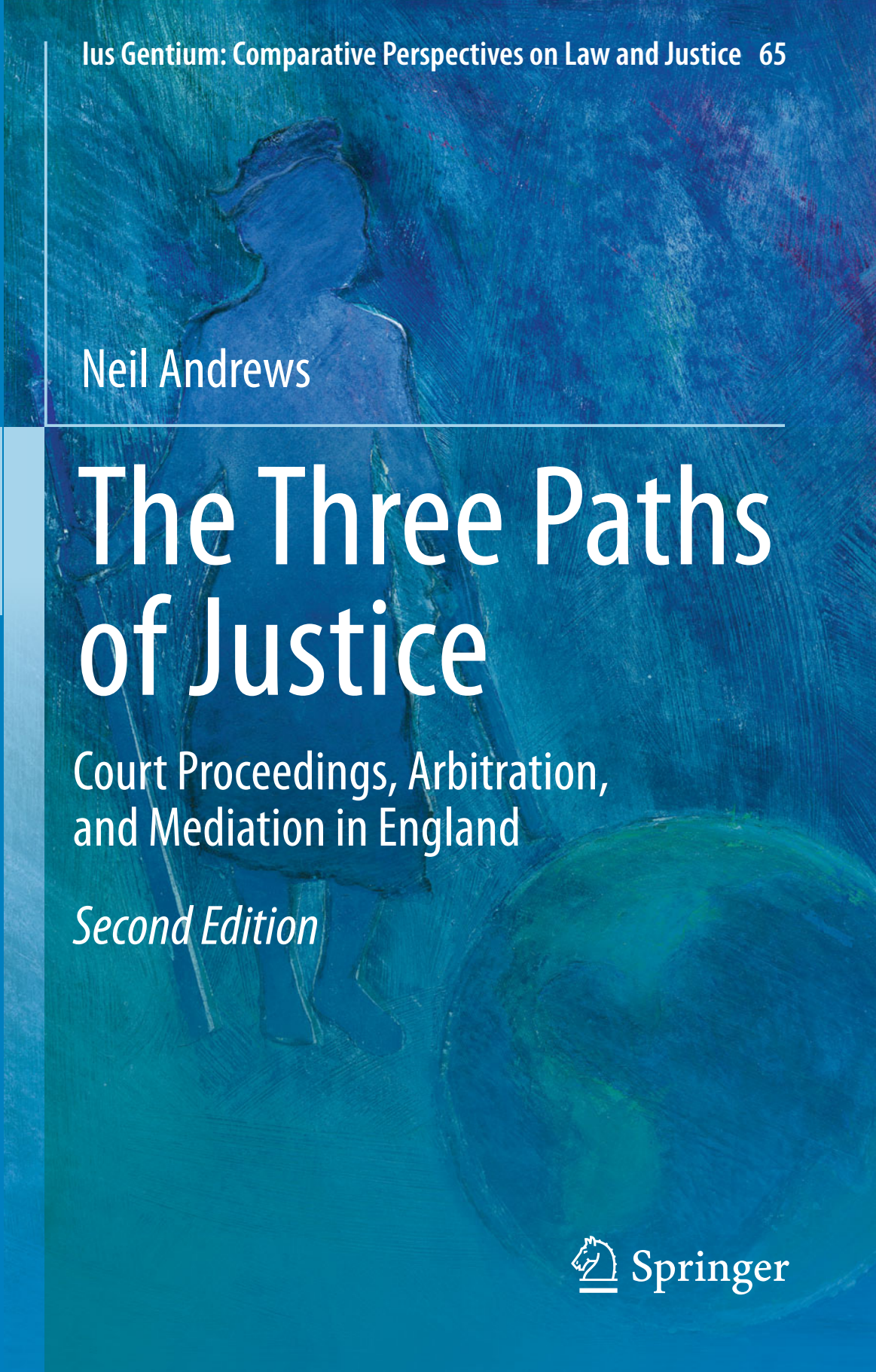
Ius Gentium: Comparative Perspectives on Law and Justice 65



Neil Andrews

The Three Paths of Justice

Court Proceedings, Arbitration, and Mediation in England

Second Edition

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Volume 65

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For Liz, Sam, Hannah, and Ruby

Preface

This succinct text covers the three main forms of dispute resolution involving the intervention of a neutral third party: court proceedings, arbitration, and mediation. The first edition was well received by lawyers, academics, and students. This second edition takes account of changes within the English and Welsh and Northern Irish system (Scottish developments are noted only incidentally). It has been necessary to rewrite every chapter, sometimes quite radically, and to add one on global mediation. English civil justice stands poised for the challenge of winning more cases following the exit of the UK from the European Union ('Brexit', which is scheduled for 2019).

The reality is that trial hardly ever occurs and that most first instance proceedings involve resort to pre-trial remedies and preparation for a trial which is avoided by settlement or the disposal of the case by pre-trial determination. Chapter 3, the longest in this book, reflects this range of pre-trial activity.

Case management and costs management absorb much judicial time (3.02 ff). The Court of Appeal's guidance on relief against sanctions has been absorbed by the courts and profession, after an anxious period (3.16). The disclosure system has been tightened (3.81).

There has been considerable activity in the field of appeals (notably, the permission to appeal regime, 4.05), costs (following the raft of Jackson changes, implemented in April 2013), and enforcement (respectively, Chaps. 4–6). The topic of *res judicata* is illuminated by an important Supreme Court decision (4.54).

The Financial List (8.13) is a new adventure in sophisticated commercial litigation for the English High Court.

The English courts continue to refine the flourishing system of freezing relief, including worldwide orders of that nature (Chap. 7 generally). 'Notification Orders' have emerged as a species of freezing relief (7.37).

The UK now has an opt-out form of class action in the field of competition law in which compensatory damages can be awarded (8.51). Although representative proceedings can yield such damages, there has been little use of this mechanism, for reasons explained at 8.43 ff. The specially tailored Competition law class action is likely to be more dynamic.

Discussion of international arbitration draws upon keynote lectures which the author has given since the first edition. English law remains at the centre of this field of global dispute resolution. There are now two chapters on mediation, the second of these reflecting the global explosion of interest in this practice.

Finally, it is hoped that the bibliography will be of special interest to foreign lawyers seeking pointers towards more detailed research.

Cambridge, UK
November 2017

Neil Andrews

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About the Author

Prof. Neil Andrews has been member of the teaching staff, University of Cambridge since 1983. He is a Professor of Civil Justice and Private Law.

He was called to the English Bar in 1981 and became Bencher of Middle Temple, London, 2007, and a Member of the American Law Institute. Formerly, he was a Praesidium Member of the International Association of Procedural Law.

With leading jurists, he collaborated in producing the AMERICAN LAW INSTITUTE/UNIDROIT's 'Transnational Principles of Civil Procedure' (Cambridge UP, 2006) (project active 2000–2006).

His research interests are in civil procedure, arbitration, mediation, and contract law.

Materials Abbreviated

AA (1996)	Arbitration Act 1996 (England, Wales, Northern Ireland)
ALI/UNIDROIT (2006)	*American Law Institute and UNIDROIT's Principles of Transnational Civil Procedure* (Cambridge University Press, 2006)
Andrews ACP (2018)	*Andrews on Civil Processes* (Intersentia Publishing, Cambridge, 2nd edn, 2018)
Andrews Arb and Contract (2016)	Neil Andrews, *Arbitration and Contract Law* (Springer Publishing, Dordrecht, Heidelberg, London, New York, 2016)
Andrews ECP (2003)	Neil Andrews, *English Civil Procedure* (Oxford University Press, 2003)
Brekoulakis, Lew, Mistelis (2016)	S Brekoulakis, JDM Lew, L Mistelis (eds), *The Evolution and Future of International Arbitration* (Kluwer Publishing, The Hague, 2016)
Briggs CMR (2013)	Lord Justice Briggs, *Chancery Modernisation Review: Final Report* (2013) (https://www.judiciary.gov.uk/announcements/chancery-modernisation-review-final-report/)
Briggs FR (2016)	Lord Justice Briggs, *Civil Courts Structure Review: Final Report* (2016) (https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf); and Lord Justice Briggs, *Civil Courts Structure Review: Interim Report* (2015) (https://www.judiciary.gov.uk/wp-content/uploads/2016/01/ccsr-interim-report-dec-15-final1.pdf)

Briggs IR (2015)	Lord Justice Briggs, *Civil Courts Structure. Review: Interim Report* (December 2015) (hereafter 'Briggs IR 2015') (https://www.judiciary.gov.uk/wp-content/uploads/2016/01/ccsr-interim-report-dec-15-final1.pdf)
Commercial Court Guide	*The Admiralty and Commercial Courts Guide* (9th edn, 2011; updated March 2016) (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/508023/admiralty-and-commercial-courts-guide.pdf)
Jackson Fixed Costs (2017)	Sir Rupert Jackson, *Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs* (July 2017) (https://www.judiciary.gov.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-2-1.pdf)
Jackson FR (2010)	Sir Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (2010) (https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf)
Jackson RCJ (2018)	Sir Rupert Jackson, *The Reform of Civil Justice* (2nd edn, Sweet and Maxwell, London, 2018)
Lew, Bor, et al (2013)	JDM Lew, H Bor, G Fullelove, J Greenaway (eds), *Arbitration in England* (Kluwer Publishing, The Hague, 2013)
Newman (2014)	LW Newman and RD Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (3rd edn, New York, 2014)
Redfern (2015)	*Redfern and Hunter on International Arbitration* (N Blackaby and C Partasides, eds) (6th edn, Oxford University Press, 2015)
WB (2018)	*Civil Procedure 2018* ('the White Book') (Sweet & Maxwell, London, 2018)
ZZP Int	*Zeitschrift für Zivilprozess International*: Germany

Chapter 1
Introduction

Contents

1.1 Overview

English civil justice comprises an array of techniques and systems, of which three (court proceedings, mediation, and arbitration) will be treated in this book. The main player remains the court system. Following reports by the Three Wise Men, there have been three waves of reform (the third is work-in-progress): 1995/6 (Woolf, 1.17), 2009 (Jackson, 1.24), 2015–6 (Briggs, 1.11). **1.01**

1.2 The Three Paths of Justice

There are three main paths of justice: court proceedings;[1] arbitration; and mediation. If not settled by private agreement, civil disputes can be adjudicated by courts, or resolved by arbitration,[2] or they can be settled by mediation,[3] or the parties can spontaneously reach unmediated agreements of settlement (1.08).[4] Hence there are **1.02**

[1]Bibliography, Sections 1–4.
[2]Bibliography, Sections 6–8.
[3]Bibliography, Section 9.
[4]Bibliography, Section 11.

N. Andrews, *The Three Paths of Justice*, Ius Gentium: Comparative Perspectives on Law and Justice 65, https://doi.org/10.1007/978-3-319-74832-0_1

'three main[5] forms of civil justice': (1) the judicial process, involving court proceedings; (2) arbitration (Chap. 9 for details); (3) mediation (Chaps. 10 and 11 for details).

1.03 There are many other possible forms of dispute resolution, notably the following.

(1) '*Mini-trial*':[6] this can be an adjunct to mediation; each party presents a 'mini' version of their case to a panel consisting of a senior executive of that party and or the other party, but this is more effective if a neutral chairs the presentation stage. This process can create a 'stronger feeling of having had a day in court than mediation', and 'a better opportunity to assess the performance of key witnesses'.[7]

(2) '*Expert determination*': this involves the giving of a binding determination by an impartial third party of a technical problem, for example, a request to make a valuation of company assets or commercial property. An expert determination clause can be combined with an arbitration clause, as on the facts of the 'Channel Tunnel' construction dispute, *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* (1993)[8] (case examined at 9.113).

(3) '*Ombudsmen*': this type of adjudication, private or semi-public, is often conducted on a 'documents-only' basis, across a range of specific fields, for example, pensions or investments disputes.[9]

(4) '*Adjudication*': this applies to construction law dispute. It involves fast-track determination of disputes arising during the course of a building project. These decisions, initially provisional, become binding if, within a short period, neither party seeks to re-open the determination, by litigation or arbitration.[10]

(5) '*Dispute Review Boards*': major international construction projects often involve such decision-makers, whose decisions become binding unless reversed by arbitration or a court decision.

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[5]Bibliography, Section 10.1; on the whole range of dispute resolution systems, S Blake, J Browne, S Sime, *The Jackson ADR Handbook* (2nd edn, Oxford University Press, 2016) and H Brown and A Marriott, *ADR Principles and Practice* (3rd edn, Sweet and Maxwell, London, 2011).

[6]S Blake (see preceding note), 2.26, 16.37 to 16.41; K Mackie, D Miles, W Marsh, Tony Allen, *The ADR Practice Guide* (Tottel Publishing, London, 2000), 13.1 and 13.1 (not in later editions).

[7]K Mackie, et al. (see preceding note) (2000), 13.2 (not in 2007 edn).

[8][1993] AC 334, 345-6, HL (clause 67).

[9]S Blake, J Browne, S Sime, *The Jackson ADR Handbook* (2nd edn, Oxford University Press, 2016), Chap. 23, section D; Andrews ECP (2013) 9.27 n 31; E Ferran, 'Dispute Resolution Mechanisms in the UK Financial Sector' (2002) 21 CJQ 135; R Nobles, 'Access to Justice through Ombudsmen: the Courts' Response to the Pensions Ombudsman' (2002) 21 CJQ 94; Lord Woolf, *Access to Justice: Interim Report* (London, 1995), 111 at [40].

[10]Bibliography, Section X.A; *Harding v Paice* [2016] EWCA Civ 1231, [2016] 1 WLR 4068; *Aspect Contracts (Asbestos) Ltd v Higgins Construction plc* [2015] UKSC 38, [2015] 1 WLR 2961, at [11] to [15]; *Pegram Shopfitters Ltd v Tally Weijl* [2003] EWCA Civ 1750, [2004] 1 WLR 2082, especially at [1] to [10]; so-called 'adjudication' under Part II, Housing Grants, Construction and Regeneration Act 1996, and the Scheme for Construction Contracts Regulations 1998 (SI 1998/649).

(6) '*Early neutral evaluation*':[11] a neutral third party, often a lawyer, gives a non-binding verdict on the merits of the dispute. There is a special provision for this in the Commercial Court.[12]

1.04 As for English court proceedings, these are governed by the procedural code, the CPR,[13] on which there are standard commentaries,[14] and scholarly literature.[15] Since the early 1990s, there have been three main waves of reform aimed at improving the court system: the Woolf reports (1995 and 1996),[16] the Jackson report (2009),[17] and the Briggs reports (2015)[18] and (2016).[19]

1.05 Practical access to justice[20] is achieved for small claims and, at the other pole of the spectrum, access is enjoyed in the High Court by oligarchs and large companies litigating matters worth several million pounds. Otherwise, there is a crisis of non-access to justice. One significant improvement for claimants (part of the Jackson package of changes) is that claimants suing for personal injury are not at a costs risk if they lose (QOCS in personal injury cases, 5.07).

1.06 Another problem has been delay. Matters have improved in the last fifteen years. But in the Court of Appeal there are either major inefficiencies or there are not enough judges, or they are now expected to perform too many tasks. The logjam in the Court of Appeal is going to take years to clear (4.06). A further problem is that when a claimant obtains a money judgment, there can be real problems in getting that judgment enforced against the defendant's assets.

1.07 Another way of explaining the overall civil justice framework is to note that there are three main 'alternatives' to civil litigation before the English courts. These are: (i) party-to-party negotiation leading to settlement: this is the most common way in which a dispute or claim is terminated; (ii) mediation or conciliation (Chaps. 10 and 11); (iii) arbitration (Chap. 9).

1.08 *Settlement*. Settlement is by far the most common way in which civil disputes truly contested on the merits (that is, claims other than straightforward debt

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[11] *The Jackson ADR Handbook* (2nd edn, Oxford University Press, 2016), Chap. 22.

[12] Commercial Court Guide, section G2; Neil Andrews, *English Civil Justice and Remedies: Progress and Challenges: Nagoya Lectures* (Shinzan Sha Publishers, Tokyo, 2007) 3.23.

[13] The Civil Procedure Rules (1998) ('CPR'): (http://www.dca.gov.uk/civil/procrules_fin/menus/rules.htm); see also: Commercial Court Guide and *The Chancery Guide* (2016) (https://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/high-court/the-chancery-division/guide/).

[14] Bibliography, Section 1.2.

[15] Bibliography, Section 2.

[16] *Access to Justice: Interim Report* (1995).

[17] Sir Rupert Jackson, *Reforming Civil Litigation Funding and Costs in England and Wales—Implementation of Lord Justice Jackson's Recommendations: The Government Response* (Cm 8041, 2011); Jackson RCJ (2018).

[18] Briggs IR (2015); for comment, Neil Andrews, 'Improving Justice Despite Austerity: Making Do or Making Better?' (2015) 20 ZZP Int 1–24.

[19] Briggs FR (2016).

[20] E Palmer, T Cornford, A Guinchard, Y Marique (eds), *Access to Justice: Beyond the Policies and Politics of Austerity* (Oxford: Hart Publishing, 2016).

enforcement actions, where there is no real defence) are concluded in England.[21] Of the matters in which civil proceedings are commenced in England, a very high percentage do not proceed to trial[22] (the decline of civil trials in the USA has also attracted comment).[23] This is because most English actions culminate not in judgment on the merits, following examination of witnesses and documents at trial, or consideration of the merits during a summary proceeding (3.50), but in an agreement of compromise or settlement between the parties. A solicitor who assist the client in giving effect to a settlement is not necessarily responsible for advising on the merits of the settlement, for everything turns on the scope of the solicitor's retainer, that is, the extent of responsibility expressly or implied assumed on the facts.[24] The CPR Part 36 system of settlement offers (5.32) is intended to stimulate resort to constructive settlement negotiations, as Sir Geoffrey Vos C in the Court of Appeal emphasised in the *OMV* case (2017).[25]

Judicial Control of Proposed Settlements or Compromises Affecting Minors and the Mentally Incapable. Such a settlement requires the court's approval (CPR 21.10), including settlement of a prospective claim, that is there the settlement precedes commencement of formal civil proceedings (CPR 21.10(2)) (here, because the main proceedings have not been commenced, obtaining judicial approval will require an application under CPR Part 8 by a 'litigation friend'). And in this context of compromises or settlements, the Supreme Court in *Dunhill v Burgin* (*No.'s 1 and 2*)

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[21]Bibliography, Section 11; H Genn, 'Understanding Civil Justice' (1997) 48 CLP 155, 177 ff; S Roberts, 'Settlement as Civil Justice' (2000) 63 MLR 739–47 (and earlier 'Alternative Dispute Resolution and Civil Justice…' (1993) 56 MLR 452; 'The Paths of Negotiation' (1996) 49 CLP 97–109; for his study of 'ADR', M Palmer and S Roberts, *Dispute Processes* (Cambridge University Press, 2005; reprinted 2008), and M Galanter and M Cahill, 'Most Cases Settle: Judicial Promotion and Regulation of Settlements' (1994) 46 Stanford L Rev 1329 (on the USA practice); *Foskett on Compromise* (8th edn, London: Sweet & Maxwell, 2015).

[22]Sir Leonard Hoffmann, 'Changing Perspectives on Civil Litigation' (1993) 56 MLR 297, noting the increasing resort to pre-trial summary procedures, pre-action disclosure, witness statements, and provisional and protective relief.

[23]e.g., M Galanter, 'The Vanishing Trial…in Federal and State Courts' (2004) 1 J Empirical Legal Studies 451; J Langbein, 'The Disappearance of Civil Trial in the United States' (2012) 122 Yale LJ 522; J Resnik, 'For Owen M Fiss: Some Reflections on the Triumph and Death of Adjudication' (2003) 58 Miami U L Rev 173; J Resnik, 'Whither and Whether Adjudication' (2006) 86 Boston ULRev 1101, 1123 ff; J Resnik, 'Uncovering, Discovering and Disclosing How the Public Dimensions of Court-Based Processes are at Risk' (2006) 81 Chicago-Kent LR 521 and J Resnik and DE Curtis, 'From "Rites" to "Rights" of Audience: The Utilities and Contingencies of the Public's Role in Court Business' in A Masson and K O'Connor (eds), *Representation of Justice* (Brussels, 2007); A Miller, 'The Pre-trial Rush to Judgment: Are the "Litigation Explosion", "Liability Crisis", and Efficiency Cliches Eroding our Day in Court and Jury Commitments?'(2003) 78 NYULRev 982.

[24]*Minkin v Landsberg* [2015] EWCA Civ 1152, [2016] 1 WLR 1489; the background to this decision is explained by King LJ at [64] to [77], commenting on the absence of legal aid (at [65] and [66]), and the need (at [76]) for restricted legal intervention to plug this gap.

[25]*OMV Petrom SA v Glencore International AG* [2017] EWCA Civ 195, [2017] 1 WLR 3465, at [39], cited at 5.36.

(2014)[26] held that a settlement is invalid even though a party's lack of mental capacity was not known to the other party. The need for judicial approval and appointment of a 'litigation friend' applies whether the party under a disability is a claimant or defendant.[27]

1.10 *Mediation*. There has been a rise in resort to mediation (10.21). That technique has become popular (although it is still not sufficiently used) for these reasons: it offers flexible outcomes; it can be quicker and cheaper; it is private; and, if successful, the outcome is consensual. But mediation will not work if mandatory.[28] It probably works best without lawyers and in an intimate and confidential space. Once settlement is achieved, it must be rapidly formalised in writing. It should also be noted that interaction between the court process and mediation is constantly under examination. A Civil Justice Council working party (beginning May 2016) will re-examine those points of contact and influence.

1.11 Lord Briggs (2015) has noted that the contribution of non-judicial system is very significant:[29] 'the rapid growth of …ADR during the last thirty years leaves the civil courts as very much the last resort for the resolution of civil disputes. Negotiation, arbitration, mediation, early neutral evaluation[30] and adjudication by ombudsman services[31] and others resolve far more disputes than the civil courts.' He supports judicial promotion of mediation,[32] encapsulating the relationship between the courts and out-of-court mediation as follows:[33]

> the civil courts do a reasonable amount to encourage parties to settle their disputes by an appropriate form of ADR, but do not act as primary providers of it…Thus most judges will, at the case management stage, provide a short stay of proceedings to give the parties space to engage in ADR. The courts penalise with costs sanctions those who fail to engage with a proposal of ADR from their opponents. But the civil courts have declined, after careful consideration over many years, to make any form of ADR compulsory.

1.12 Lord Briggs (2013) suggested that the courts' case management function should not be geared solely to preparation for trial, but should (also) be 'calculated to

[26][2014] UKSC 18, [2014] 1 WLR 933.

[27]CPR 21.10 (introduced in 2007); Foskett *The Law and Practice of Compromise* (8th edn, London, 2015) Chap. 27, noting the impact of the Mental Capacity Act 2005, which took effect on 1 October 2007.

[28]Neil Andrews, 'The Duty to Consider Mediation: Salvaging Value from the European Mediation Directive', in N Trocker and A De Luca (eds), *La Mediazione Civile all Luce della Direttiva 2008/52/CE* (Firenze University Press, 2011), 13 to 34.

[29]Briggs IR (2015), 2.22 (see also 7.18 to 7.27).

[30]Ibid., at 7.20, on 'early neutral evaluation' within the Financial Ombudsman Service.

[31]Ibid., 2.92: the Financial Ombudsman Service resolved 310,000 disputes in 2014; it has a staff of 4000; there are 300 ombudsmen; there are 2000 adjudicators; 2.93, 'the civil courts have no formal link with ombudsmen services.'

[32]On the interaction of the courts and ADR, Briggs IR (2015), 2.86 to 2.93; 11.20 and 11.21; Briggs CMR (2013), Chap. 5; 16.36 to 16.38.

[33]Briggs IR (2015), 2.86.

maximise the likelihood of a successful outcome of ADR'.[34] His remarks are attractive and perhaps clairvoyant. Finally, Lord Briggs (2015) notes that in small claims litigation before the County Court, a telephone system of one-hour slots[35] for mediation is publicly funded. Demand exceeds supply.[36] 70% of cases referred to this service are resolved without further court proceedings.[37]

1.13 Arbitration[38] continues to be attractive for large commercial matters. Its attractions are (9.20): the parties can choose the decision-maker, who can be truly expert; proceedings and outcomes are private; the award is enforceable cross-border under the New York Convention (1958). But the fact that arbitrated disputes are confidential explains why they are nearly always removed from the public system of rule making under the Common Law precedent system. Here Section 69[39] of the Arbitration Act 1996 is an important compromise. It allows appeals, with permission, to proceed to the Commercial Court on points of English substantive law (although that possibility can be excluded by agreement). Arbitration tends to be a rather formal style of proceeding; commercial arbitration conducted in England can replicate many aspects of High Court commercial litigation, although this tendency is regrettable, has been lamented, and should be resisted.

1.14 *Versatile 'Neutrals': judge-arbitrator, judge-mediator; arbitrator-mediator.* Since 1970 it has been possible to appoint a Commercial Court judge (or an Official Referee, now a judge of the Technology and Construction Court) to be a *judge-arbitrator*.[40] It had been hoped to extend this to all types of judge, but there was no time to gain Governmental consent to this suggestion.[41] It was also noted that there is commercial interest in using patent judges to arbitrate under such a scheme. to all types of judge, but there was no time to gain Governmental consent to this suggestion.[42] Again this change has yet to be implemented. The main three effects are that the procedure adopted by the judge-arbitrator can be discussed and agreed, rather than the ordinary court process being adopted; secondly, proceedings, including the award, are confidential; thirdly, there is greater finality, that is, less opportunity to take the final decision on appeal, compared to significant opportunity to appeal civil judgments. The fees are paid to the Treasury and not to the judge. There is slight opportunity to try to select the judge-arbitrator, but this does not

[34]Briggs CMR (2013), 5.9 to 5.16; and 16.36 to 16.38.

[35]JUSTICE, '*Delivering Justice in an Age of Austerity*' (April 2015), 2.9 (http://justice.org.uk/our-work/areas-of-work/access-to-justice/justice-austerity/).

[36]Briggs IR (2015), 2.30, 2.90.

[37]Ibid., 7.18; 7.24.

[38]Andrews ACP (2018), Chaps. 30 to 43.

[39]Ibid., at 18.67 ff; Lord Thomas CJ, 'Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration' (BAILII lecture, 9 March 2016) (https://www.judiciary.gov.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf).

[40]Mustill & Boyd, *Commercial Arbitration* (2nd edn, Butterworths, London, 1989), Chap. 20.

[41]DAC (1996), at [340] to [342].

[42]Ibid., at [343].

constitute full control. There has been little demand and the supply is also limited, all relevant judges being busy. The process has not taken off.[43] Surprisingly, it was re-enacted in the Arbitration Act 1996.[44]

1.15 The *judge-mediator* is not known in England and Wales (but the *former* judge, not appearing as a private mediator, is not uncommon). Mediation is conducted out-of-court by professional mediators, who specialise in that activity. The court is expected, when appropriate, to recommend mediation (10.38), but it does not engage in it directly. However, it was reported to the author that in at least one provincial court the practice had arisen of conducting a form of early-neutral-evaluation in order to expedite the settling of cases.[45] There is in fact a specific mechanism for early-neutral-evaluation in the Commercial Court Guide.[46] But it is little used.[47]

1.16 The *arbitrator-mediator* is also a rare beast and the balance of professional opinion is that these activities are better allocated to different person rather than being combined in the same person or tribunal.[48]

1.3 The Woolf Reforms

1.17 On 28 March 1994, Lord Mackay LC of Clashfern (Lord Chancellor 1987–97) appointed Lord Woolf to make recommendations concerning civil procedure, with the following aims:[49] (i) *improving access to justice and reducing the cost of litigation*; (ii) *reducing the complexity of the rules*; (iii) *modernising terminology*; and (iv) *removing unnecessary distinctions of practice and procedure*. Woolf's interim and final reports appeared in 1995[50] and 1996,[51] and they stimulated a substantial literature.[52] The CPR was enacted in 1998 and took effect on 26 April 1999. This is a unified code, applying to both the County Court and the High Court (the two courts of first instance, as well as to the Court of Appeal; the Supreme Court is regulated by its own rules, but it also operates within the CPR system).

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[43]Neil Andrews, 'Case Management in the English Commercial Court', in R Stürner and M Kawano (eds), *International Contract Litigation, Arbitration and Judicial Responsibility in Transnational Disputes* (Mohr Siebeck, Tübingen, Germany, 2011), 285, 292 n 57.

[44]s 93, AA (1996), and sch 2 (previous provisions were repealed; Sch 4, AA (1996), repealing s 4, Administration of Justice Act 1970).

[45]Oral communication 2015 concerning the practice in the South of England.

[46]Commercial Court Guide section G.2.

[47]Neil Andrews, 'Case Management…', see above, 296-7.

[48]Andrews ACP (2013) vol 2, Chap. 2 for discussion and extensive literature (not in second edition).

[49]Terms of appointment cited in Lord Woolf, *Access to Justice*: *Interim Report* (London, 1995), introduction.

[50]Ibid.

[51]*Access to Justice*: *Final Report* (London, 1996).

[52]Collected at Andrews ACP (2018), 1.08.

1.18 The CPR system sought to promote these principles, values, or aims: (1) proportionality, (2) procedural equality, (3) active judicial involvement in a case's progress, (4) accelerated access to justice by improved summary procedures, (5) curbing excessive documentary disclosure, (6) the courts should make greater use of disciplinary costs orders, (7) appeals should be more tightly controlled, (8) settlement should be stimulated by use of costs incentives to accept reasonable settlement offers, and (9) the courts should encourage resort to ADR, notably mediation. The CPR system also modified the principle of party-control (1.20–1.23, 1.33).[53]

1.19 Summary disposal of cases is promoted by introduction of a more searching test of 'real prospect of success', in CPR Part 24 (3.50).[54] 'Standard disclosure' was introduced to render documentary discovery more focused on essentially important documents, rather than permitting an extensive trawl for all possibly significant material (3.77).[55] The courts were encouraged to adjust costs awards to reflect the fact that a victorious party had raised unnecessary issues (5.06).[56] Finality of judgment was fortified by the requirement that an appellant must obtain permission to appeal (4.05). Settlement is promoted by the capacity of both defendants *and claimants* to make settlement offers backed by the risk of adverse costs consequences. In essence, CPR Part 36 provides that if a settlement offer is not accepted, but judgment proves worse for the offeree than that offer, the offeree will suffer adverse consequences (5.32). Those adverse consequences are the costs risk, in this context.

1.20 *The Rise of Case Management*.[57] The CPR system created a general framework for active involvement of judges in the pre-trial development of moderately or extremely complex litigation. Judges are required to ensure that litigation proceeds with reasonable speed and that the main issues are identified and prioritised. At trial (and during its preparation), judges should control the volume of evidence.

1.21 Under the CPR, judges must assume managerial responsibility for the progress of cases and not rely on the parties' lawyers to take the initiative in preparing the case. The courts must set a window or date for trial.[58] Left to their own devices, parties' lawyers often proceeded at less than glacial speed. Before 1999, too many cases had been left to drift without official direction. These disputes had become the (lucrative) play-thing of rival teams of lawyers. However, under the CPR, civil judges have been granted wide-ranging powers to manage the development of civil cases, especially in large actions. This was a fundamental change because before

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[53]Neil Andrews, 'A New Civil Procedural Code for England: Party-Control 'Going, Going, Gone'' (2000) 19 CJQ 19-38.

[54]CPR 24.2: *Swain v Hillman* [2001] 1 All ER 91, 92, CA.

[55]CPR 31.6; on the pre-CPR excessive documentary disclosure system, Lord Woolf, *Access to Justice*: *Interim Report* (1995), Chap. 21, at para's 1–9.

[56]*AEI Rediffusion Music Ltd v Phonographic Performance Ltd* [1999] 1 WLR 1507, 1522-3, CA.

[57]On this topic, see also Chap. 3 at **3.02**.

[58]Lord Woolf's two reports are: *Access to Justice*: *Interim Report* (London, 1995) and *Access to Justice*: *Final Report* (London, 1996).

1998 English procedure had generally avoided pre-trial judicial management (although, even before the Woolf reforms, case management had emerged as a convenient and necessary technique in, notably, the Commercial Court, part of the High Court).

1.22 Lord Neuberger MR (as he then was), in a lecture (2012),[59] said that a sea-change has occurred since 1998:[60]

> The judiciary, and lawyers, have adapted pretty well to active case management over the last decade… It is something now with which we are all familiar; and more importantly we now have a generation of solicitors and barristers who know nothing other than a system where there is active case management. There are also many judges who have been appointed since 1999, who know no different approach to carrying out their judicial role… What was once novel is for many not just the norm but the only one they have known. It is unsurprising therefore that we have all got better at it…

1.23 But there are limits to judicial initiative under the CPR: (1) parties still select factual witnesses and draw up witness statements; (2) parties still select party-appointed experts (they can also agree upon selection of a single, joint expert, this 'shared' expert being an innovation of the CPR system); (3) judicial permission to use experts is required, but judicial selection of individual experts is avoided, unless the parties reach stalemate in agreeing a single, joint expert;[61] (4) the Court of Appeal has said that excessive intervention by trial judges during the course of evidence is prohibited because it would be wrong for a judge to 'arrogate to himself a quasi-inquisitorial role', this being something which is 'entirely at odds with the adversarial system.'[62]

1.4 The Jackson Changes (2013)

1.24 Following Sir Rupert Jackson's report on the costs regime (2010),[63] various procedural changes, notably affecting costs, were introduced on 1 April, 2013[64] (in particular, see 1.26–1.29 and Chap. 5 on the costs regime). The former Senior Costs Judge, Peter Hurst (who retired in the Summer of 2014), has estimated that pre-April 2013 costs issues will continue to rumble through the system for at least

[59]Lord Neuberger, 'Docketing: Completing Case management's Unfinished Revolution' (2012), at [11]: (http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mor-speech-solicitors-cost-conference-lecture-feb2012.pdf).

[60]Ibid., at [14].

[61]On these aspects of CPR Part 35 and D Dwyer, *The Judicial Assessment of Expert Evidence* (Cambridge University Press, 2008).

[62]*Southwark LBC v Maamefowaa Kofiadu* [2006] EWCA Civ 281, at [148].

[63]Jackson FR (2010); generally, see Chap. 5 of the current work, and see Bibliography, Section 3.4.

[64]Legal Aid, Sentencing, and Punishment of Offenders Act 2012, with extensive secondary legislation.

five years, and that the problems and uncertainties generated by a new set of costs rules will occupy the courts, notably the higher courts, for at least ten years.[65] Here is a summary of the main 'Jackson' changes made on 1 April, 2013.

1.25 *The Overriding Objective and Proportionate Cost.* The Overriding Objective in CPR Part 1 has been reformulated to highlight the need for cases to be dealt with justly and 'at proportionate cost.'[66] Proportionality has become the ultimate determinant when assessing standard basis costs (5.10).[67]

1.26 *Qualified One Way Costs Shifting* ('*QOCS*').[68] (For details, 5.07). This involves a major rupture of the costs-shifting principle (5.05). In personal injury claims,[69] the claimant will not normally be at risk of liability for the defendant's costs even though the claim fails, unless the claim was 'fundamentally dishonest' (if so, permission is required to enforce the costs order)[70] or it was struck out as an abuse of process (if so, no permission is required to enforce the costs order).[71] The system is 'one way' in the sense that the defendant (unlike the claimant) is at a costs risk if the claim is successful. The law is here tilted in favour of those claiming to have suffered a type of harm which elicits strong public sympathy.

1.27 *Conditional Fee Agreements* (*CFAs*). (For details, 5.46). From 1 April, 2013, neither the success fee[72] nor the ATE legal expenses premium can be recovered from the defeated party.[73] CFAs entered on or after 1 April, 2013, are subject to these restrictions: the success fee cannot exceed 100% of the recoverable fees;[74] and in the case of personal injury claims at first instance the success fee cannot exceed 25% of damages.[75] It follows that the success fee and any ATE insurance premium will have to be paid by the client. But there will be no need for ATE insurance in personal injury litigation, because qualified one way costs shifting

[65]P Hurst, 'The English System of Costs' [2014] 25 EBLR 565, 585.

[66]CPR 1.1(1): These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.

[67]CPR 44.3(2); CPR 44.3(5) identifies five factors relevant to proportionality; general discussion, Neil Andrews, 'On Proportionate Costs' (2013) ZZP Int 3-18 and (2014) 232 *Revista de Processo,* 393-409; J Sorabji, 'Prospects for Proportionality: Jackson Implementation' (2013) 32 CJQ 213.

[68]CPR 44.13 to 44.16; PD (44), 12.4 to 12.7.

[69]As defined at CPR 44.13(1).

[70]CPR 44.16(1); PD (44), 12.4 to 12.7.

[71]CPR 44.15.

[72]s 44(4), Legal Aid, Sentencing, and Punishment of Offenders Act 2012 (substituting s 58A(6) within the Courts and Legal Services Act 1990).

[73]s 46(1), Legal Aid, Sentencing, and Punishment of Offenders Act 2012, adding a new Section 58C to the 1990 Act.

[74]Article 3, Conditional Fee Agreements Order 2013/689.

[75]Articles 4 and 5, ibid.; Article 5(2), ibid., refers to: '(a) general damages for pain, suffering, and loss of amenity; and (b) damages for pecuniary loss, other than future pecuniary loss.'

(5.07) will normally protect such a claimant from liability for the defendant's costs in the event that the claim fails.

1.28 *Damages-Based Agreements*.[76] (For details, 5.57). A legal representative can agree with the client[77] that professional remuneration will be waived unless the case is won. In the event of victory, the representative's payment will be specified as a percentage or fraction of the money recovered by the client from the opponent.[78] As explained at 5.58, damages-based agreements have not taken off.

1.29 *Costs Budgets*.[79] Where the claim is for £10 million or more on the Multi-Track,[80] parties must file a costs budget (5.21).[81] This will constrain assessment of standard basis costs, unless the court finds that there is a good reason to depart from the budget.[82]

1.30 *Permission to Appeal Sought from Relevant Appeal Court*. Of the numerous restrictions on appeal (4.04 for details), one of the more important is that an appeal requires permission (4.05).[83] Lord Briggs (2015) describes the pre–October 2016 arrangements in the Court of Appeal for the grant of permission to appeal.[84] That rather baroque system contributed to great overload in that court, because much judicial time was being diverted to oral applications for permission to appeal. But since October 2016, oral hearings have declined, because a Lord Justice will normally be able to dispose of the petition on the papers alone.[85]

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[76]s 58AA(3)(a), Courts and Legal Services Act 1990 (amended by s 45, Legal Aid, Sentencing, and Punishment of Offenders Act 2012); Damages-Based Agreements Regulations 2013/609; CPR 44.18.

[77]Reg 1(2), Damages-Based Agreements Regulations 2013/609.

[78]s 58AA(3)(a), Courts and Legal Services Act 1990 (amended by s 45, Legal Aid, Sentencing, and Punishment of Offenders Act 2012).

[79]CPR 3.12 to 3.18; PD (3E); V Ramsey, 'Implementation of the Costs Reforms' (2013) 32 CJQ 112, 118–119; noting Lord Neuberger MR, Lecture, May 29, 2012 (http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/proportionate-costs-fifteenth-lecture-30052012.pdf).

[80]CPR 3.12(1)(a)(b); or, CPR 3.12(1)(c), unless the claim is made by or behalf of a person under 18.

[81]Annexed to PD (3F).

[82]CPR 3.18.

[83]CPR 52.3, 52.4.

[84]Briggs IR (2015), 2.67 to 2.79; J Leabeater et al., *Civil Appeals: Principle and Procedure* (2nd edn, Sweet and Maxwell, London, 2014), Section 2.3.

[85]CPR 52.5(2) (effective, October 2016): 'The [Lord Justice] considering the application on paper may direct that the application be determined at an oral hearing, and must so direct if the judge is of the opinion that the application cannot be fairly determined on paper without an oral hearing.' S Sime, 'Appeals after the Civil Courts Structure Review' (2017) 36 CJQ 51–69.

1.5 Four Enduring Features of the English Process

1.31 (1) *Divided Legal Profession.* The professional division between different types of litigation lawyers has been maintained: overall control of the case resting with solicitors, who delegate specific tasks, such as advocacy or 'advice on law or evidence', to specialists, namely barristers.[86] There is a category of solicitor-advocate, but there are not many of these.

1.32 (2) *Costs Risks.* (For details, 5.05). Each litigant is at risk of an order to pay the legal costs reasonably incurred by the opponent, if the latter emerges victorious from the fray, except in the case of personal injury claims, where an honest claimant is immune from having to pay costs, if the claim fails, so-called 'qualified one-way costs shifting' (5.07). This cost-shifting rule operates intensively because English legal costs are high (Sir Rupert Jackson's 'Civil Litigation Costs Review'[87] (supplemented by a stream of lectures)[88] placed the whole topic of costs and funding under scrutiny). The adverse costs implications provided by CPR Part 36 (5.32), where a settlement offeree chooses to proceed to judgment, are a powerful economic incentive to take seriously such settlement proposals.

1.33 (3) *Party Determination of Issues and Control of Evidence.* The scope of the litigation is determined by the parties' pleadings (called under the CPR 'statements of case'). Furthermore, the parties must choose how to support their rival contentions, by adducing witness and documentary evidence, and by framing and researching legal submissions (this contrasts with the more active involvement of some civil law courts). In England witness statements and expert reports are prepared in consultation with the parties' lawyers but *without judicial supervision*. At trial, factual witnesses and experts are examined and cross-examined by the parties (normally by their advocates) in the presence of a judge whose task is to listen and ask occasional questions, only for the purpose of clarification. The Court of Appeal in the *Southwark London Borough Council* case (2006) affirmed that if the judge were to intervene excessively during the hearing of oral evidence, he would 'arrogate to himself a quasi-inquisitorial role', something which is 'entirely at odds with the adversarial system.'[89]

1.34 (4) *Decline of the* '*Grand*' *Trial*. (a) *Trial a Rarity.* Large actions involve a segmented passage through various interim and pre-trial stages and remedies.[90]

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[86] RL Abel, *The Legal Profession in England and Wales* (Basil Blackwell, Oxford, 1988); RL Abel, *English Lawyers: Between Market and State: The Politics of Professionalism* (Oxford University Press, 2005); see also Bibliography, Section 1.1, for literature on professional and legal ethics.

[87] Jackson FR (2010); on which AAS Zuckerman, 'The Jackson Final Report on Costs—Plastering the Cracks to Shore up a Dysfunctional System' (2010) 29 CJQ 263.

[88] Accessible collectively at: (http://www.judiciary.gov.uk/publications-and-reports/review-of-civil-litigation-costs/lectures); see also Jackson RCJ (2018).

[89] *Southwark LBC v Kofi-Adu* [2006] EWCA Civ 281, [2006] HLR 33, at [148].

[90] e.g., Sir Leonard Hoffmann, 'Changing Perspectives on Civil Litigation' (1993) 56 MLR 297.

Indeed trial is a rare event (3.154) because most actions either settle, or the claimant abandons the case (on 'discontinuance'), or the action is terminated by a pre-trial judgment. (b) *Trial Without a Jury*. English civil trials are adjudicated by professional judges sitting alone, lacking support from fellow judges or a civil jury (in modern English civil proceedings, jury trial is now quite exceptional and confined to specific types of claim, notably malicious prosecution or false imprisonment, 3.157).

1.6 Six Phases of Court Proceedings

1.35 These are: (1) the pre-action phase; (2) commencement and pleadings; (3) case management and preparation for trial (factual evidence, expert evidence, and disclosure); (4) trial and judgment; (5) appeal; (6) enforcement.

1.36 *Phase One: Pre-Action Protocols*. The CPR system introduced an important set of 'pre-action protocols'.[91] As explained in Andrews (2007),[92] a leading aim of the English scheme of pre-action protocols is to promote early and informed settlement, avoiding the expense and inconvenience of formal litigation. This is rooted in the philosophy that formal litigation, notably trial, is a form of dispute resolution which should be treated as a matter of 'last resort'.

1.37 This pre-action regime requires prospective parties, in particular: (1) to communicate among themselves the nature of the claim and defence in advance of commencement of proceedings; (2) consider opportunities for settlement and resort to ADR, notably mediation (although the latter is not compulsory); and (3) to make appropriate exchanges of relevant information, including central documents relevant to the case. It follows that in a large and complicated dispute the parties will be engaged in compliance with these requirements for many months. However, the pre-action protocol system can contribute to complex litigation. For example, Sir Rupert Jackson, in his speech on 'The Reform of Clinical Negligence Litigation' (2012), said that the clinical negligence pre-action protocol needed to be shortened; and he also criticised advisors' resistance to mediation in this field and on their tendency to delay settlement until just before trial.[93]

1.38 The courts become involved in the pre-action phase of litigation only retrospectively, once proceedings have begun. The judges are then prepared to criticise parties (and to consider applying sanctions to defaulting parties) who have failed to comply with the pre-action protocol. In particular, the courts are empowered to adjust costs orders to reflect this default. But this seldom occurs.

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[91] Practice Direction-Pre-Action Conduct for relevant subject areas.

[92] Neil Andrews, in A Pellegrini Grinover and R Calmon (eds), *Direito Processual Comparado: XIII World Congress of Procedural Law* (Editora Forense, Rio de Janeiro, 2007), 201–42.

[93] http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lj-jackson-twelfth-lecture-implementation-programme-22032012.pdf.

1.39 *Phase Two: Commencement and Pleadings*. Proceedings begin once the claimant issues a claim form. CPR 7.2(1) states: 'Proceedings are started when the court issues a claim form at the request of the claimant.'[94]

1.40 The date when proceedings are 'commenced' or 'brought' or become 'definitively pending' is important for determining at least two important procedural issues: whether the plaintiff's attempt to bring proceedings is in fact 'out of time' for the purpose of the limitation or prescription rules; and whether the present proceedings are to be accorded priority under a regime of *lis alibi pendens* (for example, under the European Union jurisdictional regime).[95] But it is unnecessary to investigate this matter further. What is significant for us is that the process of court proceedings has an officially-defined beginning.

1.41 Cases are allocated to different types of first instance court (County Court or High Court) and to different systems of procedure (known as 'tracks') under the CPR. This is founded on the principle of proportionality: that litigation must be tailored to the size and nature of the dispute. The existence, in particular, of different levels of first instance proceeding was not an innovation of the CPR system, the dualism of County Court and High Court first instance jurisdiction having arisen in the nineteenth century. Within the County Court system, small claims procedure was introduced in the 1960s and 1970s.[96] But the CPR system refines the notion of proportionate allocation (stopping short of amalgamating the County Court and High Court system into a unified first instance court).

1.42 There are currently (late 2017) three[97] tracks (that is, types of first instance procedure to which a case can be allocated): the small claims jurisdiction; the fast-track; and the multi-track. High Court litigation is concerned only with the multi-track. The County Court, which is the inferior first instance jurisdiction, is concerned with all three tracks. The small claims system concerns actions not exceeding £10,000 (or £1000 in the case of personal injury claims and housing repair claims by resident tenants).[98] Above the small claims jurisdiction is the second tier of first instance adjudication, the 'fast-track', dealing with claims not

[94]Commencement is when the court enters the date on the claim form, CPR 7.2(2); but for limitation purposes, when the claim form was received in the court office: PD (7) 5.1; *St Helens MBC v Barnes* [2006] EWCA Civ 1372, [2007] CP Rep 7 (noted J Sorabji [2007] CJQ 166).

[95]Brussels 1 Regulation (recast) (Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on 'jurisdiction and the recognition and enforcement of judgments in civil and commercial matters'; e.g., *Gasser GmbH v MISAT Srl* (*Case C-116/02*) [2003] ECR I-14693.

[96]Bibliography, Section 3.1, for literature on small claims.

[97]An intermediate track between the fast track and the multi-track has been proposed: Jackson Fixed Costs (2017). Briggs FR (2016) contains recommendations for the creation of an electronic 'on-line' court for certain monetary claims under £25,000. On these recommendations, see cirticial comment in *Civil Justice Quarterly* (special issue on the Online Court proposals) (2017) 36 CJQ 1–126.

[98]CPR 26.6(1)(2)(3); CPR 27.1.