*For people interested in mediation in Scotland*

**September 2024**
**Issue No 134**

# collaborate

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# Save the Date

This years Mediate 24 conference will take place on Monday 2nd December 2024.

We're delighted that it will be in Dundee at the V & A and look forward to welcoming everyone with an interest in mediation in Scotland.

We are currently working on the programme and the theme is 'Words Matter' which we will be exploring through a range of keynotes workshops and plenary sessions.

Tickets will be available soon via Scottish Mediations website and Eventbrite.

# Scottish Mediation Board

Scottish Mediation are recruiting new trustees to join our Board.

We are interested in recruiting Trustees who have a broad range of skills which may have been gained across a range of sectors. Applicants may have direct mediation skills but we are also interested in applications from experienced leaders who appreciate and have experience of the organisational benefits of mediation or who have experience in commissioning mediation to resolve disputes. This might include those working in local authorities, those with financial management experience and those with experience of complaints management. We are keen to ensure our Board reflects the diversity of the Scottish population.

If you are interested further details are available here.

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**Registered Office: 18 York Place Edinburgh EH1 3EP www.scottishmediation.org.uk**

# Mediation Would Have Helped

**Anonymous**

A few years ago at work one of my colleagues and I really weren't getting on. After yet another miscommunication that frustrated us both – I thought we had agreed he would do a report and he thought we had agreed I would do it - the one thing we both agreed on was that mediation would help. When we approached our HR department they decided that a member of the HR department could 'have a go' at mediation. Having worked with Scottish Mediation for some time and heard about their work, I wasn't convinced, but I wasn't really given another option either so I agreed to it.

What followed were regular sessions between me, my colleague and a member of the HR department (let's call them Hannah) to try and resolve the issues. Sounds ok so far, doesn't it? But what I found difficult was that at these sessions Hannah only wanted to focus on the positives…but we weren't there because of any positives. We were there because we had trouble communicating. We spent hours looking at what worked well, and some time looking at improvement but there was no time for me to talk about the impact this was having on me (it was incredibly stressful) or how continuing to work with this person was very, very difficult. I'm guessing my colleague would have benefited from discussing how he felt about everything too.

Hannah 'having a go' meant that we never got to the root of the issues we were having were or discussed how we both interpreted things. I didn't learn how I could communicate in a way my colleague understood and my colleague didn't get a chance to think about what this would look like for him. Not surprisingly, this didn't work very well - nothing was resolved and I no longer speak to the colleague – in fact I changed jobs to get away from him. For a long time I was angry with the colleague and with the HR department, and though the old adage that time heals has proved true I still wouldn't speak to either of them if we bumped into each other.

A good friend of mine volunteers with a mediation organisation and as part of her induction she got to sit in on a mediation. She said it was amazing – she was astounded at how well the mediator let each party have their say and then explain all the options available to them to move forward. The party who was unhappy didn't get the resolution they wanted but they fully understood that that wasn't ever going to happen and that there were limited options available to them – they chose the one that was the next best. I didn't get that chance,

and neither did my colleague. The only option for me was to leave.

I'm still frustrated that we weren't offered mediation from a suitably qualified/ experience individual as I think things would have gone very differently if we had. Having a go at something that takes real skills and experience isn't helpful – would you let an unqualified electrician rewire your house? If you're in any doubt, please learn from my (bad) experience and get a trained mediator in.

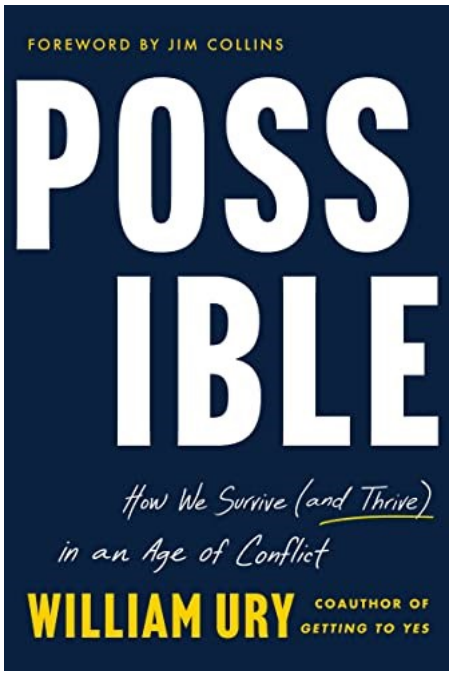
*This article was submitted to SM by someone we have previously worked with who has a good understanding of mediation, thanks go to them for sharing their experience.*

# Possible - William Ury

**John Sturrock**

Recently I spent several hours in Edinburgh in the company of my good friend William Ury. As many readers will know, Ury is co-author of what is arguably the most influential book ever written on negotiation, 'Getting to Yes', and author of other important texts including 'Getting Past No', 'The Power of a Positive No' and 'Getting to Yes with Yourself'.

In a career spanning over forty years, Ury has been involved in efforts to resolve some of the world's most intractable problems, ranging from the Cold War in the 1980s to apartheid in South Africa, ongoing conflict in the Middle East, the drugs war in Colombia, the nuclear threat from North Korea – and many others. He was in Edinburgh while taking a sabbatical following publication of his latest book, 'Possible'. In the book, he explores his approach to conflict resolution over the years, with fascinating stories of people he has worked with and the techniques which have made a difference and, in many cases, transformed conflict into something hopeful.




As we walked in the Meadows ("who fights while they walk?" he writes), Ury outlined his vision for a better world, even now when in so many places we seem to be regressing from the optimism which characterised the early days of Getting to Yes. Drawing on history, he described those relatively small tipping points or moments in time which changed everything. Looking ahead to an imagined positive future, he asked: how can we work back and create such moments now? What are the interventions now that could prevent catastrophe later and steer us on a better path? As we walked, I realised that there are probably few people on the planet better placed (and better connected) to inspire these interventions than William Ury.

In the book Possible, he lays out a prospectus for us all to follow. Those familiar with his work will recognise the concepts of going to the balcony to see the bigger picture and of building a golden bridge for your enemy or negotiating counterpart to cross as you search for a mutually acceptable solution. "Breakthrough negotiation" Ury writes "is the art of letting the other person have your way."

Armed with powerful examples, Ury emphasises the importance of the Third Side, the role which civic society can play in helping to unlock impasse and move difficult negotiations towards a conclusion. This requires us to look outside the narrow confines of those immediately involved and find others in the wider community who are affected by, and can influence, the decision. Perhaps we in Scotland might think about this when we face industrial action affecting transport and rubbish collection, for example. A collective effort, deploying Ury's concept of "swarming", may inspire the creativity which, he writes, "is the key to making the impossible possible."

Six years ago, when William Ury was last in Edinburgh, he addressed a conference of international mediators in the chamber of the Scottish Parliament and made a lasting impression on the audience, as he had on his first visit in 2009 when we hosted an all-day workshop in The Hub on the Royal Mile. We are privileged that such a world-leader in the field of conflict resolution, mediation and negotiation is a friend of Scotland. It falls to us to honour that friendship by following his example in how we approach the apparently intractable challenges we inevitably face in this country – and beyond. As Ury asks at the very end of his new book: "If not you, who? If not now, when?"


**Embark on a transformative educational journey with our leading postgraduate course in Mediation and Conflict Resolution at the Law School, University of Strathclyde. Immerse yourself in a learning experience where theory meets practice and discover the art of mediation under the guidance of our UK and international experts.**

## WHAT DOES THIS COURSE PROVIDE?

- A thorough introduction to the academic study of mediation and conflict resolution.
- Opportunity to gain hands-on mediation experience with our award-winning Mediation Clinic. The recent expansion across most of Scotland's courts increases the opportunities for students to gain real-life practical experience.
- Rigorous and multi-disciplinary with a distinctive focus on interpersonal mediation skills including the ability to deliver online mediation.
- Participants will enhance their confidence in dealing with interpersonal and organisational conflict while developing their communication and problem-solving skills.
- As well as core classes on mediation theory and practice, students may choose electives in negotiation, employment mediation and arbitration plus classes from throughout the Law School.
- Accreditation by Scottish Mediation (as fulfilling the training requirement for the Scottish Mediation Register).

## WHO WILL BENEFIT FROM THIS COURSE?

This course is designed for individuals seeking a dynamic and practical understanding of mediation. It will appeal to mediators, lawyers, managers, HR, health professionals, and anyone who deals with conflict in their work. Whether you are a seasoned professional looking to enhance your skills or a newcomer eager to explore the world of mediation, our course provides a comprehensive platform for personal and professional growth.

Legal training is not a pre-requisite; the MSc/LLM option means students from a wide range of disciplines can tailor the course to their needs.

## HOW IS THIS COURSE TAUGHT?

The course is taught via a mix of in-person and online classes at the University of Strathclyde. Classes normally take place early evening, and some weekend availability will also be required.

## WHAT OUR GRADUATES SAY?

"I absolutely loved my time at Strathclyde. Taking the time to think deeply, read widely and engage with others has proved to be extremely valuable".

"The opportunity provided by the Mediation Clinic is invaluable. The combination of theory provided by the lecturers, and real-world practice offered through the clinic has strengthened my practice in ways that a theory-only course never could have".

**Start date:** September each year

**Mode of Study:** Full-time and Part-Time, taught by a combination of early evening and weekend classes, in-person and online teaching. In person attendance is compulsory.

Application and Further Information can be found at:
**https://www.strath.ac.uk/courses/postgraduatetaught/mediationconflictresolution/**

**Join us and become part of a community dedicated to fostering excellence in mediation. Elevate your expertise, gain hands-on experience, and make a meaningful impact in resolving conflicts.**

**Contact**

E: hass-pgt-enquiries@strath.ac.uk
T: +44 (0) 141 444 8600

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SCAN QR CODE

# Scottish Mediation News

## Practice Standards and New Registrations 2023

Thinking of joining the Scottish Mediation Register? You can become a member or registered practitioner. Attend this free online seminar to find out more about registration. What is required to be a registered mediator and what are the required standards. Find out about the many benefits and opportunities for sharing practice and learning.

The hour-long seminar will consist of a 15 minute presentation, followed by an opportunity to ask questions.

The event will take place on Tuesday 8th October from 12.00pm-1.0pm. Zoom link to be sent out nearer the time.

To register an interest plea email admin@scottishmediation.org.uk

## Welcome to Scottish Mediation

Scottish Mediation are delighted to welcome Gordon Murray, Elizabeth Unsworth and Aitana Ruis Fabregat who join as practitioner members.

Lisa Sim, Denzil Johnstone, Katherine Hart, Colin Sturrock, Lisa Blackett, Andy Witty, Nara Morrison, Will Cole, Gordon Graham, Vicky Kirkland, Nicola Keogh, Fiona Martin and Lili Norris join as individual members.

Whether you are an organisation, a practitioner of mediation or someone interested in finding out more we have a range of memberships available which can be viewed here.

## International Mediation Clinic Network Conference (online)

**Wednesday 27 November at 5pm GMT**

Topic: Clinical Mediator Education

The International Mediation Clinic Network was established to offer encouragement, support, and learning opportunities for these clinics. It is open to academics, practitioners, students, and anyone interested in mediator education. It creates a platform for sharing best practices, fostering collaboration, and promoting the work of Mediation Clinics within academic institutions. Mediation Clinics are increasingly emerging worldwide across a variety of settings.

The International Mediation Clinic Network invites conference proposals from educators, students, and practitioners to explore “Clinical Mediator Education” topics. Selected papers will be considered for publication.

Clinical Mediator Education is a comprehensive and multifaceted training process that prepares individuals to mediate conflicts across various settings, ensuring they have the skills, knowledge, and ethical grounding to guide parties toward resolution.

Submission of Proposal
Please submit a 150-word proposal and submit to mediationclinic@strath.ac.uk in Word or pdf format. Form can be obtained from mediationclinic@strath.ac.uk
If selected you will be invited to present at the International Mediation Clinic Network Conference on Wednesday 27 November 2024 at 5pm – 7pm GMT (online).
Each presentation will be allocated 15 minutes to speak and 5 minutes for Q&A.
Please direct any enquiries to:
Pauline McKay, Mediation Clinic Co-ordinator, University of Strathclyde. T: 44 141 548 4510

# The Edinburgh Conversations

The Edinburgh Conversations, which took place between 1981 and 1988 under the auspices of the University of Edinburgh, played a significant role in easing tensions between East and West at the time of the Cold War.

Exactly 40 years ago, in September 1984, the fourth set of Conversations took place in Moscow. Held alternately in Edinburgh and Moscow, the Conversations brought together senior academics, diplomats and military officials from the Soviet Union, the United States and the United Kingdom. The key figure was the Professor of Defence Studies at the University of Edinburgh, Professor John Erickson, a leading expert on the Soviet military, who was held in equally high esteem in the Kremlin and in the Pentagon. Another key figure was Michael Westcott, a senior administrator at the University, who acted as Secretary to the Conversations and without whose tireless efforts behind the scenes, the Conversations might never have succeeded.

Sturrock KC, also a graduate of the University and now one of the UK's leading mediators, who was a close friend of Michael Westcott and who assisted him in the Conversations and has access to his private papers about them.

From their personal knowledge, our conversationalists will discuss what happened in the Edinburgh Conversations, how they were conducted and why they were successful. They will contemplate, in the context of the current global situation, what might be done in 2024 to replicate the approach, focusing on the process, personalities and relationships which sustained the initiative and how these same ideas might be applicable today, exploring underlying themes such as hosting, hospitality and humility at times of hostility, distrust and suspicion.

The photo shows Professor John Erickson (front right) and a group of participants in the Conversations in the mid eighties. Courtesy of John Sturrock, circa 1986.


In this event, Retired US Air Force Colonel Fred Clark Boli, who undertook his PhD at the University of Edinburgh and who worked closely with Professor Erickson during the Edinburgh Conversations, was formerly US Department of Defense representative to the Conversations and an expert on Russian affairs, will be in conversation with John

If you like to attend this event please click here.

# Scottish Mediation News

## Reflective Practice

Michael Lang will be presenting a Certificate Course in Reflective Practice Group Leadership, beginning October 10, 2024. He already has registrants from Ukraine, Greece, the UK and the US.

This is a year-long course with monthly sessions, together with 2 webinars—a total of 22 hours of instruction. Course materials include articles, handouts and specially created videos, as well as Michael's new book, The Guide to Reflective Practice in Conflict Resolution—second edition.

In this professional development training course we will focus on:

- understanding the principles and methods of Reflective Practice
- creating and facilitating a receptive and supportive learning group
- managing the process of Reflective Debrief® (used for individuals and within a group setting)

Participants will have repeated hands-on opportunities to practice Reflective Debrief®, presenting and exploring puzzling practice situations and serving as "debriefer"—the person facilitating the reflective conversation.

Course participants will receive a Certificate from the Reflective Practice Institute International (RPII). There is more information about the course on the RPII website. https://www.reflectivepracticeinstitute.com/certificatecourses

We would offer Scottish Mediation members a 25% tuition discount.

## Save the Date

Our next CPD session will be on November 5th at 10am online. The topic is 'Reluctance to mediate? A person-centred approach to overcoming barriers to mediation.' It will be led by colleagues from St Andrews University Mediation service, details to follow.

SCOTTISH COMMUNITY MEDIATION CENTRE

### Restorative Skills Training:

Our course has been assessed and approved by the Restorative Justice Council.

It provides a safe and enjoyable environment to learn the practical skills that are needed to become a trained restorative practitioner. Learners are taken through all stages of the restorative process. The course demonstrates how the theory of restorative practice is applied to real life scenarios and develops the ability to manage the restorative meeting.

The next course is being held in October (15, 16, 23, 24, 25, 29, 31st )

For more detailed information or to book a space, please contact Robert Lambden at Scottish Community Mediation Centre: e-mail infoscmc@sacro.org.uk or visit www.scmc.sacro.org.uk The course fee is £700.

# Understanding Mediation: Principles and Practices in Malaysia Context

**Syafiqah Binti Abdul Razak and Atiqah Binti Abdul Razak**

Mediation is one of Malaysia's dispute resolution practices. Mediation is a voluntary process between two parties or more before a certified mediator reaches potential amicable settlements. The practice of mediation in Malaysia is based on various legal frameworks including the Mediation Act which provides a structured process for mediation and recognized agreement through mediation are enforceable.

Mediation as referred to in the Mediation Act 2012, is a voluntary process in which a mediator facilitates communication and negotiation between parties to assist the parties in reaching an agreement regarding a dispute. The Mediation Act 2012 is enacted to promote and encourage mediation as a method of alternative dispute resolution by providing for the process of mediation, thereby facilitating the parties in disputes to settle disputes in a fair, speedy and cost-effective manner and to provide for related matters.

**Modes of Mediation in Malaysia**

Mediation may be carried out in the following modes:

1.Court-Assisted Mediation (civil and syariah courts);
2.By mediators from the list of certified mediators under the Malaysian International Mediation Centre ("the MIMC").
3. By the The AIAC Mediation Rules (formerly known as "KLRCA Mediation Rules") are a set of procedural rules encompassing different aspects of the process of mediation to aid parties in resolving both international and domestic disputes. With the AIAC Mediation Rules and the Malaysian Mediation Act 2012, AIAC seeks to promote mediation as a desirable commercial option for parties in Malaysia;
4.Independent mediator

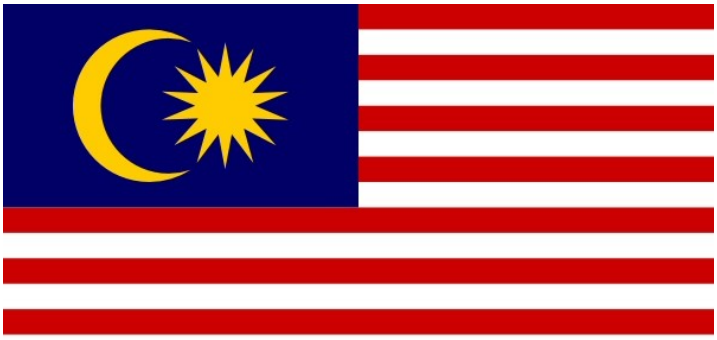
**Law that governs mediation in Malaysia**

1.Mediation Act 2012
2.Order 34 Rule 2 (1A) & (1B) of Rules of Court 2012;
3. Practice Direction Regarding Mediation
4. Practice Direction No. 2 (year 2022);
5. Mediation Rules 2023 under AIAC;
6. Work manual on Sulh (Syariah Court practice)

This newsletter will cover the practice of mediation as mentioned earlier.

**1. Court Assisted Mediation ("CAM")**

Malaysia practices dual systems, which are civil law and shari'e law. Generally. Matters



pertaining to family law matters that involve Muslims would be heard in Syariah Court. While other matters will be heard in civil court.

This requirement is stated under Order 34 Rules 2 Rules of Court 2012
Pre-trial case management when directed by the Court (O. 34, r. 2)

(1) Without prejudice to rule 1, at any time before any action or proceedings are tried, the Court may direct parties to attend a pre-trial case management relating to the matters arising in the action or proceedings

(2) At a pre-trial case management, the Court may consider any matter including the possibility of settlement of all or any of the issues in the action or proceedings and require the parties to furnish the Court with such information as it thinks fit, and the appropriate orders and directions that should be made to secure the just, expeditious, and eco-

# Understanding Mediation: Principles and Practices in Malaysia Context

nomical disposal of the action or proceedings, including:-

(a) mediation in accordance with any practice direction for the time
being issued;

Practically, the court will advise parties to attend for a mediation session prior to trial. Normally, parties need to fill out a form in order to proceed with mediation. Generally, officers of the court other than the trial judge will become the mediator. If parties reach an amicable settlement, this term will be put under consent judgment. Then, parties need to appear before the presiding judge to endorse the consent judgment.

In Syariah Court, generally the mediator is called a "sulh" officer. The mediation setting is named Sulh Proceedings. Al-sulh is well accepted by disputing parties from the muslim community involving matrimonial cases settled by way of mutual agreement of the parties.

The sulh officer conducts the sulh by adhering to a standardized guide on ethical standards and work mannerism as specified (work manual on Sulh). This is to ensure the whole process is conducted in a proper manner. If parties reach consensus, mutual agreement will be handed to the presiding judge for endorsement as an order of settlement.

**2. Mediators under the Malaysian International Mediation Centre ("the MIMC")**

Malaysian International Mediation Centre (MIMC) is one of the governed bodies under the Malaysian Bar that had the right to conduct mediation training and issue mediator certification.
Basically, below are the processes of mediation in Malaysia.

1.Pre-mediation
Normally, during the pre-mediation parties will sign an agreement to mediate and to appoint a mediator.

2.Mediator's Opening Statement
In this step, normally the mediator will explain the role of mediator, explain the process and procedure of mediation, establish ground rules and do a little housekeeping.

3.First Joint Session
The mediator will encourage parties to discuss the issues one by one based on agenda.

4.Private Discussion
The private discussions are confidential and all information expressed should not be revealed to other parties except with parties' consent.
5. Second Joint Session
The purpose of this stage is to identify parties interests, needs, goals & objectives. The mediator will facilitate parties to focus on resolution and evaluate settlement options

Photo by Sebastiaan Chia on Unsplash

6.Settlement Phase
Once parties have agreed on the options, an agreement can be drafted based on the agreed terms.

# Understanding Mediation: Principles and Practices in Malaysia Context

**Mediation under Asian International Arbitration Center (AIAC)**

AIAC is one of the organizations in Malaysia that provides neutral and independent services for the conduct of domestic and international arbitration and other alternative dispute resolution (ADR) proceedings such as mediation.
AIAC Mediation Rules 2023 also stipulated the role and appointment of mediators and related costs and fees for domestic and international mediation.
Referring to Rule 4 of AIAC Mediation Rules 2023 An "international mediation" means a mediation where:
One of the parties to the mediation has its place of business in any state other than Malaysia;
Any place where a substantial part of the obligations of any commercial or other relationship is to be performed or the place with which the subject matter of the dispute is most closely connected is in any state other than Malaysia; or
The parties have expressly agreed that the subject matter of the mediation relates to more than one state.

**Independent/Private mediator**

A mediator who is already accredited by the authorized body is qualified to become a mediator in Malaysia. Generally, parties may appoint independent/private mediators to hear their matters prior to litigation. Parties may agree on the fee and venue for the mediation being conducted.
Type of cases referred in mediation in Malaysia
In Malaysia, a variety of cases referred to mediation, which reflected the importance of mediation as an alternative dispute resolution. These are the following cases referred to Mediation:

**Family Dispute**

Mediation is an alternative way to resolve disputes involving divorce, child custody, estate disputes and maintenance issues. Mediation setting provides convenience & supportive avenue for the parties to discuss, highlight, and reach amicable settlement

compared to the litigation process.

**Commercial disputes**

Commercial disputes refer to the disputes pertaining to the business arrangement between the parties/ different legal entities. There are a lot of disputes that relate to commercials. One of those involves contract disputes where they failed to fulfil the obligations under the contract. Practically in Malaysia, solicitors will include mediation clauses in a contract as an alternative dispute resolution process.

**Corporate disputes**

Corporate disputes can happen in a variety of contexts. One of the contexts is concerning shareholder disputes. Conflict may happen among shareholders pertaining to the oppression of minority shareholders, right related to division. Oppression into mergers and acquisitions is also one of the corporate disputes that can be resolved through mediation.

**Intellectual Property Disputes**

Disputes related to the infringement of copyright, trademark, intellectual property, and use of trade secrets can also be resolved through mediation. The parties may discuss peacefully and bring the matters to the court
Benefits of Mediation

There are several benefits of mediation that can benefit the parties who choose mediation as an alternative dispute resolutions process.

Firstly, the benefit of mediation is private and confidential. The mediation process is inherently private and confidential which means any information, agreement made during the session is private and confidential. This confidentiality encourages the parties for open communication. Whatever statement is mad by the parties during the mediation session cannot be used against them. If the parties bring the matter for

# Understanding Mediation: Principles and Practices in Malaysia Context

court proceedings, the matters are not private anymore because the public can access the information once the decision has been made by the court.
Secondly, the benefit of mediation is time efficiency. Mediation can resolve disputes more quickly. This is because the parties can decide the time for the mediation session and if the session runs smoothly, the dispute can settle within one day. However, if the matter is brought to the court, it will take more time because of the lengthy process of court proceedings and backlog of cases.

Thirdly, the benefit of mediation is autonomy over outcome and flexible solutions. This is because in mediation settings, mediators act as facilitator to facilitate the parties reaching an amicable settlement and not as judges. The decision is made by the parties. As such, parties can generate more options and find viable solutions for both parties.

Fourthly, the benefit of mediation can foster retention of relationships between the parties. Mediation encourages parties to listen to each other's concerns and needs. Compared to the courtroom, the parties will litigate against each other and cause more harm to their relationship.

Fifthly, the benefit of mediation is cost-effectiveness. Mediation generally incurs lower expenses compared to traditional litigation due to reduced attorney fees, court fees and other expenses.

**Conclusion.**
In conclusion, the introduction of mediation in Malaysia represents an important step forward in the country's approach to resolving disputes. Mediation offers many advantages as explained above. The support from the Malaysian government and the establishment of various mediation institutions highlights its growing role in both civil, commercial matters and Syariah matters. By integrating mediation into

the legal system, Malaysia enhances access to justice and improves the efficiency of legal processes.

Disclaimer: This newsletters contains general information only. It does not constitute legal advice nor an expression of legal opinion. For further information or inquiries kindly contact +6014-923 8785 and email atiqah@legalasa.com & syafiqah@legalasa.com

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# Amending the CPR to Accommodate the Impact of Churchill

**Tony Allen**

The case of Churchill v Merthyr Tydfil overruled the earlier Halsey decision, allowing courts to mandate that parties explore Alternative Dispute Resolution. CEDR's Tony Allen explains the recent amendments made to the Civil Procedure Rules (CPR) which ensure that ADR is now an objective of civil justice, allowing courts to direct parties to resolve their disputes efficiently and cost-effectively.

**A Brief Modern History**

Much has already been written about *Churchill v Merthyr Tydfil CBC.* We now know that courts do have the power to order parties into 'ADR', and that, on this point at least, *Halsey v Milton Keynes NHST* was wrong. The question then arises as to what the practical implications of *Churchill* are and how they should be woven into civil procedure. The impact of *Halsey* was felt immediately. Judges stopped, or did not start, mandating parties into ADR. For nineteen years they could only "robustly recommend" ADR, occasionally imposing a costs sanction for unreasonably refusing to use it. Would reversal of *Halsey* by *Churchill* need any further intervention by way of rule change, or would some kind of jurisprudence emerge piecemeal over the next couple of decades?

The Civil Procedure Rules Committee (CPRC) swiftly decided that rule change was indeed required to create a clear framework for what amounts to a dramatic change in procedural law. In April 2024 – five months after *Churchill* – it had agreed on draft amendments to the CPR and published these for consultation, with responses sought by the end of May 2024, a very short period. A joint response to the consultation was submitted by CMC, CEDR and Ciarb. Despite the intervening general election, the CPRC approved the draft rules as slightly amended in response to the consultation, and formally made them on 29 July 2024, to be laid before parliament the next day and to come into force on 1 October 2024, a remarkably rapid process. The relevant statutory instrument is the Civil Procedure (Amendment No.3) Rules 2024 SI 2024 No. 839 (L.11).

**1. What are the Amendments in their Final Form?**

The full text of the relevant amended Rules (which are CPR 1, 3, 28, 29 and 44) will not appear on the official CPR website until they come into effect in October 2024.
To summarise the three main areas of change:

1. The first and most striking are the insertions into CPR 1, where the overriding objective of civil justice is enshrined, and against which judges often measure the exercise of discretions given to them. The familiar objective – "enabling the court to deal with cases justly and at proportionate cost" – is said to include "so far as is practicable" such matters as equal footing, speed, economy, appropriate resources, and rule compliance. Now it is expanded to include "using and promoting ADR"[1]. For use and promotion of ADR to have become an objective of civil justice is startling indeed [2]. CPR 1.4, dealing with the court's duty of active case management, is now said to include "ordering or encouraging[3] the parties to use an ADR procedure if the court considers it appropriate and facilitating the use of such procedure[4].

2. The second set of amendments relates to clarifying the court's management powers over ordering ADR, set out in CPR 3, 28 and 29. CPR 3.1(2)(o) and (p) now read:

"(o) order the parties to participate in ADR;

(p) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective,

# Amending the CPR to Accommodate the Impact of Churchill

**Tony Allen**

including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case."

CPR 28 (which deals with matters to be dealt with by directions in fast track and intermediate track cases) now includes "whether to order or encourage the parties to participate in ADR"[5].

CPR 29 (which deals with case management in multitrack cases, so all litigation of significant value and complexity not covered by other Court Guides) requires directions hearing in every case and now provides:

"(1A) When giving directions, the court must consider whether to order or encourage the parties to participate in ADR[6]."
This latter provision is expressed very strongly. "Must" is not a frequently used verb in the CPR.

3. The third instance of amendment relates to the costs provisions in CPR 44, in which the way litigation is conducted is identified as a possible basis for sanctioning unreasonable behaviour. The conduct of parties is now said specifically to include:

"whether a party failed to comply with an order for alternative dispute resolution, or unreasonably failed to engage in alternative dispute resolution proposed by another party [7]."

Note that the word "participate" in the original draft has been changed to "engage" as a result of the consultation. CMC/CEDR/ Ciarb pointed out in their response that "participate" might allow an intrusive judge to feel entitled to assess the nature of a party's participation during a mediation behind the veil of privilege and confidentiality and suggested "failed to agree to participate" as an alternative. "Engage" connotes "initial engagement" and answers the point. Arguably, this amendment encapsulates settled law since 2002 set out in such court decisions as Dunnett v Railtrack and indeed in Halsey itself.

## 2 . Where to From Here?

These amendments to the CPR, alongside the Court of Appeal decision in Churchill, coupled also with the parallel developments over small claims introduced on 22 May 2024 can only have a dramatic effect on the position of ADR, and mediation in particular, in civil justice. Next to the rapid development of mandatory mediation for small claims, we

now have mandatory consideration of ADR (which in the main means mediation) at directions stage in multitrack cases. Although the same peremptory language is not used in the Business and Property Courts Guides, few parties have felt it wise to ignore the theoretically non-compulsory terms of Commercial Court ADR (now NDR) Orders ever since they were conceived in 1995.

The fundamental change for general litigation lies in the fact that courts will now be able to mobilise mediation during the life of any case, rather than relying on a degree of pressure to mediate merely being generated by the possibility that a case will reach trial and costs sanctions might be imposed by a judge retrospectively for unreasonably refusing to mediate some time ago. The essentially second-hand impact of costs sanctions was accurately reflected by Lord Briggs when not overruling the trial judge's exercise of discretion on costs in PGF v OFMS [8], referring to "a sanction which, even if a little more vigorous than I would have preferred, nonetheless operates pour encourager les autres.

Whether this will lead eventually to the demise of sanctions under CPR 44.(5)(e) remains to be seen, though this provision will

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still undoubtedly be used for cases which are already approaching trial without any prior deployment of mediation. The case of Northamber v Genee World[9] has already seen a sanction imposed for failure to mediate since Churchill.

Will courts need to order mediation, or will parties simply agree to use mediation by agreement, to avoid any risk of a costs sanction at a directions hearing or on a specific application by an opponent? Experience in other jurisdictions, such as British Columbia, suggests that compulsion usually means that parties pre-empt compulsion by consent. Furthermore, where has already been one mediation which failed,

courts have already strongly recommended [10] or actually ordered a stay for[11], a second mediation, because new material may have emerged to change perceptions.

But perhaps the biggest impact on future litigation culture will come from the amendments to CPR 1. Judges very often refer back to the overriding objective when exercising their discretion, and if they do so in future it will be much harder for judges for whom costs sanctions for refusing to mediate are distasteful, to indulge any such inclination. After all, they have now been told that one facet of the objective of civil justice is use and promotion of ADR, and have been placed under a duty to manage cases actively which includes ordering or encouraging use of ADR "if it considers that appropriate, and facilitating the use of such procedures".

Whether anything like the six Halsey excuses for not sanctioning refusal to mediate will extend into decision-making over whether to order parties to mediate (as was mooted by the Bar Council during Churchill) is not clear. The hope must be that judicial decision-making about all these matters will in future be much more consistent as a result of the new amendments to the CPR.

### 3. What About the Acronym 'ADR'?

Unsurprisingly perhaps, 'ADR' is still with us. CMC/CEDR and Ciarb annexed comments to their response to the CPRC consultation about this acronym, and these still hold in terms of hoping that there will be further discussions to provide a better one. More importantly, greater clarity is needed about what it does and does not cover, as the CPR glossary gives it such a wide spectrum of possible meaning. The CPRC obviously felt that it was important to get the basic rule changes through as quickly as possible. Although the responses to the consultation have yet to be published, we can safely assume that there will have been even greater differences of opinion than emerged from the CMC/CEDR/Ciarb submission on this topic. It is clear from the minutes of the April 2024 CPRC meeting that a phase two for discussion of further reform is contemplated.

Meanwhile, interesting times lie ahead.

References

[1] CPR 1.1(2)(f). The amended Rules use "alternative dispute resolution" (for better or worse) throughout, but for convenience this article abbreviates it to "ADR".

[2] An interesting debate emerges in the published minutes of the CPRC for its April 2024 meeting, which considered "the principle of including, in the Overriding Objective, something which is conceptually different from the rest of that rule. It was

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observed that ADR could be seen as more of a tool in support of achieving the Overriding Objective, rather than the Overriding Objective itself. However, the principle, that ADR should be included in the Overriding Objective in some form, was AGREED."

[3] The order of the underlined words was reversed in response to a suggestion made in the CMC/CEDR/Ciarb during the consultation.

[4] CPR 1.4(2)€

[5] CPR 28.7(1)(d) and 28.14(1)(f)

[6] CPR 29.2(1A)

[7] CPR 44 (5)€

[8] [2013] EWCA Civ 1288 para 56

[9] [2024] EWCA Civ 428

[10] See Francis v Pearson and Burston [2024] EWEHC 605 (KB)

[11] See Heyes v Holt [2024] EWHC 779 (Ch)

This article was first published on the CEDR website.

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