). While this chapter has its focus on the legal system, this is not the only lens through which to examine the mediation movement, and there can be no one, definitive history of this diverse movement in Canada.

a Pioneering Projects

3.05 Early Canadian initiatives in mediation were in the area of family law disputes.[9] The first Canadian court-based family conciliation service was set up in Alberta in 1972. Ontario followed in 1973 and BC in 1974.[10] At that time, public and private family mediators in Canada were primarily social workers and counsellors trained in

8 Warren E Burger, "Isn't There a Better Way" (1982) 68 ABA Journal 274.

9 Mediation was not new in Canada in the 1970s. Canada's federal Government passed the *Conciliation Act, 1900* (63-64 Vict, c 24) in response to labour unrest and union industrial action in the late 19th century. This Act formed the precedent for Canadian labour legislation, which imposes regulated systems of collective bargaining including mediation. Jay Atherton, "The British Columbia Origins of the Federal Department of Labour" (1976-77) 32 BC Studies 93; F R Scott, "Federal Jurisdiction over Labour Relations – a New Look" (1960) 3 McGill Law Journal 153. Voluntary labour conciliation has been incorporated into labour legislation in Canada since 1900. While labour mediators were a strong part of the mediation movement in the US, for the most part labour mediators in Canada tended to confine their activities to labour disputes, and they were not noticeably active among the proponents of mediation in the justice system in the 1970s and 1980s.

10 Audrey Devlin and Judith Ryan, "Family Mediation in Canada – Past, Present, and Future Developments" (1986) 11 Mediation Quarterly 93; BC Justice Review Task Force, *A New Justice System for Families and Children: Report of the Family Justice Reform Working Group to the Justice Review Task Force* (May 2005); Robert Tolsma, John Banmen and John Friseen, "Role and Competencies of Family Court Counselors" (1984) 22 Family Court Review 35; John Waterhouse and Lorraine Waterhouse, "Implementing Unified Family Courts: The British Columbian Experience" (1983–1985) 4 Canadian Journal of Family Law 153.

family therapy,[11] along with some lawyers. Interest in family mediation grew with the 1985 *Divorce Act*,[12] which instituted "no-fault" divorce in Canada. Mediators were influential in drafting s 9 of the *Divorce Act*, which requires lawyers to certify that they have discussed negotiation with their clients and informed them of mediation services.[13]

3.06 Also, during the early 1970s, community activists conducted mediation experiments.[14] By the late 1980s, local mediation centres for community conflict and small claims disputes were springing up across Canada,[15] often funded by governments seeking to save money by diverting cases from courts into mediation centres staffed primarily by volunteers.

b Getting Organised: Interdisciplinary Civil Society Organisations

3.07 Mediation proponents began to form interdisciplinary national and provincial associations during the early 1980s.[16] Some mediation organisations had their primary focus on establishing mediation as

11 For an early discussion of the emerging practice of family mediation, see the first Canadian book on family mediation by therapist professor of social work, Howard H Irving, Divorce Mediation: A Rational Alternative to the Adversarial System (Universe Books 1981). Also see Howard H Irving and Michael Benjamin, *Therapeutic Family Mediation: Helping Families Resolve Conflict* (Sage 2002).

12 *Divorce Act*, RSC, 1985, c 3 (2nd Supp); Hilary Linton, "Family Mediation in Canada: A Brief History" (First International Congress on Mediation, Lisbon, 2010) <www.riverdalemediation.com/wp-content/uploads/2011/01/Family_Mediation_in_Canada.pdf> accessed 6 June 2013.

13 *Divorce Act*, RSC, 1985, c 3 (2nd Supp), s 9.

14 Dean E Peachey, "Victim/Offender Mediation: The Kitchener Experiment" in Martin Wright and Burt Galaway (eds), *Mediation in Criminal Justice* (Sage 1988).

15 Catherine Morris (ed), Resolving Community Disputes: An Annotated Bibliography About Community Justice Centres (UVic Institute for Dispute Resolution 1994).

16 The Conflict Resolution Network Canada (the Network) was founded in 1984. The Network, later renamed the Conflict Resolution Network Canada, was a highly respected organisation that produced a number of publications and a quarterly magazine. It closed its doors in approximately 2008, primarily due to funding difficulties. Family Mediation Canada ("FMC"), a civil society organisation, was founded in 1985 by a group of mediation proponents including social workers, judges and lawyers, with a grant from Canada's Department of Justice.

a profession with codes of ethics and qualification standards.[17] While some wished to professionalise the field, others envisioned the expansion of broad-based,[18] grassroot initiatives including community mediation and victim-offender mediation (now called "restorative justice"). Mediation proponents in the legal profession convinced law schools and continuing legal education organisations to create mediation and negotiation courses, lobbied law societies to support mediation, talked to judges and persuaded government officials to make laws or policies supportive of mediation.

3.08 A pivotal moment in the Canadian evolution of dispute resolution occurred in 1986 when Canada, with consent of its provinces, acceded to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Canada and the provinces passed new arbitration legislation based on the 1985 UNCITRAL Model Law on International Commercial Arbitration.[19] Most provinces also modernised their domestic arbitration legislation. At that time, the Canadian Commercial Arbitration Center ("the CCAC")[20] was founded in Quebec, and the BC Government created the BC International Commercial Arbitration Centre ("the BCICAC"). Realising that it would take time to generate international commercial arbitration business, the BCICAC cultivated business in domestic commercial arbitration

17 For more information on the movement towards qualifications and codes of ethics, see Catherine Morris, "The Trusted Mediator: Ethics and Interaction in Mediation" in Julie Macfarlane (ed), *Rethinking Disputes: The Mediation Alternative* (Emond Montgomery Publications Limited 1997); Catherine Morris and Andrew Pirie, "Preface" in Catherine Morris and Andrew Pirie (eds), *Qualifications for Dispute Resolution: Perspectives on the Debate* (UVic Institute for Dispute Resolution 1994); Cheryl Picard, "The Emergence of Mediation as a Profession" in Catherine Morris and Andrew Pirie (eds), *Qualifications for Dispute Resolution: Perspectives on the Debate* (UVic Institute for Dispute Resolution 1994).

18 Eric B Gilman and David L Gustafson, *Of VORPs, VOMPs, CDRPs and KSAOs: A Case for Competency-Based Qualifications in Victim-Offender Mediation* (UVic Institute for Dispute Resolution 1994) 98; Pirie, "Manufacturing Mediation: The Professionalization of Informalism" (n 2) 191.

19 United Nations Commission on International Trade Law ("UNCITRAL"), UNCITRAL Model Law on International Commercial Arbitration 1985.

20 See the website of the CCAC at www.ccac-adr.org/en/.

and mediation. Canadian arbitration associations became interested in mediation.

3.09 The proponents of mediation included community activists, family therapists, lawyers, engineers, teachers, other professionals, academics, judges, and government officials with interests broadly ranging from family and community mediation to commercial arbitration. This diverse set of actors had no singular vision for the dispute resolution movement. Some mediation proponents believed disputants should have more individual or corporate autonomy to choose from dispute resolution options along a continuum from unassisted negotiation to mediation to arbitration to the courts.[21] Others emphasised empowerment of communities or religious groups[22] to retrieve dispute resolution from the courts into the hands of local community dispute resolvers who shared their own values.[23] Still, others believed mediation should become a mandatory part of the formal justice system or be encouraged through regulatory incentives so as to foster court efficiency and access to justice. Some proponents of mandatory mediation

21 See Catherine Morris, "Definitions in the Field of Conflict Transformation" (*Peacemakers Trust*, 2012) <www.peacemakers.ca/publications/ADRdefinitions.html> accessed 6 June 2013.

22 For example, the Ismaili Muslim community founded a conciliation and arbitration service in 1984. Aga Khan, *National Conciliation and Arbitration Board for Canada: Submission to Ontario Arbitration Review September 10, 2004*. Conciliation Services Canada was founded by Mennonite Christians in 1990; see www.conciliationservices.ca/index.php?id=2. The Christian Legal Fellowship has a mediator referral service; see <www.christianlegalfellowship.org/?i=15718&mid=1000&id=392762> accessed 6 June 2013, which emphasises the work of US author, Ken Sande, *The Peacemaker: A Biblical Guide to Resolving Personal Conflict* (3rd edn, Baker Books 2003). The Jewish *Beth Din* system of conciliation and arbitration has operated in Canada for many years. A controversy about faith-based arbitration emerged in Canada in 2006, resulting in a report to the Ontario government: Marion Boyd, *Religion-Based Alternative Dispute Resolution: A Challenge to Multiculturalism* (Institute for Research on Public Policy 2007).

23 Robert A Baruch Bush, "Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments" (1989) 66 Denver University Law Review 335; Catherine Morris, "Where Peace and Justice Meet: Will Qualifications for Dispute Resolution Get Us There?" in Catherine Morris and Andrew Pirie (eds), *Qualifications for Dispute Resolution: Perspectives on the Debate* (UVic Institute for Dispute Resolution 1994).

believed in institutionalisation of mediation because they saw it as better than adversarial disputing, particularly for family law disputants.[24]

3.10 By the mid-1980s, mediation proponents had persuaded courts and public officials across Canada to consider mediation as a possible way to increase court efficiency and improve access to justice.[25] The 1988 report of BC's Justice Reform Committee led by Ted Hughes, then BC's Deputy Attorney General, provides a snapshot of typical thinking in Canada's legal profession at the time. Hughes recommended that judges be encouraged to refer cases to mediation and that mediation be made available through BC's publicly funded legal aid program.[26] He also recommended development of "professional standards" and certification for mediators.[27] Hughes stopped short of recommending mandatory mediation because of opposition expressed in submissions, insufficient evidence that mandatory mediation would reduce court delays, and a lack of "properly trained neutrals."[28]

3.11 The Hughes Report also considered the roles of judges and lawyers. Traditionally, Canadian judges have limited their role to adjudication. Lawyers initiate the steps in litigation, harnessing court administrative procedures and interlocutory processes to gain leverage in negotiations. This "litigotiation"[29] process was

24 For example, BC's Jerry McHale and Saskatchewan's Ken Acton, both government-based pioneers of mediation in Canada, take this approach. They are quoted in Janice Mucalov, "Mediation, Like It or Not" (*The National*, February 2003) <www.cba.org/cba/national/janfeb03/PrintHtml.aspx?DocId=6371> accessed 6 June 2013.

25 For example, see the Hughes report from BC and the Zuber report from Ontario: Edward N Hughes, *Access to Justice, The Report of The Justice Reform Committee* (The Hughes Report) (BC Ministry of the Attorney General 1988); T G Zuber, *Report of the Ontario Courts Inquiry* (The Zuber Report) (Ontario Ministry of the Attorney General 1987).

26 Hughes (n 24) 207.

27 Ibid.

28 Ibid 187.

29 Marc Galanter, "Worlds of Deals: Using Negotiation to Teach About Legal Process" (1984) 34 Journal of Legal Education 268.

noted to result in settlements in 85–95% of cases,[30] often just before trial. Hughes urged a major shift, saying: "[t]he responsibility for the pace of litigation can no longer be left entirely in the hands of lawyers and their clients. The burdens on our court system today require that the judiciary assume an active role in seeing that a case, once set for trial, proceeds as expeditiously as possible."[31] The Hughes Report prepared the ground in BC for more thinking about judicial case management, including judicial dispute resolution ("JDR").

3.12 At the time, lawyers and judges seldom had any formal training in settlement skills. Hughes recommended that lawyers and the public be provided with more information about mediation[32] and suggested development of standards for training.[33]

c Education and Training: The Emergence of Philosophical Struggles

3.13 In 1989, the Canadian Bar Association ("the CBA") Task Force Report on ADR[34] recommended development of dispute resolution education for law students, lawyers, judges, and the general public. Continuing education courses in mediation became more available in several disciplines, including the legal profession. While it was common ground among the diverse proponents of mediation that more training was needed, different philosophical approaches began to emerge.

3.14 Canadian training in mediation was and is heavily influenced by the 1981 publication, Getting to Yes, by Harvard University's Roger

30 This was the US estimate in the early 1990s by Marc Galanter and Mia Cahill, "Most Cases Settle: Judicial Promotion and Regulation of Settlement" (1993-94) 46 Stanford Law Review 1339.

31 See, eg, Hughes (n 24). Also see commentary on Zuber by Ian Greene, "The Zuber Report and Court Management" (1988) 8 Windsor Yearbook of Access to Justice 150.

32 Hughes (n 24) 190.

33 Ibid 195.

34 Canadian Bar Association and Bonita Thompson, *Task Force on Alternative Dispute Resolution, Alternative Dispute Resolution: A Canadian Perspective* (Canadian Bar Association 1989). UVic legal scholar, Andrew Pirie, was a significant contributor to this report.

D Fisher and William Ury. They proposed that "win-win" agreements could be created by exploring and accommodating the interests of all parties.[35] This "interest-based" approach is also called "integrative" dispute resolution and is distinguished from "distributive" or competitive approaches.[36] Fisher and Ury's thinking deeply penetrated Canadian mediation training during the 1980s. Trainers taught mediators to facilitate parties' creation of interest-based solutions. From a practical standpoint, however, many mediators, particularly commercial mediators, were less animated by the vision of "facilitative", interest-based mediation and more by the idea of helping parties to hash or bash out settlements,[37] telling parties their predictions of how a judge might decide the case and sometimes suggesting solutions.[38] This method of mediation became known as "evaluative" or "predictive" mediation.[39] Many parties preferred to retain retired judges with substantive knowledge and professional gravitas who often had little or no training in interest-based, facilitative mediation. American critics of both evaluative and interest-based mediation cultivated methods that focussed less on solutions and more on transformation of relationships, but "transformative mediation"[40] has not deeply penetrated mediation training for lawyers in Canada, although it is taught in programs aimed at community and workplace conflict management.

35 Roger Fisher, William Ury and Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In* (2nd edn, Penguin Books 1991).

36 Ibid 41. See Albie M Davis, "An Interview With Mary Parker Follett" (1989) 5 Negotiation Journal 223.

37 James J Alfini, 'Trashing, Bashing, and Hashing it Out: Is This the End of 'Good Mediation'?" (1991) 19 Florida State University Law Review 47.

38 For a concise explanation of these mediation styles, see Zena Zumeta, "Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation" (*Mediate.com*, September 2000) <www.mediate.com/articles/zumeta.cfm> accessed 6 June 2013.

39 The "facilitative" and "evaluative" terminology is attributed to Leonard L Riskin, "Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed" (1996) 1 Harvard Negotiation Law Review 8.

40 Robert A Baruch Bush and Joseph Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (Jossey-Bass Publishers 1994); Joseph P Folger and Robert A Baruch Bush (eds), *Designing Mediation: Approaches to Training and Practice within a Transformative Framework* (The Institute for the Study of Conflict Transformation 2001).

CONTENTS

1 Introduction

6.1.01 The Hong Kong *Mediation Ordinance* ("the Ordinance") was passed on 15 June 2012 and came into force on 1 January 2013. The Ordinance applies when mediation is conducted at least partially in Hong Kong or pursuant to a written agreement to mediate which refers to the law of Hong Kong or the Ordinance itself.[3] It aims to provide a regulatory framework for promoting the use of mediation as a dispute resolution process and protecting the confidential nature of mediation communications.[4] It defines "mediation" as a facilitative process in which one or more neutrals assist disputants to identify the issues in dispute, explore and generate options, communicate with one another, and/or reach a settlement agreement as to the whole or part of the dispute.[5] Further, it prohibits disclosure or admissibility of mediation communications unless in exceptional circumstances or with leave of the court.[6]

6.1.02 At present, Hong Kong has not adopted legislation based on the Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law ("the Model Law").[7] Its adoption seems unlikely for the following reasons. First, the Ordinance is broader in scope and sets out provisions similar to Arts 8 to 10 of the Model Law. Second, mediation rules of major service providers, such as the Hong Kong International Arbitration Centre, the Law Society of Hong Kong and Hong Kong Mediation Centre, are in place to govern

3 *Mediation Ordinance (Cap 620)*, s 5(1). The *Mediation Ordinance* does not apply to similar processes that are regulated by other Ordinances. See *Mediation Ordinance (Cap 620)*, s 5(2) and Sch 1.

4 *Mediation Ordinance (Cap 620)*, s 3.

5 *Mediation Ordinance (Cap 620)*, s 4.

6 *Mediation Ordinance (Cap 620)*, ss 8–10. See also K Bowers, "Hong Kong Dispute Resolution Alert – May 2013" <www.hwbhk.com/en/news/all-news/hong-kong-dispute-resolution-alert-%E2%80%93-may-2013.html> accessed 22 June 2013.

7 2002 UNCITRAL Model Law on International Commercial Conciliation <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html> accessed 12 July 2013.

the commencement of mediation, appointment of mediators, role of mediators, conduct of mediation, termination of mediation, and relationship with other dispute resolution processes.[8] Finally, enforceability of settlement agreement was left out in the Ordinance, as the drafters considered the action of breach of contract suffice.

6.1.03 In what follows, this chapter tracks the development of mediation practice in Hong Kong. It then examines the consequences on the courts, legal practitioners and scholars. It concludes that pro-mediation policies and practice have positioned Hong Kong in line with major common law jurisdictions. The continuing contribution from the mediation industry and legal scholarship is crucial to enhance mediation services in the future.

6.1.04 While there is currently no mandatory mediation regime in Hong Kong, civil claimants are encouraged to engage in mediation prior to court litigation through the judiciary's civil justice reform initiated in 2000 and implemented in 2009. It placed alternative dispute resolution, in particular mediation, at the core of the reform[9] to conserve judicial resources and reduce time and costs involved in litigation.[10] So convinced was the judiciary of the benefits of mediation that the final report recommended imposing a proactive duty on the court to encourage its use and broadening the court's discretion to issue adverse costs orders for unreasonable refusal to mediate.[11]

8 *Hong Kong International Arbitration Centre Mediation Rules* <http://www.hkiac.org/index.php/en/mediation/mediation-rules> accessed 12 July 2013; the Law Society of Hong Kong's *Mediation Rules* <http://www.hklawsoc.org.hk/pub_e/mas/rules.asp> accessed 12 July 2013; Hong Kong Mediation Centre Mediator's Rules and Code of Ethics <http://www.mediationcentre.org.hk/prorules_eng.html> accessed 12 July 2013.

9 Interim Report (n 3) paras 623-678.

10 Chief Justice's Working Group on Civil Justice Reform, "Civil Justice Reform: The Final Report" (Final Report) (Hong Kong Special Administrative Region, People's Republic of China, 3 March 2004) paras 797–800.

11 Final Report (n 5) paras 826–827, 841–854.

2 The Impact on the Dispute Resolution Culture

6.1.05 Mediation has been taking root in Hong Kong since the turn of the century. There is already some mediation experience in certain commercial sectors in Hong Kong, such as construction, and in certain legal fields, such as family law.[12] The judiciary launched a pilot scheme for family mediation in 2000 and set up a Mediation Coordinator's Office within the Family Court building.[13] With its proven record of helping separating/divorcing couples to resolve their problems without the need for expensive litigation, that Mediation Coordinator's Office continues to operate now, even though the Pilot Scheme has ended.[14] Similarly, a Mediation Coordinator's Office was established in the Lands Tribunal in 2008 to provide information on mediation to parties who are interested in mediating their disputes.[15]

6.1.06 Two milestones in the history and development of mediation in Hong Kong were the introduction of the Civil Justice Reform ("the CJR") in April 2009 and the implementation of Practice Direction on Mediation ("PD 31") in 2010.

6.1.07 The CJR set out a number of underlying objectives, which are, among others, to increase cost effectiveness of civil procedure, to deal with cases as expeditiously as is reasonably practicable, to promote a sense of reasonable proportion and procedural economy, and to facilitate the settlement of disputes.[16] In addition, the civil procedure rules introduced in 2009 place a positive duty on the court to further the underlying objectives by

12 Tanner de Witt Solicitors, "An effective way of resolving disputes in Hong Kong" <www.tannerdewitt.com/practice-areas/mediation.php> accessed 22 June 2013.

13 Hong Kong Judiciary, "Family Mediation" <www.judiciary.gov.hk/en/crt_services/pphlt/html/fm.htm> accessed 22 June 2013.

14 Hong Kong Judiciary, "Family Mediation" (n 9).

15 Mediate First, "Mediation Schemes" <http://mediatefirst.hk/page12.html> accessed 22 June 2013.

16 *Rules of the High Court*, Order 1A, r 1 <www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/6001DD4CD77C2F14482575EE002ABDB6/$FILE/CAP_4A_e_b5.pdf> accessed 22 June 2013.

actively managing cases.[17] As part of active case management, the court has to help parties to settle cases and to encourage and facilitate parties to use an alternative dispute resolution procedure where the court considers it appropriate.[18]

6.1.08 While the CJR set out objectives and implemented changes in court rules, PD 31 created a framework for mediation. Under PD 31, parties to a dispute must explore the possibility of mediation before pursuing litigation. They are required to file certificates stating that they have been advised about mediation and to indicate whether they are willing to attempt mediation, and if not, why not.[19] The court may issue an adverse costs order (in essence, a fine) when a party unreasonably refuses to engage in mediation.[20]

6.1.09 Although mediation was not made mandatory in the CJR, the court's proactive approach in case management, coupled with the court's discretion to impose adverse cost penalties if it believes a party has acted unreasonably in refusing to mediate, might make parties feel that they are left with no choice but to go through mediation.[21] This has brought about changes in the litigation culture in Hong Kong[22] and the use of mediation in Hong Kong as a means of alternative dispute resolution has been reinforced and increasingly favoured.[23]

17 Bowers (n 1).

18 *Rules of the High Court*, Order 1A, r 4(2) of the <www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/6001DD4CD77C2F14482575EE002ABDB6/$FILE/CAP_4A_e_b5.pdf> accessed 22 June 2013

19 Deacons, "Guide to Hong Kong Civil Litigation And Dispute Resolution" (March 2011) <www.deacons.com.hk/eng/knowledge/knowledge_62.htm#7> accessed 22 June 2013.

20 Paragraph 4, Practice Direction 31 on Mediation (PD 31) <http://legalref.judiciary.gov.hk/lrs/common/pd/pdcontent.jsp?pdn=PD31.htm&lang=EN> accessed 22 June 2013.

21 Department of Justice, "Report of the Working Group on Mediation" (Department of Justice, The Government of the Hong Kong Special Administrative Region, February 2010) <www.doj.gov.hk/eng/public/pdf/2010/med20100208e.pdf> accessed 22 June 2013.

22 Bowers (n 1).

23 Bowers (n 1).

6.1.10 The 2008 Lehman mini-bond crisis[24] brought to light the rising need for a quick, simple and efficient way to resolve disputes related to financial products.[25] The Hong Kong Government introduced the Financial Dispute Resolution Scheme ("the FDRS") and established the Financial Dispute Resolution Centre ("the FDRC") in February 2010 to provide a one-stop, independent and affordable avenue for consumers to solve monetary disputes between financial service providers and consumers. All licensees or regulatees of the Securities and Futures Commission and the Hong Kong Monetary Authority, such as brokers or banks, are required to join the FDRS. Disputants who are members must enter into mediation and arbitration as per the scheme should they fail to settle their dispute on their own.[26] In general, mediation or negotiation preceding arbitration is a common practice in many jurisdictions, and affords parties the opportunity to participate in an attempt to settle their claim before accessing a more formal channel.[27] In the context of the FDRC, the role of the mediator and the arbitrator are distinct and parties are required to submit first to mediation and if parties fail to settle through mediation, they may then proceed to arbitration.[28]

24 "One key consequence of the filing for bankruptcy of Lehman Brothers was the unwinding of credit-linked notes, marked 'minibonds', arranged by a subsidiary of Lehman Brothers Holdings. . .as a result of the unwinding, the value of the notes fell to a small fraction of the principle amounts paid for them." See; Ali, S (2013). Consumer Financial Dispute Resolution in a Comparative Context: Principles, Systems and Practice (Cambridge University Press).

25 Approximately 34,000 retail investors invested in minibonds in Hong Kong. Ibid.

26 Hong Kong Trade Development Council, "Arbitration and Mediation Industry in Hong Kong" (18 May 2012) <http://hong-kong-economy-research.hktdc.com/business-news/article/Hong-Kong-Industry-Profiles/Arbitration-and-Mediation-Industry-in-Hong-Kong/hkip/en/1/1X000000/1X006N9U.htm> accessed 22 June 2013.

27 Shahla F Ali, Consumer Financial Dispute Resolution in a Comparative Context: Principles, Systems and Practice (Cambridge University Press 2013).

28 "Mediation and Arbitration" (Financial Dispute Resolution Centre Limited) <www.fdrc.org.hk/en/html/resolvingdisputes/resolvingdisputes_mediationarbitration.php> accessed 5 July 2013. See also: Shahla F Ali, Consumer Financial Dispute Resolution in a Comparative Context: Principles, Systems and Practice (Cambridge University Press 2013).

3 The Impact on Courts

6.1.11 The judiciary's civil justice reform, initiated in 2000 and implemented in 2009, significantly facilitated the use of mediation in Hong Kong. The interim report on the reform identified four serious problems that afflicted the local civil justice system: high litigation costs; procedural delays; complex procedural rules; and challenges posed by unrepresented litigants.[29] It placed alternative dispute resolution, in particular mediation, at the core of the reform[30] to conserve judicial resources and reduce time and costs involved in litigation.[31] The judiciary was so convinced of the benefits of mediation that the final report recommended imposing a proactive duty on the court to encourage its use and broaden the court's discretion to make adverse costs orders for unreasonable refusal to mediate.[32] Amendments to primary and subsidiary legislation ensued,[33] of which the modified Rules of the High Court and the District Court ("the Rules") are the most relevant for analysing the role of judges and legal practitioners in mediation.

6.1.12 The Rules provide that one of the underlying objectives of the civil justice system is to facilitate the settlement of disputes.[34] The court has a duty to actively manage cases to pursue those aims.[35] Active case management powers include, among other things, encouraging litigants to use an alternative dispute resolution

29 Interim Report (n 3) pt I.

30 Interim Report (n 3) paras 623–678.

31 Final Report (n 5) paras 797–800.

32 Final Report (n 5) paras 826–827, 841–854.

33 Hong Kong *Court of Final Appeal Fees Rules (Cap 484B); High Court Ordinance (Cap 4); Rules of the High Court (Cap 4A); High Court Suitors' Funds Rules (Cap 4B); High Court Fees Rules (Cap 4D); District Court Ordinance (Cap 336); District Court Civil Procedure (Fees) Rules (Cap 336C); District Court Suitors' Funds Rules (Cap 336E); Rules of the District Court (Cap 336H); Matrimonial Causes (Fees) Rules (Cap 179B); Lands Tribunal Ordinance (Cap 17); Lands Tribunal Rules (Cap 17A); Small Claims Tribunal Ordinance (Cap 338); Law Amendment and Reform (Consolidation) Ordinance (Cap 23); Arbitration Ordinance (Cap 341).*

34 *Rules of the High Court (Cap 4A)* and *Rules of the District Court (Cap 336H)*, O 1A, r 1(e).

35 *Rules of the High Court (Cap 4A)* and *Rules of the District Court (Cap 336H)*, O 1A r 4(1).

procedure if the court considers that appropriate, as well as helping litigants to settle the whole or part of their case.[36] Yet the Rules do not define the term "alternative dispute resolution." The judiciary clarified in PD 31 that the term refers to third-party assisted negotiations and that mediation is the preferred method.[37] According to the PD 31, litigants must make arrangements for mediation within 28 days after the pleadings are deemed to be closed. These arrangements include: the subject matter of negotiation; the mediation rules; the choice of the mediator; the date, venue and fees of mediation; and the minimum level of participation.[38] It also forewarns litigants of the risk of being ordered to pay the opponents' costs if they unreasonably refuse to engage in mediation.[39]

6.1.13 What, then, constitutes a reasonable refusal to participate in mediation? On whom does the burden of proof rest? In *Golden Eagle International (Group) Ltd v GR Investment Holdings Ltd*, Lam J ruled that the onus was on the party who refused mediation.[40] The judge pointed out that the nature of the dispute may render it unsuitable for mediation, if the dispute raises a point of law, which, when determined, will provide guidance for the future in a particular trade or market, or it raises a point of law that arises from time to time and a binding precedent would be useful, or injunctive or other interlocutory relief is essential to protect the position of the party.[41] He noted, however, that most cases are not by their nature unsuitable for mediation.[42] Sadly, he did not confront other factors that may be relevant in deciding whether a refusal to mediate is unreasonable; namely, the merit of the case,

36 *Rules of the High Court (Cap 4A)* and *Rules of the District Court (Cap 336H)*, Order 1A, r 4(2)(e), (f).

37 PD 31 (n 16), para 3.

38 PD 31 (n 16), paras 8–15, 18–20.

39 PD 31 (n 16), para 4. See also *Rules of the High Court (Cap 4A)* and *Rules of the District Court (Cap 336H)*, Order 62, r 5(1)(e), 2(d).

40 *Golden Eagle International (Group) Ltd v GR Investment Holdings Ltd* [2010] 3 HKLRD 273 para 44.

41 Ibid, paras 22–24.

42 Ibid, para 25.

the extent to which other settlement methods have been attempted, whether the costs of mediation would be disproportionately high, whether any delay in setting up and attending mediation would be prejudicial, and whether mediation has a reasonable prospect of success.[43]

6.1.14 Following the lead provided by the CJR, the judiciary set up mediation schemes in areas related to matrimonial and family law,[44] construction,[45] personal injury and employee compensation,[46] shareholders' rights,[47] building management,[48] and compulsory sale of land for redevelopment.[49] It left the provision of court-related mediation services to the market. The Hong Kong International Arbitration Centre, the Hong Kong Mediation Centre, the Law Society of Hong Kong, and the Hong Kong Bar Association are leading service providers. Each runs a panel of mediators, recognising professionals who have received at least 40 hours of training on facilitative mediation and conducted two simulated mediation assessments. The four organisations are founding members of the Hong Kong Mediation Accreditation Association Limited ("the HKMAAL")[50], a non-statutory industry-led accreditation body for mediators incorporated on 28 August 2012 to administer the Hong Kong Mediation Code[51] with regular reviews, establish a complaint and disciplinary procedure, and formulate accreditation standards for mediators, supervisors, assessors, trainers, coaches, other professionals involved in mediation, and mediation training courses.

43 Ibid, paras 21, 27–30. See also *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 WLR 3002 paras 16, 18–27 per Dyson LJ.

44 Practice Direction 15.10 on Family Mediation; Practice Direction 15.11 Financial Dispute Resolution Pilot Scheme; Practice Direction 15.11A Application of Financial Dispute Resolution Pilot Scheme; Practice Direction 15.12 Matrimonial Proceedings and Family Proceedings; Practice Direction 15.13 Children's Dispute Resolution Pilot Scheme.

45 Practice Direction 6.1 on Construction and Arbitration List.

46 Practice Direction 18.1 on the Personal Injuries List.

47 Practice Direction 3.3 on Voluntary Mediation in Petitions Presented under ss 168A and 177(1)(f) of the *Companies Ordinance (Cap 32)*.

48 Lands Tribunal, "Direction Issued by the President of the Lands Tribunal Pursuant to Section 10(5)(a) of the Lands Tribunal Ordinance (Cap 17) – Case Management and Mediation for Building Management Cases" (LTPD: BM No 1/2009, 2009).

49 Lands Tribunal, "Direction Issued by the President of the Lands Tribunal Pursuant to Section 10(5)(a) of the Lands Tribunal Ordinance (Cap 17) – Mediation for Compulsory Sale Cases Under the Land (Compulsory Sale for Redevelopment) Ordinance (Cap 545)" (LTPD: CS No 1/2011, 2011).

6.1.15 As more accredited and non-accredited mediators have come on the scene, the court has offered guidance on how to elect the most appropriate mediator for a dispute. Registrar Lung laid down a three-step approach in *Upplan Co Ltd v Li Ho Ming*:[52]

> "First, the court will consider all the relevant objective data, in the following priority:
>
> - the nature of the matter and the issues for mediation;
> - the amount involved and the importance of the matter to the parties;
> - the mediators' knowledge and experience in respect of the issues in order to determine whether the mediators are the appropriate persons to deal with the issues concerned;
> - the experience of the mediators in mediation;
> - the other relevant experiences such as that of legal practice, arbitration or social experience;
> - the fees and expenses for the mediation;
> - the availability of the mediators, bearing in mind that mediation will be taking place near the trial; and
> - other relevant factors.

50 For details, see HKMAAL website: <http://www.hkmaal.org.hk/en/index.php> accessed 15 July 2013

51 Hong Kong Mediation Code <http://www.doj.gov.hk/eng/public/pdf/2010/med20100208e_annex7.pdf> accessed 12 July 2013.

52 *Upplan Co Ltd v Li Ho Ming* [2011] 1 HKLRD B2 paras 13–15.

CONTENTS

1 Prefatory Note

14.01 While most other countries deal with only one or a limited number of jurisdictions, the United States consists of 51 different jurisdictions – the federal system and the 50 states.

14.02 In the area of arbitration, each state's arbitration statutes generally apply only to strictly local cases because in other cases those statutes are pre-empted[2] by the *Federal Arbitration Act*. Besides, insofar as state law **does** apply, whether independently or as a supplement to the *Federal Arbitration Act*, virtually all states have adopted the *Uniform Arbitration Act 1955*[3] or the Revised *Uniform Arbitration Act 2000*[4] in one form or another.

14.03 In contrast, no equivalent federal statute exists for mediation, and it is generally assumed that states' legislation in the area of mediation has primary applicability. As the laws differ greatly from state to state, it is not possible, or even desirable, within the scope of this Chapter to discuss the gamut of mediation related legal systems in the United States. Although the author will touch on the mediation laws of other states and/or the federal system, he will mostly focus on what he knows best: the laws and rules

2 *Allied-Bruce Terminix Cos v Dobson* 513 US 265 (1995); *Preston v Ferrer* 552 US 346 (2008) ("The FAA's displacement of conflicting state law is 'now well-established', and has been repeatedly reaffirmed." 552 US at 353). See also *AT&T Mobility LLC v Concepcion* 563 US, 131 S.Ct 1740 (2011) (stating with respect to s 2 of the *Federal Arbitration Act* that "[a]lthough §2's saving clause preserves the generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives. … The overarching purpose of the FAA … is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." and "…States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." Slip Opinion at 9, 17).

3 See John M McCabe, "Uniformity in ADR: Thoughts on the Uniform Arbitration Act and Uniform Mediation Act" (2003) 3 Pepp Disp Resol LJ 317, 318.

4 The RUAA has been adopted in various forms in 17 jurisdictions: Alaska, Arizona, Arkansas, Colorado, Hawaii, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, Washington and the District of Columbia. Several other states are considering its adoption, including Arizona, New York and Pennsylvania. See <http://www.uniformlaws.org/Act.aspx?title=Arbitration%20Act%20%282000%29> accessed 23 June 2013.

pertaining to mediation as they prevail in the state of California and the county of Los Angeles.

2 Introduction

14.04 As in most countries, mediation in the United States has existed for hundreds if not thousands of years. There is evidence that the elders of several Native American tribes utilised mediation as a form of conflict resolution long before the United States was founded.[5] The Quakers also have a long history of practicing both mediation and arbitration. In fact, it appears that much of the early US model of mediation was based on the work of the Quakers.[6] In New York City, the Jewish community established its own mediation forum.[7] Chinese immigrants established the Chinese Benevolent Society to resolve disputes within the family and within the community by mediation.[8]

14.05 The modern incarnation of mediation in the United States finds its roots in the collective negotiations of the labour-versus-

5 See Mark S Hamilton, "Sailing in a Sea of Obscurity: The Growing Importance of China's Maritime Arbitration Commission" (2002) 3 Asian-Pacific L& Pol'y 10, under "II B. The History of Dispute Resolution in China"; Robert Perkovich, "A Comparative Analysis of Community Mediation in the United States and the People's Republic of China" (1996) 10 Temp Int'l & Comp LJ 313, n.6 and the works cited therein.

6 See Steven G Mehta, "Mediation in History: The Quakers the oldest mediation organization" <http://stevemehta.wordpress.com/2010/01/26/mediation-in-history-the-quakers-the-oldest-mediation-organization> accessed 23 June 2013 ("For over 300 years the Quakers have been working for peace and acting as mediators." "The first recorded instance of Quakers being involved as "mediators", was in 1850, when Joseph Sturge and two colleagues tried to bring peace between Denmark and the duchies of Schleswig-Holstein.")

7 See eg, section 2 of the *Charter of the Kehillah (Jewish Community) of New York City*, April 5, 1914, reproduced in Jacob Rader Marcus (ed), *The Jew in the American World: A Source Book* (Detroit: Wayne State University Press, 1996) 334-337. See also <www.history.umd.edu/Faculty/BCooperman/NewCity/Marcus3%28334-337%29.htm> accessed 23 June 2013.

8 Mediation Matters, "History of Mediation", <www.mediationmatterssd.com/mediationmatters/history.html> accessed 23 June 2013.

management arena during the 1960s,[9] and, perhaps surprisingly, in the urban turmoil and civil unrest of the late 1960s, when riots broke out in places such as Watts (in Los Angeles), Detroit, and Boston.[10] Essentially, the mediation methods used in the labour area were adopted by community activists to intervene in interracial conflicts.[11]

14.06 Courts first became interested in mediation in divorce cases. Beginning in the 1970s, more states began to adopt laws in favour of "no-fault" divorce, while in "fault-based" states the courts began to favour "divorce by consent" for "irreconcilable differences."[12] Reluctant to conduct adversarial proceedings for child custody issues, courts became open to the mediation process as a way to help parents resolve those disputes.[13] Consequently, in 1981, California enacted the first mandatory mediation law addressing child custody disputes.[14] This law allows courts to waive mandatory mediation in cases involving domestic violence, which are handled by Family Court Services under guidelines developed by the California Judicial Council.[15]

9 The first time that a full-time professional mediator was employed occurred as far back as 1913, when the United States Secretary of Labor filled the first positions of "Commissioners of Conciliation" in labour disputes. Earlier, tentative measures were undertaken by some states in order to deal with the growing industrial unrest, including Maryland (1878), Pennsylvania (1883), New York (1886) and Massachusetts (1886). For more detail, see Jerome T Barrett, "A Brief Histroy of DOLs Conciliation Service" (2000), <http://www.mediationhistory.org/Papers/BriefHistoryofDOL.pdf>, accessed June 25, 2013. See also, Jerome T Barrett, "The Origin of Mediation: The United States Conciliation Service in the US Department of Labor" (1995), <http://www.mediationhistory.org/Papers/OrginofMediation.pdf>, accessed June 25, 2013.

10 Robert A. Baruch Bush, "Staying in Orbit, or Breaking Free: The Relationship of Mediation to the Courts over Four Decades" (2008) 84 N Dak L Rev 705, 709.

11 Id 710.

12 Id 718.

13 Ibid.

14 California Civil Code, s 4607(a) et seq (West 1981) (repealed 1982), since replaced by California Family Code, ss 3170-3173.

15 California Rules of Court, r 1257.2.

14.07 On 24 January 1982, the Chief Justice of the United States Supreme Court, Warren Burger, addressed the American Bar Association at its mid-year meeting in Chicago. In his famous speech, Chief Justice Burger called for an increased focus on mediation and arbitration.[16] Although he spoke more about arbitration than mediation, many trace the rapid increase in popularity of alternative dispute resolution programs in the 1980s and 1990s to his "call to action."[17]

3 Regulation of Mediation in the United States

14.08 A few years **before** Chief Justice Burger's call to action, as one of the first in the country,[18] California had instituted an ambitious court-based alternative dispute-resolution program: pursuant to a 1978 amendment to the Code of Civil Procedure,[19] this program required certain litigants to submit their civil cases to non-binding or "judicial" arbitration.

14.09 As stated in the prefatory note above, mediation in the United States is a matter of state law, and is regulated state by state. In some states, at least when it comes to court-annexed mediation, it

16 Chief Justice Warren E Burger, "Isn't There a Better Way?" (Annual Report on the State of the Judiciary, Remarks at the Mid-Year Meeting of the American Bar Association, 24 January 1982), reproduced in (1982) 68 ABAJ 274.

17 Kevin C Clark, "The Philosophical Underpinning and General Workings of Chinese Mediation Systems: What Lessons Can American Mediators Learn?" (2002) 2 Pepp Disp Resol LJ 117, 121 et seq.

18 The oldest program instituting mandatory judicial arbitration was adopted in Pennsylvania in 1952. California's program appears to be the first one after Pennsylvania. For a description of the judicial (non-binding) arbitration programs in a number of states, see L Christopher Rose, "Nevada's Court-Annexed Mandatory Arbitration Program: A Solution to Some of the Causes of Dissatisfaction with the Civil Justice System" (1999) 36 Idaho L Rev 171.

19 California Code of Civil Procedure ("CCP"), ss 1141.10–1141.31. The implementation of these provisions can be found in Title 3, Division 8, Chapter 2 of the California Rules of Court, r 3.810–3.830.

is even regulated county by county. In the federal system, court-annexed mediation is regulated district by district.[20]

14.10 Thus, to the extent that mediation is regulated, there is a true hodge-podge of laws that vary from state to state and even from county to county within the same state. By 1989, the legislatures of the 50 states and the Federal Government had adopted close to 1,000 mediation-related statutes.[21] As of 1994, those several governments had enacted 2,000 such statutes,[22] and in 2001, this number had increased to more than 2,500 statutes.[23]

14.11 As a result, the National Conference of Commissioners sought to develop a model *Uniform Mediation Act* ("the UMA"), which it approved in 2001. The model act was modified in 2003 to incorporate by reference the UNCITRAL Model Law on Conciliation ("the Model Law") for disputes involving international commercial mediation. Currently, the UMA has been adopted in ten states and the District of Columbia (Washington DC), and has been introduced in Hawaii, Massachusetts, and New York.[24]

20 *Alternative Dispute Resolution Act 1998*, 28 USC § 651(b). The Federal Court System is divided into twelve Circuits, numbered 1 through 11 and the Federal Circuit covering Washington DC. Each Circuit is divided into Districts. The 9th Circuit includes California (in addition to the Districts of Alaska, Western and Eastern Washington, Oregon, Idaho, Nevada, Arizona, Hawaii, Guam and the Northern Mariana Islands), which is (sub-)divided into four districts: respectively the Northern, Eastern, Central and Southern Districts of California. Los Angeles is in the Central District.

21 See Scott H Hughes, "The Uniform Mediation Act: To the Spoiled Go the Privileges" (2001) 85 Marq L Rev 9, 16-17.

22 Ibid 17.

23 National Conference of Commissioners on Uniform State Laws, Uniform Mediation Act with Prefatory Note and Comments, at Prefatory Note, Part 3, "Importance of Uniformity" <http://www.uniformlaws.org/Act.aspx?title=Mediation%20Act> (click on "Final Act" to download; accessed 9 July 2013). The UMA was drafted by the Drafting Committees of the NCCUSL and the section on Dispute Resolution of the American Bar Association.

24 Uniform Law Commission, Legislative Tracking, <http://www.uniformlaws.org/Act.aspx?title=Mediation%20Act> ibid.

14.12 In contrast to the Model Law and the European Directive,[25] the UMA deals almost exclusively with the issue of confidentiality. A similar pattern can be discerned in several states that have adopted a mediation-related statute other than the UMA. In California, for example, the mediation-related provisions in the Evidence Code regulate confidentiality and little else. This is in contradistinction to the California *International Arbitration and Conciliation Act*, which, although adopted in 1988, to date constitutes the most thorough mediation legislation this author is aware of.[26]

14.13 In spite of the considerable progress made at several levels of government to consolidate and create cohesive mediation systems, there still are countless statutory provisions at both federal and state level, as well as local ordinances and regulations at the level of labour relations boards, workmen's compensation boards, school districts, and public commissions (such as for public utilities, parks and wildlife departments, social services, etc), which may include, and in many instances do include, their own rules regarding mediation.[27] Also, as noted previously, the local courts frequently each have their own rules about mandatory and voluntary mediation.

25 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L 136/3.

26 The California *International Arbitration and Conciliation Act* that deals with international mediation is set forth in ss 1297.11–1297.432 of the Code of Civil Procedure, of which ss 1297.341–1297.432 deal with international mediation. Five other states adopted somewhat more modest versions of an *International Arbitration and Conciliation Act*: Colorado (Colorado Rev Stats ss 13.22-501 to 13.22-507), North Carolina (NC Gen Stat ss 1-567.30 to 1-567.87), Ohio (Ohio Revised Code Title 27, Courts – General Provisions – Special Remedies, Chapter 2712), Oregon (Oregon Revised Statutes ss 36.450 to 36.558) and Texas (Texas Civil Prac and Remedies Code, Chapter 172). For an analysis of these laws and a comparison with the *Uniform Arbitration Act* and the Model Law on International Commercial Conciliation, see Rebecca Golbert, "A Comparison of International Commercial Arbitration and Conciliation Acts" (2010) 18 CA Int'l LJ 17.

27 Hughes (n 20) 17.

a Court Referral to Mediation

14.14 The first state to adopt a systematic court referral to mediation was Florida, which in 1988 adopted a law that authorised all civil court judges, on a discretionary basis, to order any case on their docket to mediation (with certain exceptions).[28] Florida was soon followed by other states, including Texas, North Carolina, Minnesota, Massachusetts, Illinois, Ohio, and others.[29]

14.15 On the federal level, the first mediation and arbitration programs dated from the 1970s. In October 1998, Congress adopted the *Alternative Dispute Resolution Act*, which required each district court to implement its own ADR program and to authorise the use of at least one form of ADR. Permitted forms of ADR include but are not limited to mediation, early neutral evaluation, minitrial, and voluntary arbitration.[30] According to a 2012 report, 34 of the 94 district courts now authorise referral to two or more forms of ADR (usually including mediation), while a total of 63 district courts authorise referral to mediation.[31]

4 Regulation of Mediation in California

14.16 The mediation rules of California were spread over seven different codes until that state adopted a comprehensive mediation statute in 1998 as part of the Evidence Code, restating and adding to, the existing legislation.[32] Presumably, more states will seek to consolidate their legislation, either by adopting the UMA[33] or by following California's example of adopting the relevant state's

28 Fla Stat § 44.102 (2009); Baruch Bush (n 8) 732.

29 Baruch Bush (n 8) 732.

30 See <http://www.uscourts.gov/News/TheThirdBranch/99-02-01/New_Law_Authorizes_ADR_In_All_District_Courts.aspx> (accessed 9 July 2013).

31 See <http://news.uscourts.gov/alternative-dispute-resolution-now-established-practice-federal-courts> (accessed 9 July 2013). See also Caroline Harris Crowne, "The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice" (2001) 76 NYUL Rev 1768, 1790.

32 See Eric van Ginkel, "The UNCITRAL Model Law on International Commercial Conciliation: A Critical Appraisal" (2004) 21 J. Int Arb 1, 3.

33 See para 14.11 above.

own comprehensive mediation confidentiality statute. If that assumption is correct, the enormous proliferation of statutes may well diminish in the coming years – although a wider acceptance of the UMA will perhaps not have as much impact as one might expect, as it basically covers only confidentiality.

a Encouraging the Use of Mediation – Confidentiality

14.17 The predominant reason for the adoption of statutory law that deals with mediation is to encourage the use of the process.[34] The main subject covered in such statutes is confidentiality of the mediation process and the protection of mediation communications in the evidentiary rules that apply to pre-trial discovery and evidence taken at trial.[35] Such protection can take the form of a "privilege" (as is provided in the UMA) or simply an evidentiary exclusion rule (as in the California Evidence Code).

14.18 California has one of the strictest statutory schemes of mediation confidentiality (as previously stated, not as a privilege but rather as an evidentiary exclusion provision[36]). Yet, it should be noted, even the strictest rule of confidentiality cannot be watertight, as documents mentioned or things said during the mediation can become the subject of a discovery request and therefore are effectively not protected if relevant to the litigation. In part, this is the result of the provision that "[e]vidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation."[37]

b Lessening the Caseload of the Courts

14.19 The public policy of lessening the caseload of the courts and the very substantial costs associated with the expansion of the court

34 See, eg, California CCP, s 1775 (a)–(e).

35 *Accord*, McCabe (n 2) 319.

36 See, eg, Rebecca Callahan, "Mediation Confidentiality: For California Litigants, Why Should Mediation Confidentiality be a Function of the Court in Which the Litigation is Pending?" (2012) 12 Pepp Disp Resol LJ 63, 68.

37 California Evidence Code, s 1120. A similar provision can be found in UMA, s 5(c).

system that would be required without encouragement of alternative dispute resolution is another, almost equally important reason for the adoption of mediation legislation. For example, s 1775(c) of the California Code of Civil Procedure ("the CCP") explicitly provides that "…[m]ediation may also assist to reduce the backlog of cases burdening the judicial system. It is in the public interest for mediation to be encouraged and used where appropriate by the courts."

14.20 The effect of mediation on the courts has been dramatic. The federal statistics available for 2012 indicate that on average only between 1.2% and 2% of all civil cases filed in federal district courts actually go to trial.[38]

14.21 The most recent data published by the Los Angeles Superior Court appear to indicate that during fiscal year 2009-10 only about 1.5% of the more than 350,000 civil cases filed[39] went to a trial by jury.[40] Though, the number of cases referred to court-annexed mediation in the Los Angeles Superior Court actually decreased

38 Basic statistical information for the federal court system can be found at <http://www.uscourts.gov/Statistics.aspx> accessed July 13, 2013. In 2012, there were 274,365 civil cases pending, with a total of 5,478 trials (3,342 non-jury trials and 2,136 jury trials). The number of trials as a percentage of pending cases amounts to approximately 2.0%. See <http://www.uscourts.gov/Statistics/JudicialBusiness/2012/us-district-courts.aspx> accessed July 13, 2013. Donna Stienstra, the Senior Research Associate of the Federal Judicial Center informed this author in a recent telephone conversation that no statistics are being kept on a national scale as to the number of cases that are settled as a result of mediation as compared to the number of civil cases filed. Her article, "ADR in the Federal District Courts: An Initital Report, dated November 16, 2011" can be downloaded from <http://www.fjc.gov/public/pdf.nsf/lookup/adr2011.pdf/$file/adr2011.pdf> accessed July 12, 2013.

39 This number includes cases with limited jurisdiction ($25,000 and under), small claims ($10,000 for individuals, $5,000 for corporate plaintiffs), unlawful detainer and civil harassment cases. LASC (2011) Annual Report 30, available at <http://www.lasuperiorcourt.org/courtnews/Uploads/14201053918492010AnnualReport.pdf> accessed July 12, 2013.

40 No data are available for the number of cases that went to a bench trial (ie, trial without a jury). Assuming the number is similar to the jury trial number, approximately 3% of civil cases filed are tried in the Los Angeles Superior Court.