SEMINAR PAPER

THE GATEKEEPERS TO COMMERCIAL MEDIATION – WHO ARE THEY, WHAT DO THEY WANT AND NEED, AND WHO WILL THEY BE IN THE FUTURE?

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[Slide] THE GATEKEEPERS TO COMMERCIAL MEDIATION – WHO ARE THEY, WHAT DO THEY WANT AND NEED, AND WHO WILL THEY BE IN THE FUTURE?

Introduction

1. **[Slide]** Our ten-year-old son James has an imaginary world called Heriseka. He tells us all about it in cheerful and bloodcurdling detail. It is a terrifying and beautiful place, that makes Avatar's Pandora look like a bouncy castle. The trees are purple and the skies are gold, and it is populated by yetis, giant bees with drill-bit faces, and all manner of evil warlords.

2. The hero of James's stories about Heriseka is, unsurprisingly, an adventurous ten-year-old boy. But the hero also has a companion – a garrulous, green, pot-bellied, teenage goblin, with a solitary gold tooth, and a mohawk, called Jeff.

3. The hero met Jeff whilst searching for clues in a deep, dark and scary cave. The hero was alone, had lost his torch, and was struggling through the pitch-black darkness. He heard a throat clear, a light came on, and a cockney voice said "'ello poppet". It was Jeff, armed with a frappuccino and a chocolate donut, coming to the rescue for the first of many times.

4. The main reason I told you the story of Jeff the goblin is because it is cute, and I hoped that it might tempt you away from an afternoon doze. But the story does also have a message, and that is that salvation can come in unlikely and unexpected forms.

5. Because I am a card-carrying member of the Mediation First Party, I see mediation as a form of salvation for many commercial disputes. If it was up to me, many more would be mediated. But it is not up to me. It is up to others, the gatekeepers – those who decide when, and with whom, to mediate.

6. In the first part of this seminar, I want to talk about who the key current gatekeepers to commercial mediation in New Zealand are. The most significant group are private practice commercial litigators. There are some interesting observations to be made about them in this context. Other current gatekeepers include insurance claims managers, and various government and QUANGO decision-makers.

7. I think there are opportunities to grow the use of commercial mediation in the future, both with these groups, and with others. As we pursue such growth, we need to be conscious of what people want from mediation, and what they need. In the second part of this seminar, I will talk about some of those wants and needs.

8. In the third part of this seminar, I will talk about the likely new players. The new gatekeepers to commercial mediation in New Zealand of the future. These will likely include in-house counsel, business leaders, the judiciary, Asian, Maori and Pacific New Zealanders, and gatekeepers in new specialty areas. I think that, in the future, these people will be ever-more important to mediation. And, hopefully, particularly if we can address their wants and needs, they will be sending ever-more work our way.

[Slide] The current gatekeepers to commercial mediation in New Zealand

9. The research done by Dr Grant Morris of Victoria University in 2015 suggested that there are some 800 commercial mediations in New Zealand per year[1]. But we do not have precise data on who is making the decisions on when, and with whom, to

mediate those matters. That is, who are the current gatekeepers to commercial mediation in New Zealand?

[Slide] *Private practice commercial litigators*

10. Most of the commercial mediation referrals I get are from private practice commercial litigators. This is consistent with Grant's survey, in which New Zealand commercial mediators described "*law firm/lawyer*" as their number one source of referrals for commercial mediations[2].

11. Using a combination of statistics, personal experience and supposition, I would like to venture some observations on private practice commercial litigators as gatekeepers to commercial mediation:

    (a) **[Slide]** First up, I think that mediation is still very much a matter of personal taste amongst them. Here are some of the things that friends of mine, who I regard to be skilled litigators, have said to me about mediation: "*I hate mediation*", "*I only mediate cases I know I am going to lose*", and "*why bother? If I want to settle, I'll just go and have a cup of coffee with the guy on the other side*". I think that there are still a lot of commercial litigators who will not mediate if they can help it;

    (b) **[Slide]** Secondly, they are not referring most of the commercial disputes they are dealing with to mediation. In this regard, here are some rough, but hopefully interesting, numbers:

        (i) In the 2014/15 financial year, there were some 3,500 new civil cases filed in the High Court[3], the District Court[4] (disputed cases only) and the Weathertight Homes Tribunal[5] (projected figure) combined. There will have been other commercial cases filed in specialist tribunals such as the Intellectual Property Office of New Zealand ("IPONZ"). So, let us suppose there are around 4000 new commercial cases filed a year;

        (ii) For every commercial case that is filed, I suspect there will be at least that many significant commercial disputes that are resolved before a case is filed. So we are talking at least 8000 commercial disputes a year in New Zealand;

        (iii) If we use the figure of 800 commercial mediations a year, that would suggest that only around 10% of commercial disputes are mediated. I suspect that the real figure is even less than that. Research by CEDR in the UK in 2013 suggested that 6% of civil disputes were being settled by mediation[6]. These figures tell us that there are vast opportunities for our industry; and

    (c) **[Slide]** Thirdly, these gatekeepers are being quite selective in the types of cases that they refer to mediation. Grant's research suggested that the four most common legal subject areas for commercial mediation were: contracts, property, building/construction, and insurance[7]. That result virtually mirrors data obtained in ADR survey work undertaken for the Ministry of Justice in 2004[8]. I think there is real potential for an expansion of commercial mediation in other specialty areas, and comment on that later in this paper.

[Slide] *Insurance claims managers*

12. Claims managers in major insurance companies are important gatekeepers to commercial mediation in New Zealand too. My observations in this regard:

    (a) Insurers are often involved in high volume litigation, such as leaky homes cases, and earthquake claims;

    (b) Insurers often have the greatest resources with which to fight, and when necessary pay out on, claims. They are therefore more likely to take the lead in defending or pursuing claims, and share the greatest burden in settling them. Consequently, insurers often have more influence than other parties on when to mediate, and who to use as mediator;

    (c) Claims managers are often very experienced at negotiation and mediation. They do not have the deference to legal advice/direction that other clients might have in these disputes. Whilst it may not be the claims manager who makes the call to the mediator, I suspect that a nod of approval from a claims manager is more than just pro forma in the referral process, and a veto will be fatal; and

    (d) I often hear people saying that "such and such" a mediator is favoured by insurance companies. Whether that is true or not, I think it speaks to a sense in the industry about the importance of insurers as gatekeepers.

13. There may well be scope for growth within this group of commercial mediation gatekeepers. I certainly think that we should pursue greater dialogue with them. One topic for such dialogue might be the pre-emptive development of a mass mediation scheme for disaster relief. More on this later.

[Slide] *Government and QUANGO decision-makers*

14. There are currently a variety of government and QUANGO schemes that encourage, and act as gatekeepers to, commercial mediation. Important examples include:

    (a) The Banking Ombudsman Scheme has facilitation and conciliation steps, with the Ombudsman's in-house investigators acting as the neutrals[9];

    (b) The Insurance and Savings Ombudsman has mediation as an option for complaints made to the Ombudsman. Again, the mediating is done in-house[10];

    (c) Fairway's Financial Dispute Resolution Service has a mediation component[11];

    (d) The Weathertight Homes Tribunal was of course a great source of commercial mediation work for years, although its caseload is decreasing[12]; and

    (e) The EQC has a mediation service for complaints about Canterbury earthquake claims, which is run by AMINZ.

15. The government and QUANGO decision-makers involved in establishing, running, and directing disputes to, these schemes deserve credit for doing so. There may well also be scope for growth in some of these schemes. I certainly think that it will be to everyone's advantage if the schemes are, and are seen to be, successful.

[Slide] Gatekeepers' wants and needs

16. The research suggests some quite clear "wants" on the part of the gatekeepers to commercial mediation. I identify, and comment on, some of those "wants" which I think are significant in this context as follows:

(a) *To achieve Settlement*. Gatekeepers want commercial mediations to lead to settlement[13]. And, given that, I do not think that we should shy away from telling the market about the effectiveness of the process. For example:

(i) US Department of Justice ("DOJ") records in 2012 showed that the success rate for voluntary ADR in Department litigation across the US ranged from 69%-79%[14];

(ii) A 2011 study of civil cases in Michigan found that mediation produced far more settlements and consent judgments (84% of cases) than other approaches[15];

(iii) In Grant Morris's 2015 research, all of the New Zealand commercial mediators surveyed reported settling at least 70% of the cases they mediated. 56% reported settled over 90%[16];

(b) **[Slide]** *To save time and money.* Gatekeepers want mediation to save time and money[17]. It does, and, again, we should not shy away from telling the market about this. For example:

(i) The US DOJ records in 2012 showed that by using voluntary ADR 1,516 months of litigation time were saved (ie, over 100 years) [18];

(ii) In a 2010 survey of mediations in UK construction disputes, "*[t]he cost savings attributed to successful mediations were significant….. . Only 15% of responses reported savings of less than £25,000; 76% saved more than £25,000; and the top 9% of cases saved over £300,000...*"[19];

(iii) A 2001 study of mediated EU commercial cases found that even those that did not settle at mediation were shorter and less costly to the courts and the disputants[20];

(c) **[Slide]** *An experienced mediator*. Experience was the most important mediator selection criteria identified in a 2013 International Mediation Institute survey[21]. Other research has also emphasised the importance of experience to those who select mediators[22]. To an extent, experience is no doubt important to the selection of any professional – no-one wants to be a surgeon's first nose job. But I suspect that experience is particularly important to commercial mediation gatekeepers. If they are to entrust their client and their case to another, they want them to be a tried hand;

(d) *A flexible mediator*. In this regard:

(i) My sense is that lawyer-gatekeepers in particular want a mediator who has a degree of flexibility in their approach on the day – someone can roll with the punches, and who keeps coming up with new ways of keeping the parties focussed, and deadlock-breaking;

(ii) A 2008 study by an American Bar Association Task Force found that mediation users are demanding that mediators move away from a "cookie cutter" approach, and towards customised processes[23]; and

(e) *Evaluative input (?)*. There is international research which suggests that, rightly or wrongly, mediation participants want mediators to give evaluative input[24]. I recently presented on mediation to a group of corporate counsel, and litigators, at a major firm. I said that the predominant view within the mediation establishment in New Zealand is that mediators should not give evaluative input. A senior litigator at the firm said that was "*ridiculous*". He thought that, absent evaluative input, mediators might as well just be there to "*pour the coffee*". I have talked to many other lawyers and non-lawyers who have similar, if less vehemently expressed, views on this topic. A desire for evaluative input is also, I suspect, the driving force behind the perception of many that retired judges make good mediators. The rights and wrongs of this are for another day, but I think that we do need to be conscious of the fact that evaluative input is what a substantial part of our market wants (or at least thinks it wants!).

17. **[Slide]** I think there are additional factors that gatekeepers "need" from commercial mediation:

(a) *A mediator that they have trust and confidence in*. Parties and their lawyers need rapport with the mediator, and building it is of critical importance. US research is consistent with this:

> "*According to a survey by Northwestern University law professor Stephen Goldberg, veteran mediators believe that establishing rapport is more important to effective mediation than employing specific mediation techniques and tactics.*
>
> *To gain parties' trust and confidence, rapport must be genuine: "You can't fake it," one respondent said. Before people are willing to settle, they must feel that their interests are truly understood.*"[25]

(b) *A process which is ethical*. Comments in this regard:

(i) Gatekeepers need to be able to trust the process. This is important to the success of mediations. It is also important to the perception of commercial mediation generally;

(ii) Because mediation is a private, non-transparent, process, we must be continue to be zealous at guarding, and policing, our own ethical standards – rigorous on bias, conflicts and confidentiality;

(iii) I also think that an ethical danger zone for mediators lies in the pressure that the process sometimes puts on parties. That pressure can be willingly sought, or at least knowingly abided. But we need to beware of, and address, the impression that mediators use that pressure in an improper way to force settlements;

(c) *Protection from power imbalance*. This is a difficult topic. Mediators of course have no actual power over the parties. Power imbalance is almost always a problem that pre-dates the mediation. But I think that gatekeepers and parties need mediators to do what they can to keep the process as fair as possible; and

(d) *A process which allows them to save face*. I would suggest that face-saving can sometimes be as important to the gatekeepers (especially lawyers) as it is to parties. It is an area that calls for sensitive management. It is an area where mediators must be particularly careful if they are giving evaluative input.

[Slide] The commercial mediation gatekeepers of the future

18. The groups I have identified as the existing key commercial mediation gatekeepers: private practice commercial litigators, insurance claims managers, and government and QUANGO decision-makers, will continue to play significant roles. And, as I have said, I am sure that there is scope to grow the use of commercial mediation within these groups.

19. I also think that there are going to be some important new groups of gatekeepers in the future. I want to talk about those groups for the balance of this seminar. As I do so, I will touch back on some of the wants and needs that I think gatekeepers have, and talk about how these might relate to the new gatekeepers of the future. As a general proposition though, I think we can safely assume that all future gatekeepers will want to see a process that achieves settlements, that saves time and costs, and that is conducted in an ethical and fair way.

[Slide] *In-house counsel*

20. I suspect that commercial mediators should be talking more to in-house counsel. In the UK, in 2013, CEDR noted a huge increase in direct referrals to mediation from in-house counsel – from nearly zero to just over one-third of its cases in 2012[26]. In-house counsel numbers are on the rise in New Zealand – from 1995 to 2014, they went from 12% to 21% of all New Zealand lawyers[27].

21. Just as they are growing in numbers, I am sure that in-house counsel will grow in confidence in their ability to manage disputes. I would suggest that, for many mediations, there is no reason why in-house counsel should not front the process for their organisation. And I suspect that, in the future, many more will. Commercial mediators should embrace and encourage this.

[Slide] *Business leaders*

22. I think that business leaders will have a greater role as gatekeepers, and indeed champions, of commercial mediation in the future. Some interesting overseas research in this regard:

    (a) Summaries of perspectives collected at the IMI-inspired Convention on Shaping the Future of International Dispute Resolution in 2014 found that business people attendees were more in favour of early mediation, and compulsory mediation, than legal advisor attendees[28]; and

    (b) Recent research by Andrew Agapiou and Bryan Clark at the University of Strathclyde into Scottish construction mediation revealed a similar perspective. End-users of mediation services were more keen on judges referring more cases to mediation, and on mandatory mediation, than lawyers[29]; and

(c) When CEDR did a survey of in-house lawyers in 2013, they asked "What would encourage greater use of mediation?" Answer:

> "*CEOs and CFOs should be targeted from a marketing perspective."*[30]

23. The key to this market will be educating business leaders on what the process is, and what it can achieve. These decision-makers will probably be more attracted than any others to the ability mediation has to achieve settlements, and save time and money.

24. I think that commercial mediators will also need to move out of their legal-circle comfort zones, and start to build relationships of trust and confidence with business leaders.

[Slide] *The Judiciary*

25. The High Court has the ability to refer matters to mediation, with party consent, via HCR 7.79(5). The District Court used to have that power under DCR 1.7 of the 2009 rules, but that provision has not been carried through into the 2014 rules as best I can make out.

26. In any event, judicial referral of commercial cases to mediation in New Zealand seems to be minimal. Mediator respondents to Grant Morris's 2015 survey rated such referrals as their least common source of work[31].

27. As Grant noted in another paper, "*Towards a history of mediation in New Zealand's legal system*"[32], in 2014:

> "*The potential for mediation to be used in all civil cases…was highlighted in a number of reports during the late 1990s and early 2000s. All recommended that the District and High Courts take a more systematic approach to diverting cases to mediation, in part to relieve pressure on the Court system and reduce expense and delay. These recommendations have not been comprehensively implemented*."

28. The apparent reluctance of the New Zealand Courts to refer commercial matters to mediation leaves them at some variance with trends in comparable jurisdictions. Mediation schemes operate in Courts in the UK, the US, Australia and Canada. A 2013 EU survey of major European commercial mediation providers found that judicial referrals accounted for: 48% of the referrals received by the provider in France, 33% of those received by the provider in Catalonia, and 22% of those received by the provider in Belgium[33].

29. Why the apparent disconnect here? Some of you may recall Justice Winkelmann's paper to this conference in 2011, entitled "*Mediation is no Substitute for Civil Justice*"[34]. In that paper, Her Honour raised some concerns about mediation. She suggested that there are mediation practices that imperil the quality and benefit of the process. She was also troubled by the role of power imbalance in mediation. I respectfully wonder if these views reflect a wider unease amongst the judiciary in this country about mediation.

30. If so, I think that we need to further engage with the judiciary over such issues. If we can address some of the negative perceptions that may exist in relation to commercial mediation, we may be able to encourage a judicial referral regime here that looks more like regimes elsewhere.

[Slide] *Asian, Maori and Pacific New Zealanders*

31. I suspect that commercial mediation has a low level of penetration in commercial disputes involving Asian, Maori and Pacific New Zealanders. Yet, demographically, these are the fastest growing parts of our community[35]. Economically, these groups will, or should, have ever-greater clout. Maori Authorities alone were worth $12.5 billion in 2013[36].

32. We should be looking to develop commercial mediation within these parts of our community. And we should be developing how we mediate to meet their wants and needs. I am acutely ill-qualified to talk to how we go about doing these things, but flag the following points as conversation starters:

    (a) You will probably struggle to find a more politically correct lot than a group of mediators. But the ability to say the right things is not enough. We need to guard against our unconscious biases. We need to remember that every culture in New Zealand has a long and time-honoured history of dispute resolution;

    (b) Most importantly, we need to diversify our own ranks. We need to make sure that there are more Asian, Maori and Pacific commercial mediators, and that they get the experience to be credible in the market. Not only is this intrinsically the right thing to do, but it will also help give these parts of our community trust and confidence in the process;

    (c) With regards commercial mediation with Asian New Zealanders, I would touch on a couple of points made in recent writing:

        (i) In his 2015 paper "*The International Evolution of Mediation: A Call for Dialogue and Deliberation*"[37], Professor Tom Stipanowich talks about the history and development of mediation in China. One of the key points he makes is that, in China, there is a far greater expectation that the mediator will give evaluative input on the dispute as a part of the mediation process[38]. I wonder if this is something that we need to bear in mind as we customise our process here – and think about the use of evaluative input generally;

        (ii) Carole Smith's paper to the AMINZ Conference last year, "*Mediating the Asian way: is there a difference?*"[39] echoed Professor Stipanowich on the evaluative input point. She also provided material about the importance of preserving, and giving "face". I am sure it would be of benefit to mediators here to get a better understanding of what this means in practice, and how it might relate to our existing "face-saving" skills;

    (d) With regards commercial mediation with Maori and Pacific New Zealanders:

        (i) What is striking, and sad, is that there appears to have been very little written on the topic; and

        (ii) I suspect that there will be a variety of issues, from *mana* to relations within wider community groups, that need to be taken into account.

[Slide] *Gatekeepers in new specialty areas*

33. I talked at the outset about the types of cases that are currently being referred to commercial mediation. I think that the gatekeepers of the future will include people working in new specialty areas. The following are specialty areas which I think are ripe for significant growth:

(a) *IP/IT*. For many reasons, IP and IT are highly amenable to mediation – disputes are often multi-national, cases are expensive to litigate, the law is complex, damages are often hard to quantify, and much can be achieved by way of agreement that cannot be achieved in Court (eg royalty and territory agreements). IP showed the highest growth in mediation use of any specialty area between 1997 and 2011 in Professor Stipanowich's US Fortune 1000 survey[40]. Many Intellectual Property Offices worldwide have mediation schemes. I am hoping to build up support this year for an IPONZ mediation scheme;

(b) *Farm debt mediation* ("FDM") is another field with potential. It is already significant in Australia[41]. With dairy prices so low, and many farms highly leveraged, we may well soon sadly need to look more carefully at how farm debt issues are managed. New Zealand First is seeking to introduce FDM legislation into Parliament[42];

(c) *Regulatory disputes.* I know that Polly Pope and Derek Johnstone are presenting a paper at this conference on the ADR opportunities in this field. Some brief observations:

(i) There has been a recent article written by Nathaniel Walker, "*The Role of Mediation in Regulatory Enforcement*", which suggests the use of mediation by the FMA[43]. I understand that Polly and Derek are talking to this too;

(ii) There has been some really interesting research done by Melinda Jone at Canterbury University into the development of a tax mediation scheme in New Zealand, following examples set in the US[44]. Interestingly, the research emphasised the importance of having tax mediators with strong mediation skills, rather than tax expertise[45];

(iii) There are many lessons to be learned from overseas here. The Radioshack case in the US is particularly interesting in this context:

A. RadioShack, once a major force in US electronics retail, filed for bankruptcy protection in February 2015. A major and very modern issue in that bankruptcy was the disposal of its customer data. RadioShack wanted to sell 8.5 million customer email addresses and some 67 million customer name and address files. Various states' attorneys objected to this on privacy grounds[46];

B. Radioshack agreed to go to mediation with the states' attorneys, and the prospective purchaser of the data, to address the issue[47]. A deal was reached which put tight limits on the data purchase, and allowed customers to opt out of having their data transferred[48]. New York's Attorney General, Eric T. Schniederman, described the settlement as a victory for

consumers' privacy nationwide, which would serve as a model for future bankruptcies[49];

C. This seems to me to represent a really interesting development, with mediation being used to manage issues between the government and private entities over privacy rights; and

(d) *Disaster relief.* Sadly, we have to accept that there will be more natural disasters in the future. Mediation can be front and centre in reducing the legal heartache associated with them. In the US, natural disasters, particularly hurricanes, have caused waves of claims against insurers. Since Hurricane Andrew in 1992, individual states, working together with insurers, have reacted to specific disasters with dedicated mass mediation schemes. Such schemes were put in place in the aftermath of Hurricanes Katrina and Rita. These schemes seem to succeed, in the sense that settlement rates are high. For Katrina, settlement rates of 82% and 75% were recorded in Mississippi and Louisiana respectively[50].

I think we should be giving pre-emptive thought, in conjunction with insurers and government, as to how such a scheme might operate here, as and when we face the misfortune of another large natural disaster.

34. As a final note, I would suggest that, as we move into more work in these sorts of specialty areas, flexibility of approach is going to be particularly important. The cookie cutter will not wash.

[Slide] Concluding remarks

35. I have talked about who I see as the key current gatekeepers for commercial mediation in New Zealand, and opportunities for growth with them. I have talked about what I see as some of the salient wants and needs that gatekeepers have in relation to commercial mediation. And I have talked about who I think the new gatekeepers of the future will be. No doubt there is much more than can, and should, be said on these topics, and much more that we can learn. I am sure that what I have said is but a small part of a much larger conversation.

36. Hopefully, better knowing our gatekeepers, now and in the future, will enable us to be the friendly green goblins who come to the rescue – switching on the light for those in the darkness of disputes, and saying "'ello poppets".

Mark Kelly,

5 March 2016

[1] Dr Grant Morris & Ms Daniella Schroder, *LEADR/Victoria University Commercial Mediation in New Zealand Project Report*, (June 2015), p3
[2] Ibid, p6
[3] https://www.courtsofnz.govt.nz/from/statistics/annual-statistics/june-2015/high-court
[4] https://www.courtsofnz.govt.nz/from/statistics/annual-statistics/june-2015/district-courts
[5] http://www.treasury.govt.nz/budget/2014/estimates/v7/057.htm
[6] CEDR, *Preliminary Findings – Survey of In-House use of Commercial Mediation,* 7 March 2013, retrieved from: http://www.cedr.com/docslib/In-House_Mediation_survey.pdf
[7] Morris & Schroder, n1, p4
[8] *Alternative dispute resolution: General civil cases* - Prepared for the Ministry of Justice by K. Saville-Smith and R. Fraser, Centre for Research Evaluation and Social Assessment, June 2004, p14, retrieved from: http://www.justice.govt.nz/publications/global-publications/a/alternative-dispute-resolution-general-civil-cases
[9] https://www.bankomb.org.nz/how-to-complain/complaints-process-guides
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[12] http://www.treasury.govt.nz/budget/2014/estimates/v7/057.htm
[13] *ABA Section of Dispute Resolution Task Force on Improving Mediation Quality Final Report*, April 2006-February 2008, American Bar Association Section of Dispute Resolution, p7
[14] *A Case for Mediation: The Cost-Effectiveness of Civil, Family, and Workplace Mediation*, Sarah Vander Veen, January 2014, retrieved from: http://www.mediatebc.com/PDFs/1-52-Reports-and-Publications/The-Case-for-Mediation.aspx, p27, citing: *Statistical summary: Use and benefits of alternative dispute resolution by the Department of Justice*. (2012). Retrieved from: http://www.justice.goc/olp/adr/doj-statistics.htm.
[15] Vander Veen, ibid, p7, citing: Campbell, T.G. & Pizzuti, S.L. (October 2011), *The effectiveness of case evaluation and mediation in Michigan Circuit Courts, East Lansing, MI*: Courtland Consulting. Retrieved from http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Reports/The%20Effectiveness%20of%20Case%20Evaluation%20and%20Mediation%20in%20MI%20Circuit%20Courts.pdf
[16] Morris & Schroder, n1, p5
[17] Eg:
   a. Agapiou & Clark, *Construction mediation in Scotland: A comparison of the views and experiences of lawyers and end-users,* in: Raiden, A B and Aboagye-Nimo, E (Eds) *Procs 30th Annual ARCOM Conference,* 1-3 September 2014, Portsmouth UK, Association of Researchers in Construction Management, 583-591, at 586; and
   b. Stipanowich & Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1000 Corporations*, 2013, Harvard Negotiation Law Review [Vol 19:1 Season 201x], p36

[18] Vander Veen, n14, citing: *Statistical summary: Use and benefits of alternative dispute resolution by the Department of Justice,* (2012). Retrieved from: http://www.justice.goc/olp/adr/doj-statistics.htm.

[19] Vander Veen, n14, citing: Gould, N., King, C. & Britton, P. (January 2010), *Mediating construction disputes: An evaluation of existing practice*, London: The Centre of Construction Law & Dispute Resolution, King's College London. Retrieved from: http://www.ciarb.org/information-and resources/2010/02/17/KCL%20Mediating%20Construction%20Complete.pdf
[20] Vander Veen, n14, citing: De Palo, G., Feasley, A., & Orecchini, F. (2011), *Quantifying the cost of not using Mediation – A data analysis*, Brussels: European Parliament Policy Department C: Citizens' Rights and Constitutional Affairs. Retrieved from: http://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19592/20110518ATT19592EN.pdf
[21] *IMI International Corporate Users ADR Survey January-March 2013*, at https://imimediation.org/imi-international-corporate-users-adr-survey-summary, table 1
[22] Eg, see *Alternative dispute resolution: General civil cases* , n8, table 3.3
[23] *ABA Section of Dispute Resolution Task Force on Improving Mediation Quality Final Report*, n13, p12
[24] Eg:

a. Agapiou & Clark, *A follow-up empirical analysis of Scottish construction clients interaction with mediation,* (2013) 32 C.J.Q., Issue 3 2013, p374; and
b. Stipanowich, *The International Evolution of Mediation: A Call for Dialogue and Deliberation*, (2015) 46VUWLR 1101, at n167

[25] http://www.pon.harvard.edu/daily/mediation/what-makes-a-good-mediator
[26]The Law Society Gazette, *Commercial mediation: resolution revolution?*, Grania Langdon-Down, 30 September 2013
[27] McCarty, *In-house roles: no longer the low-paid alternative*, 7 May 2014, NZ Lawyer
[28] Stipanowich, n.24.b, at 1213
[29] Agapiou & Clark, n17.a, p587
[30] See n6
[31] Morris & Schroder, n1, p6.
[32] Grant Morris, *Towards a history of mediation in New Zealand's legal system*, 4VULRP 83/2014, at p12
[33] European Association of Chambers of Commerce and Industry, *"PAN-EUROPEAN MEDIATION PRACTICES" Survey on the Use and Practice of b2b Mediation Year 2012 and 2013*, Report November 2014, pp34-35
[34] Hon Justice Winkelmann, *Mediation is no Substitute for Civil Justice*, paper delivered to the AMINZ Conference 2011, 6 August 2011
[35] http://www.stats.govt.nz/browse_for_stats/population/estimates_and_projections/ethnic-pop-projections-issues-and-trends.aspx
[36] http://www.stats.govt.nz/browse_for_stats/people_and_communities/maori/tatauranga-umanga-maori-2015/3-finan-position-perform-ma.aspx
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