Paper given by Rt Hon Lord Irvine of Lairg at the Inaugural Lecture of The Faculty of Mediation & ADR 27th January 1999

Let me begin with a quotation for everyone who still thinks that the concept of alternatives to combative, court-based, Olympian dispute resolution is today's modishness. It is from The *Charitable Arbitrator,* written in 1688, by the so-called 'Prior of St Pierre', who was evidently no fan of litigation. If you are minded to satirise lawyers in print, a pseudonym may have been then, as now, a shrewd move! He wrote:

'... **to be a good mediator you need more than anything patience, common sense, an appropriate manner, and goodwill. You must make yourself liked by both parties, and gain credibility in their minds. To do that, begin by explaining that you are unhappy about the bother, the trouble and the expense that their litigation is causing them. After that, listen patiently to all their complaints. They will not be short, *particularly the first time around.'***

The Academy of Experts has worked hard in recent years to improve the standards of dispute resolution in this country. I am delighted to be here today, to deliver the inaugural lecture of this Faculty of Mediation and ADR. I hope that this lecture - like the Faculty itself - will continue to take forward the essential public debate about ADR.

The modern development of ADR has its origins in the United States of America in the 1970s as a reaction against the high cost and long delays of litigating business disputes. ADR has now come to be recognised internationally as an effective alternative to highly expensive and rigid adversarial systems.

ADR has spread primarily through the influence of the institutions ...

In the UK the Centre for Dispute Resolution (CEDR) was launched with the support of the Confederation of British Industry in 1990 to promote ADR in dispute handling. CEDR promotes ADR, trains and accredits mediators and arranges mediations and they claim a 95 per cent success rate in resolving disputes. The Academy of Experts, although its main purpose is to promote the better use of experts, is also at the forefront in the development of ADR processes and was the first UK body to establish a register of qualified mediators. The British Association of Lawyer Mediators was set up in 1995 with the aim of promoting mediation in the UK and of the role of lawyers in mediation and the maintenance of high professional standards. The City Disputes Panel, was founded in 1994 to settle financial disputes in the financial services industry. Its panellists are dedicated to the resolution of financial disputes through mediation, evaluation, determination and arbitration. Also the use of ADR has been established in the UK in resolving family and divorce disputes, employment disputes, environmental disputes, and community or neighbourhood disputes.

'ADR has a significant part to play in the delivery of civil justice'

The Government freely recognises that ADR has a significant part to play in the delivery of civil justice. In Opposition, we advocated the development of alternatives

to litigation, including the use of legal aid to fund access to mediation, arbitration and tribunals. Almost four years ago, at the Labour Party Annual Conference of 1995, we drew attention in our Policy Statement to what we considered to be: 'an imbalance between public provision for traditional litigation on the one hand and mediation services on the other.'

We also made it plain that we proposed to use the existing legal aid budget 'to expand access to alternative forms of dispute resolution such as mediation, arbitration and tribunals'. Last year, I approved the Legal Aid Board's decision to make legal aid available for mediation.

And in Government we have continued to encourage the use of mediation, most notably in the area of family law, where it is a central tenet of divorce law reform. The importance of mediation and ADR in family law cases can scarcely be understated, given the high incidence of family breakdown and the appalling social consequences which result.

Those of you here who heard me deliver the CEDR conference Keynote Address last November will know that I have no doubt whatsoever of the considerable potential benefits which ADR can deliver, for the system of civil justice, and for the individuals and parties who seek redress through that system. I spoke then of cost-effectiveness; of high approval ratings from those who have used mediation or other alternatives; of the wide endorsement and support that so many experienced judges and senior lawyers have for ADR processes. I wholeheartedly share their enthusiasm, and their desire to develop this potential to its fullest extent.

Equally, I recognise that ADR is **not** dependent on Government endorsement. It is a thriving, autonomous, profitable industry. In his address to the CEDR Conference, Professor Karl Mackie referred to 'a recognition that ADR is a serious market opportunity for professional firms, a significant management tool for companies'.

Private sector companies and individuals are increasingly choosing to investigate alternatives to the courts and arbitration. Institutions such as CEDR itself, and the City Disputes Panel, are reporting rapidly increasing caseloads. It is also significant that much of this new work is international - an affirmation of London's position as the leading centre for international commercial dispute resolution.

The courts have taken their own steps to ensure that the potential benefits of ADR are, at the very least, given ready consideration by the parties before them. A pilot mediation scheme at the Central London County Courts was set up in 1996. Mediations continue to take place regularly. Those who have participated in them generally express a high degree of satisfaction with the process. I wish to pay tribute tonight to the mediators themselves - some of whom have been provided by the Academy of Experts - for their enthusiasm and support for this pioneering scheme.

I am also pleased to commend the introduction of a mediation initiative in the Technology and Construction Court - a new court which I opened last October. It is well recognised that heavy construction cases in particular are suitable for mediation, and we know from experience both in this country - but particularly in other jurisdictions such as Hong Kong, the United States and Australia - that mediation can be a, if not the, most effective way of resolving such disputes, often within the life time of the contract, and at very considerable cost savings to the parties.

The Court of Appeal continues to support ADR actively. Specialist panels of senior, widely experienced lawyers have been set up, to assist in mediating pending appeals. At the setting down stage, the Master of the Rolls now writes to both parties, urging them to consider ADR. Should they decide not to, they are invited to indicate why. This protocol helps, not only to impress upon appellant and respondent that the Court sees ADR as a serious option, but to gather direct empirical information why it is not entertained by some.

The Commercial Court issued a Practice Direction in 1993, stating that judges of the court wished to encourage parties to consider ADR. This was strengthened in a further direction, in 1996, allowing judges to consider whether a case is suitable for ADR at the interlocutory stage, to invite the parties to try it if appropriate, and to arrange early neutral evaluation.

The active support and participation of the judiciary sends a clear message to litigants and their legal representatives. ADR is not some fashionable quirk - it is a valid avenue of settlement, recognised and even promoted by the courts.

Further a discretionary power for judges will come from the new Rule 26.4, which I have approved, part of that tranche of the civil justice reforms which are due to come into effect this April. The new Rule will enable judges, at their own volition, or if requested by both parties, to stay cases they consider may be amenable to some other, more satisfactory form of resolution, such as mediation. Now, within a process driven by the imperative to keep adjournments and delays to a minimum, this Rule is remarkable in recognising that there may actually be a time benefit in delaying full proceedings, to see if quicker, more satisfactory resolution can be brought about by mediation.

This Government's increased focus on the potential benefit of ADR is, to some extent, a recognition of what the market-place is demonstrating. ADR clearly can succeed - it **can** deliver great benefits to parties in dispute. Individuals and companies are increasingly willing to pay for the services of mediators and arbitrators because they believe that they can achieve a more satisfactory resolution to their dispute than they are likely to secure through the full process of the court. And for parties who have, or want to leave, 'ongoing' commercial relationships, mediation is of particular value.

'There are serious and searching questions to be answered about the use of ADR'

Let me make this point clearly. I have no doubt whatsoever that ADR has a role - an expanding role - within the civil justice system. But my Government and my Department's support is neither unconditional, nor is it absolute. There are serious and searching questions to be answered about the use of ADR. I believe that anybody who is genuinely committed to the better development of ADR is not only aware of these concerns, but shares my determination to see them addressed fully. It is in the interests of those who provide ADR to try to ensure that their services are professional, governed by universally-recognised competencies; and, above all, to ensure that they provide a service that people do need.

Professor Mackie referred in his speech to a 'gravy boat' trailing in the wake of current ADR opportunities. It is perhaps an expression that lawyers should avoid. Nobody wants to be accused of lapping at that trough. There may indeed be profits to be made from the provision of alternatives to court-based dispute resolution. But I can assure you that this Government will not be suborned into swelling them.

I want to set out my key concerns to you this evening - because I want you - the practitioners, the interested academics and experts, the experienced lawyers - to help us to find the answers. It is particularly appropriate to use the forum of this inaugural address to put these questions unequivocally on record. And I would ask anyone with views on these questions - based on comparative studies, or with the unique insights borne of experience - to pass your thoughts on to me. Your help in this will be of the greatest value.

The central objective of ADR is to encourage and promote the settlement of disputes without the need to start litigation. If that cannot be achieved, ADR still aims to assist in achieving a negotiated settlement before the trial itself starts. To succeed, ADR settlements must be fair and just, to the satisfaction of both parties in dispute. A settlement achieved without trial must be a sound and valid outcome in itself, not a compromised measure deemed by one or the other party to have short-changed them of something a trial would have achieved.

Some unstinting admirers of ADR assert that all disputes are suitable for ADR, and can benefit from it. I doubt that such unlimited enthusiasm does much to help promote wider use of ADR in the long run. Courts have a vital - indispensable - part to play in the resolution of many categories of dispute. It is, at best, naive to claim that mediation and its alternatives can adequately equate to this role. An obvious example is the establishment of significant judicial precedent - this can arise in any category of case in dispute. Or consider the issues of cases which set the rights of the individual against those of the State. The experience of the United States suggests this is an extremely sensitive area, which must be approached with extreme care.

I think the use of ADR in administrative cases is of necessity limited. There may be more to be gained from the development of the ombudsman system, though I appreciate that ombudsmen are more concerned with the resolution of grievances, than with the resolution of disputes over conflicting rights.

But this is our current position: we do not have sufficient analytical information about ADR to claim, with certainty, that it can be useful in every category of case. We must undertake a comprehensive process of research and consideration, to answer with certainty the question: what kinds of case are suitable for ADR.

Key areas to be addressed

Another key area to be addressed in the development of ADR is, who are the beneficiaries? And how do they benefit? In the broadest sense, our civil and criminal reforms are driven by the need to improve access to justice. Widening the means by which everyone can gain a degree of redress for wrongs done, which lives up to expectations. Providing alternatives to the court-based resolution process must clearly be a step in the right direction.

But each step must be taken with an eye to its effect on all players in the system. Improved access to the courts will inevitably increase the burden of the workload in the courts. The introduction of the small claims arbitration scheme in 1985 was hugely popular and successful. Yet the very success of this measure imposed an unexpectedly significant burden on the county courts and the District Judges charged with administering it.

Consider, for example, the impact on the courts of ADR becoming a significantly more active part of proceedings. We would have to be sure that the Court Service

actually had the capacity to deliver this substantive new function. And not at the expense of existing procedures, or other reforms - either in funding or time. Advocates of tangible Government support for ADR have argued that the Court Service will eventually benefit, through a reduction in procedural delays, or a saving of judicial time in court. This may prove to be true. But they, and we, must be able to demonstrate that the wider use of ADR in the courts is economically viable. We will need to measure and evaluate these schemes through widespread monitoring, and through pilots. And those who are active in campaigning for an expansion of ADR will need to co-operate fully in this process of assessment.

The principal argument commonly advanced in support of ADR is the potential for cost savings to the parties themselves. But again, this assumption is not straightforward. When cases do settle through ADR - particularly if this is at an early stage of litigation - very substantial cost savings can be realised. But every case which takes the option of attempting some alternative form of dispute resolution incurs an additional element of cost which does not arise if the conventional route is followed. In doing so, both parties are, in essence, taking a speculative gamble - that the investment of additional money in ADR will be rewarded by a successful pre-trial resolution, or at least a shorter case.

And the simple fact is, that some parties will lose the gamble. And ex post facto, they will have wasted time and money on testing the possibility of an alternate resolution waste which would have been avoided had they chosen to stick to the conventional process of settling their dispute through the courts. The cost of gambling on successful ADR is not borne by the mediators and arbitrators, but by the parties themselves, and by civil justice itself.

Now this is not a matter of trifling costs, or a few days' delay. Those of you with professional or personal experience of ADR will acknowledge that it is often a demanding, skilled and sophisticated process. Proponents of mediation will readily cite statistics relating to saved court time and costs in some of the most complex business disputes. They are perhaps less ready to collate information on the costs arising from failed arbitration. To ignore these elements - to make no determined attempt to weigh them up against the well-promoted benefits of ADR - is, at best, not balanced.

I don't wish to minimise the less measurable benefits which ADR can bring to parties in dispute. Those who have used it successfully report notably high levels of satisfaction with the actual outcomes achieved, and with the route taken to achieve settlement. ADR can reduce acrimony and aggression which is, regrettably, a common factor in court based disputes. The benefit of this in mediated family disputes is, I think very generally accepted.

Last October, speaking at the closing session of the fourth European conference of family law, in Strasbourg, I was pleased V acknowledge the wide international appreciation of the potential of mediation in family cases. I drew attention to the many positive benefits of the family mediator process. In reducing conflict; in encouraging a constructive and forward-looking perspective to the plans and aims of both parties. In securing agreements with a better chance of being adhered to, because they are based on step-by-step decisions reached and accepted by the individuals themselves. In the basic potential for financial savings.

So, we should not ignore the benefit of empowering the parties in less personal, emotional contexts. They too can appreciate a process of settlement which actually

leaves them with the conviction that they have received a more truly satisfactory outcome, than that which follows months of stressful, fraught litigation. There is a convincing argument that parties feel more genuine satisfaction from an outcome achieved through a mediated solution.

'A burgeoning and a profitable new profession'

By definition, practitioners of ADR have the most opportunity to benefit. Those who are able to offer competent and successful ADR and mediation services will find they are part of a burgeoning - and a profitable - new profession.

Lawyers in particular have a great opportunity to increase the range of services they can offer to their clients. That announcement last year from the Legal Aid Board that I referred to - that franchise legal aid will be available for mediation - should also cultivate the interest of many in the legal profession - including perhaps some who have remained sceptical to date.

It is clear that there is much greater awareness and interest in ADR amongst professionals from various disciplines and within the business community than was the case only five years ago or so. One good measure of ADR's growing importance is the number of mediators undergoing institutional training courses, and the fact that the Law Society and other professional bodies are devoting considerable attention to drafting appropriate ethical standards and guidelines for mediators.

New business opportunities will present the legal profession - indeed, all professions whose members are working to develop these alternatives - with considerable challenges. Certainly, compared to the majority of relevant professional organisations, ADR is not governed by any commonly agreed codes of practice, guidelines for training or professional conduct. The degree to which the public - and this Government - will put its faith in ADR, will depend greatly on the level of responsibility which those who wish to practise it can demonstrate.

So I hope that my comments, this evening and elsewhere, have demonstrated my unequivocal support for the better development of ADR. It has already begun to have a significant effect on the overall approach to civil justice. This will continue, and it will expand. My Department has taken active steps in the last year to forge links with leading providers of ADR and mediation services. Their willingness to co-operate with my officials, to offer advice, and to participate in pilot studies in the courts, is greatly appreciated, and augurs well for the future.

'We must proceed slowly on the basis of sound analysis and evaluation'

It is in our common interest to go forward - but *festina lente* - we must proceed slowly, on the basis of sound analysis and evaluation. This is a lesson which other jurisdictions have learned at a price. America, which often takes the lead in innovative legal practices, is raising serious questions over the claims made for the efficacy of ADR in the courts there. Professor Hazel Genn's thorough scrutiny of the pilot mediation work carried out in the Central London County Court, suggests that much the same challenges may be levelled at ADR in this country.

Perhaps one of the most alarming findings from Professor Genn's Report was that, throughout the time of the pilot exercise, only **five per cent** of the parties who might have elected to try mediation, actually did so. Only 5%. This was in spite of concerted efforts to encourage take-up.

In part, of course, this can be attributed to a lack of understanding - both of what mediation is, and of how successful and satisfying it can be for those in dispute. In part, it stemmed from concerns over cost. But we must be careful, and **certain,** that we are promoting and developing a service which meets a genuine if undiscovered - need. Providers must take particular care that it is not the other way round.

So I want to emphasise this. We need more, detailed, analytical information, answering the specific concerns which I have touched upon tonight, and others. Do people know and understand enough about ADR? Can it really be of benefit to a majority of cases? Under what circumstances is it **not** the right avenue? Can its benefit be had at a reasonable cost to the system as a whole, and the individual parties? What consideration should we give to an element of compulsion?

This last question is particularly difficult. Many supporters of ADR argue strongly that the current low take-up of pilot schemes comes from lack of knowledge of its potential, and a general resistance to change and the unknown. Only with an element of compulsion, they claim, will those whose reluctance is through ignorance be able to make an informed choice. But to some extent, evidence from America suggests that compulsion does not improve settlement rates. Moreover, there are fundamental constitutional issues about the right of the individual to access of justice in the courts. I have no ready answer for you this evening - the only rational answer at this time is that we must scrutinise, consider and take great care before we act.

Very difficult too is the question of costs sanctions if mediation fails. I suggested earlier that ADR adds an extra layer of costs to the litigation process. How should these costs be dealt with by the trial Judge where mediating has failed? Is it right for the Judge simply to award costs, without making an investigation of what actually happened in the mediation? That would involve the breach of a cardinal principle of ADR, its confidentiality Is it sufficient as some have suggested - simply to invite the Judge to exercise his own judgement as to whether this is a case in which ADR ought to have been tried? And if he thinks it should have been but it was not, should he express that opinion in his costs award? Should we ask the mediators, when mediation has failed, to indicate how they think the Judge should exercise his discretion with respect to costs? These questions are increasingly being asked - and they need answers.

I also referred earlier to the responsibility of the professional organisations who want to see greater use of ADR in this country. It is not the habit of the Government to constrain the activities of professional bodies. But if we are to support the expenditure of the justice budget on ADR, we will need to be sure that this industry does not become monopolistic or covert. Practitioners must demonstrate a united approach to developing standards of competence and effective training. A regime of self-regulation measurable by the Government, and by the people whom you will be looking to as clients.

ADR is, I believe, entirely consistent with the principle of the better delivery of justice.

I am optimistic about ADR's future place in the system - but I am required to be a sceptic. As Lord Chancellor, I am charged with the responsibility to ensure that what I endorse can deliver - can make a positive contribution to the justice system in total. It is therefore my duty to ask the difficult questions, and to test the answers to the limit.

ADR has many supporters. But they too have a responsibility to proceed with care. ADR is not a panacea, nor is it cost-free. But I do believe that it can play a vital part in the opening of access to justice. But to do so, it must be properly implemented, properly developed and properly regulated. So let us proceed together, with caution, and in the clear light of experience and consideration. For, if ADR can live up to the hopes of its most passionate advocates, we may together bring about one of the most far-reaching, significant - and universally appreciated - reforms to civil justice.

Now let me end on a more lyric note. It is from *The Lover Arbitrator,* written in 1799. Volnay, a lawyer, is asked to arbitrate a separation between husband and wife. He agrees, with this morally uplifting sentiment:

> **'Neither accused nor arbitrator,**
> **I'll always be a conciliator, Although a lawyer**
> **by profession**
> **To reconcile is my obsession. And so my**
> **business always ends**
> **With no more clients, just more friends.'**

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