

Neil Andrews

# The Three Paths of Justice

Court Proceedings, Arbitration,  
and Mediation in England

# THE THREE PATHS OF JUSTICE

# IUS GENTIUM

COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE

VOLUME 10

## Series Editors

Mortimer Sellers  
(University of Baltimore)  
James Maxeiner  
(University of Baltimore)

## Board of Editors

Myroslava Antonovych (Kyiv-Mohyla Academy)  
Nadia de Araujo (Pontifical Catholic University of Rio de Janeiro)  
Jasna Bakšić-Muftić (University of Sarajevo)  
David L. Carey Miller (University of Aberdeen)  
Loussia P. Musse Felix (University of Brasília)  
Emanuel Gross (University of Haifa)  
James E. Hickey Jr. (Hofstra University)  
Jan Klabbers (University of Helsinki)  
Claudia Lima Marques (Federal University of Rio Grande do Sul)  
Aniceto Masferrer (University of Valencia)  
Eric Millard (Paris-Sud University)  
Gabriël Moens (Murdoch University, Australia)  
Raul C. Pangalangan (The University of the Philippines)  
Ricardo Leite Pinto (Lusíada University of Lisbon)  
Mizanur Rahman (University of Dhaka)  
Keita Sato (Chuo University)  
Poonam Saxena (University of New Delhi)  
Gerry Simpson (London School of Economics)  
Eduard Somers (University of Ghent)  
Xinqiang Sun (Shandong University)  
Tadeusz Tomaszewski (University of Warsaw)  
Jaap W. de Zwaan (Netherlands Inst. of Intrntl. Relations, Clingendael)

# THE THREE PATHS OF JUSTICE

COURT PROCEEDINGS,  
ARBITRATION, AND MEDIATION  
IN ENGLAND

by  
Neil Andrews



Springer

Neil Andrews  
Clare College  
Trinity Lane  
CB2 1TL Cambridge  
United Kingdom  
nha1000@cam.ac.uk

ISBN 978-94-007-2293-4 e-ISBN 978-94-007-2294-1  
DOI 10.1007/978-94-007-2294-1  
Springer Dordrecht Heidelberg London New York

Library of Congress Control Number: 2011936162

© Springer Science+Business Media B.V. 2012

No part of this work may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, microfilming, recording or otherwise, without written permission from the Publisher, with the exception of any material supplied specifically for the purpose of being entered and executed on a computer system, for exclusive use by the purchaser of the work.

Printed on acid-free paper

Springer is part of Springer Science+Business Media ([www.springer.com](http://www.springer.com))

*For Liz, Sam, Hannah, and Ruby  
and in memory of  
Kurt Lipstein  
1909–2006  
Professor of Comparative Law, University of  
Cambridge,  
Fellow of Clare College,  
Bencher of Middle Temple*

# Foreword

In this book Neil Andrews does non-English lawyers a great service: he gives us an authoritative, digestible and—and at the same time—critical guide to the new civil justice in England and Wales. For a dozen years we have watched—sometimes puzzled—as the queen of common law systems has transformed itself in ways that we have not seen heretofore and to an extent that England has not experienced for a long time. Led by the ‘Woolf reforms’ of 1999, the metamorphosis has included, in addition to substantial changes in civil procedure, the introduction of the Human Rights Act of 1998 (entered into force 2000), the establishment of a Ministry of Justice (2007) and the abolition of the House of Lords (Judicial) and creation of the Supreme Court of the United Kingdom (began business 2009).

Neil Andrews is one of England’s best known proceduralists and author of one of its best known treatises on civil procedure. He, as well as anyone could, guides readers through the thickets and hedges of England’s reforms to the essential elements of the reforms. He helps readers learn conveniently what is new and what is old: what is system-shaking and is therefore especially worthy of foreign attention.

Such a guide is particularly needed by American lawyers and law reformers: Americans are accustomed to looking to England for ideas for the American system. Even before the Woolf reforms came into effect, some American observers ascribed a ‘Continental Character’ to English law distinct from America’s common law. We all wonder what the effects of the predominantly civil law European Union will be on its premier common law system.

American lawyers need not fear English abandonment of values their system holds dear. The ‘overriding objective’ of the Woolf reforms is the enabling of courts ‘to deal with cases justly.’ Areas they target for reform include putting parties on an equal footing, dealing with cases proportionately to the disputes involved, and handling cases expeditiously and fairly. Neil Andrews, in [Chap. 2](#) of the book, ‘Principles of Civil Justice,’ lays out four headings under which to consider the fundamental and important principles of civil justice:

- a. Regulating Access to Court and to Justice
- b. Ensuring the Fairness of the Process: a Shared Responsibility of the Court and the Parties
- c. Maintaining a Speedy and Efficient Process
- d. Achieving Just Outcomes

These are not alien to American lawyers: they are at the heart of American civil justice. They are the promises that America's founding fathers made in their declarations of rights of 1776.<sup>1</sup> These are, indeed, values shared by civil law systems.

I commend Neil Andrews for his openness. His work is valuable because he is critical. He is not timid. He is not content to recite the hopes of English reformers; he does not finesse hard problems by calling them out of place in a short work. He does not retreat to a student's outline. Instead he sets out the realities of the reforms' implementation. He calls failures when he sees them: through colorful language he imprints them in readers' memories. I give but one example:

Bill Gates himself, and other modern-day descendant of Croesus, would hesitate to run the risk of engaging in protracted and complicated claims hear by the High Court. The 'Woolf reforms' of 1999 were expected to alleviate the problem of the high costs of litigation. But the situation has not improved. [9.16]

Americans hoping to find in England a panacea for the failures of American civil justice will be disappointed. The ailments of English civil justice—above all lawyer control of proceedings—are largely our own. If we are to overcome them, we must be open to changes that differ from traditional common law approaches.

Baltimore, Maryland

James R. Maxeiner

---

<sup>1</sup> They were included in what are called 'open courts' clauses. That in Maryland's Declaration of Rights of November 3, 1776 reads:

17. That every freeman, for any injury done to him in his person, or property, ought to have remedy by the course of the law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the law of the land.

Maryland Declaration of Rights of Nov. 3, 1776, in *The Decisive Blow is Struck, A facsimile edition of The Proceedings of the Constitution Convention of 1776 and the First Maryland Constitution* (1977). Similar declarations were made throughout colonial America. J. Maxeiner, G. Lee, and A. Weber, *Failures of American Civil Justice in International Perspective* 3–5 (2011).



# Preface

This work is intended to enable lawyers, especially non-English lawyers, to gain an overview of the three main processes now operating in England for the resolution of civil disputes: civil proceedings in the courts, arbitration, and mediation. These three forms of civil justice, and their developing connections, continue to (1) bewilder, frustrate, and impoverish disputants, (2) enrich lawyers, (3) confuse most advisors, and (4) stimulate scholars. It seems to lie beyond the power of Government to respond successfully to (1). As for (2), proposals for changes in the costs rules for court litigation will increase the opportunity for some lawyers to become very rich quickly (contingent fees: 5.20 ff). It is hoped that (3) (confusion) might be reduced and (4) (stimulation) promoted by this short work. It is also hoped that the reader will find pointers for further research not just in the footnotes and bibliography, but in the section entitled 'Leading Contributors to English Civil Justice', which introduces foreign readers to the main players in the subject's modern development and analysis.

The text reflects fast-moving changes within this subject. The sources of this change are internal—constant development of the subject by the English courts and legislature—and external, notably the influence of the European legal authorities. For example, this book contains discussion of: curbing appeals (1.40; 4.01 ff); creation of the United Kingdom Supreme Court (2.06 ff; 4.03 ff); expansion of electronic justice (1.42); attempted reform of costs in England (5.20 ff); judicial abolition of the immunity protecting party-appointed experts against civil liability (3.73); awards of secret injunctions to protect privacy (currently a red-hot issue within England) (3.09); EU law and the limits of legal professional privilege (2.11 ff, and 3.30 ff); European human rights law and the scope of the privilege against self-incrimination (2.15 ff; 7.25); protective relief, namely 'freezing injunctions', in support of foreign proceedings (7.17 ff); the European mediation directive (2008) (9.49); mediation and sanctions (9.32); proposals for automatic referral of court proceedings to mediation (9.19); mediation sceptics (9.21); the long-running debate whether England should expand opportunity for opt-out system of class action

litigation in money actions (8.09; 8.23 ff); the controversy concerning arbitration and the ‘anti-suit injunction’ within the European Union (10.16 ff; 11.03 ff); problems concerning attempted enforcement of foreign arbitral awards under transnational convention (10.29 ff; 11.17 ff); the transnational trend towards combining the functions of mediators and arbitrators (11.36 ff); links between the courts and the processes of mediation and arbitration ([Chapter 11](#)); and perennial and fundamental issues, such as identification of fundamental principles of civil justice, under the American Law Institute/UNIDROIT principles (2.22), or Article 6(1) (2.02 ff) of the European Convention on Human Rights, and generally ([Chapter 2](#), notably the author’s four-fold categorisation at 2.35 ff—(i) Regulating Access to Court and to Justice (ii) Ensuring the Fairness of the Process (iii) Maintaining a Speedy and Efficient Process (iv) Achieving Just and Effective Outcomes); and the capacity of courts to engage actively in aspects of the case (1.08, 1.22 ff; 1.28).

I am grateful to my wife, Elizabeth Deyong, and our children, Samuel, Hannah, and Ruby. Their good humour has enabled me to keep the Law fully at arm’s length outside normal business hours.

This work is copyright Neil Andrews 2011.

Cambridge, UK

Neil Andrews

# Contents

<b>1</b>	<b>Introduction</b>	<b>1</b>
1.1	The New Procedural Code ('CPR 1998') and the Woolf Reforms	1
1.2	Enduring Features of the English Civil Justice System	3
1.3	Changes and Challenges Association with the Civil Procedure Rules (1998)	3
1.4	Six Phases of English Civil Proceedings	8
1.5	Concluding Remarks	23
<b>2</b>	<b>Principles of Civil Justice</b>	<b>25</b>
2.1	Introduction	25
2.2	Article 6(1), European Convention on Human Rights	26
2.3	Other Aspects of European Influence on English Civil Procedure	32
2.4	UNIDROIT/American Law Institute Project (2000–2006)	40
2.5	Author's First List of Principles: Principles of Civil Procedure (1994)	44
2.6	Author's Second List of Principles: English Civil Procedure (2003)	45
2.7	A Fresh Start: Four Fundamental Aims of Civil Justice	45
2.8	Concluding Remarks	47
<b>3</b>	<b>First Instance Proceedings</b>	<b>49</b>
3.1	Introduction to Accelerated Relief Concerning the Substance of the Claim	50
3.2	Interim Payments	50
3.3	Interim Injunctions	52
3.4	Default Judgments	55
3.5	Preliminary Issues	57
3.6	Summary Judgment	58
3.7	Striking Out Claims or Defences	59
3.8	Disclosure	62

3.9	Pre-action Protocols . . . . .	64
3.10	Pre-action Judicial Orders for Disclosure . . . . .	64
3.11	Disclosure Against Non-parties . . . . .	65
3.12	Assessment of Pre-action and Non-party Disclosures . . . . .	67
3.13	Disclosure of Documents During the Main Proceedings . . . . .	68
3.14	Privileges in General . . . . .	70
3.15	Legal Advice Privilege . . . . .	71
3.16	Litigation Privilege . . . . .	75
3.17	Experts . . . . .	80
3.18	Roles of the Court and Experts . . . . .	82
3.19	The ‘Single, Joint Expert’ System . . . . .	84
3.20	Court Assessors . . . . .	87
3.21	Party-Appointed Experts . . . . .	88
3.22	Selection and Approval of Party-Appointed Experts . . . . .	89
3.23	Disclosure of Party-Appointed Expert Reports . . . . .	91
3.24	Discussions Between Party-Appointed Experts . . . . .	94
3.25	Factual Witness Immunity . . . . .	99
3.26	Trial . . . . .	100
3.27	Evidence at Trial . . . . .	103
<b>4</b>	<b>Appeals and Finality . . . . .</b>	<b>107</b>
4.1	Appeals . . . . .	107
4.2	Res Judicata: ‘Cause of Action Estoppel’ and ‘Issue Estoppel’ . . . . .	115
4.3	Preclusion of Points That Should Have Been Raised: The Rule in <i>Henderson v. Henderson</i> (1843) . . . . .	118
4.4	Other Aspects of Finality . . . . .	119
<b>5</b>	<b>Costs . . . . .</b>	<b>121</b>
5.1	A Time of Change . . . . .	122
5.2	Costs-Shifting Rule . . . . .	122
5.3	Security for Costs . . . . .	123
5.3.1	Factors Relevant to the Exercise of the Discretion to Order Security for Costs . . . . .	124
5.3.2	Claimant Resident Outside England and Outside the Territories of the European Union or the Lugano Convention . . . . .	125
5.3.3	Security for the Costs of an Appeal . . . . .	126
5.4	Protective Costs Orders and Costs Capping . . . . .	126
5.5	Discretionary Costs Decisions . . . . .	127
5.6	Standard and Indemnity Costs . . . . .	128
5.7	Costs Against Non-parties . . . . .	128
5.8	‘Wasted Costs’ Orders Against Lawyers and Experts . . . . .	129
5.9	Conditional Fee Agreements . . . . .	130
5.10	Assessment of the English Conditional Fee System . . . . .	135
5.11	Comparison with USA Contingency Fees . . . . .	137
5.12	The Jackson Report (2009–10) . . . . .	138

<b>6</b>	<b>Enforcement of Court Judgments and Orders</b>	141
6.1	Money Judgments	141
6.2	Enforcement of Injunctions	145
<b>7</b>	<b>Protective Relief</b>	151
7.1	Introduction	151
7.2	Freezing Relief	152
7.3	Search Orders	161
7.4	Civil Orders for Custody of Passports	165
<b>8</b>	<b>Multi-party Litigation</b>	167
8.1	Three Forms of English Multi-party Litigation	168
8.2	Representative Proceedings ('Opt Out')	169
8.3	Group Litigation Orders ('Opt In')	178
8.4	English Rejection (2009) of Generic 'Opt Out' Class Action	184
8.5	Conclusion	186
<b>9</b>	<b>Mediation</b>	187
9.1	The Spectrum of ADR	187
9.2	Disputants' Duty to Consider Mediation	191
9.3	Mediation's Growth in England	193
9.4	Mediation and Settlement Scepticism	197
9.5	Mediation Agreements	201
9.6	Pre-action Duty of Parties to Consider ADR	203
9.7	Occasions for Judicial Encouragement of Mediation	204
9.8	Judicial Order to 'Stay' Court Proceedings to Facilitate Mediation	205
9.9	Costs Sanctions for Failure to Pursue Mediation	206
9.10	Privileged Mediation Discussion	211
9.11	English Reception of the European Mediation Directive	214
9.12	Concluding Remarks	215
<b>10</b>	<b>Arbitration in England</b>	219
10.1	Introduction	219
10.2	Confidentiality	221
10.3	Party Selection: Of the Panel, Governing Norms, and Arbitral Procedure	225
10.4	Arbitration Clauses	227
10.5	Anti-suit Injunctions Concerning Offending Proceedings Outside the European Union	228
10.6	Anti-suit Injunctions Concerning Offending Proceedings Within the Europe Union	231
10.7	Damages for Breach of an Arbitration Clause	235
10.8	Speed and Efficiency	237
10.9	Finality	237
10.10	Freezing Relief and Arbitration	240

10.11	Recognition and Enforcement of Arbitration Awards Under the New York Convention (1958) . . . . .	241
10.12	Conclusion . . . . .	247
<b>11</b>	<b>Connections Between Courts, Arbitration, Mediation and Settlement: Transnational Observations . . . . .</b>	<b>249</b>
11.1	Introduction . . . . .	249
11.2	Courts and the Appointment of Arbitrators . . . . .	251
11.3	Courts and Anti-suit Remedies to Support Arbitration Agreements . . . . .	251
11.4	Courts and Protective Relief to Support Arbitration . . . . .	253
11.5	Courts Providing Support for the Gathering of Evidence for Use in Arbitration . . . . .	259
11.6	Recognition and Enforcement of Foreign Arbitral Awards Under the New York Convention (1958) . . . . .	261
11.7	Effect of a National Court's Annulment of a Domestic Arbitral Award . . . . .	262
11.8	Mediation Before Commencement of Arbitration . . . . .	264
11.9	Mediation When Arbitration is Pending . . . . .	265
11.10	The Conservative View: Arbitrators Should Not Combine the Function of a Mediator . . . . .	265
11.11	Parties Consenting to Arbitrators Acting Also as Mediators: The Transnational Rise of the Chameleon 'Neutral' . . . . .	267
11.12	Institutional Support for Contractually Mandating Arbitrators to Facilitate Settlement . . . . .	271
11.13	Concluding Remarks . . . . .	274
	<b>Bibliography . . . . .</b>	<b>275</b>
	<b>Leading Contributors to English Civil Justice . . . . .</b>	<b>281</b>
	<b>Index . . . . .</b>	<b>293</b>

# Chapter 1

## Introduction

### Contents

1.1 The New Procedural Code ('CPR 1998') and the Woolf Reforms . . . . .	1
1.2 Enduring Features of the English Civil Justice System . . . . .	3
1.3 Changes and Challenges Association with the Civil Procedure Rules (1998) .	3
1.4 Six Phases of English Civil Proceedings . . . . .	8
1.5 Concluding Remarks . . . . .	23

### 1.1 The New Procedural Code ('CPR 1998') and the Woolf Reforms

**1.01** Under the 1998 procedural code, the Civil Procedure Rules ('CPR (1998)'), also known as the 'Woolf Reforms',<sup>1</sup> English 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 1998 English procedure had generally avoided pre-trial judicial management (although, as explained below, 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).<sup>2</sup> The 1998 code was intended to change the culture of English court-based litigation. English civil procedure has moved from an antagonistic style to a more co-operative

---

<sup>1</sup> Lord Woolf's two reports are: *Access to Justice: Interim Report* (1995) and *Access to Justice: Final Report* (London, 1996) both available on-line at: <http://www.dca.gov.uk/civil/reportfr.htm>.

<sup>2</sup> On the CPR system from the perspective of the traditional principle of party control, Neil Andrews, 'A New Civil Procedural Code for England: Party-Control "Going, Going, Gone"', *Civil Justice Quarterly* 19 (2000): 19–38; Neil Andrews, *English Civil Procedure* (Oxford: Oxford University Press, 2003), 13.12 to 13.41; 14.04 to 14.45; 15.65 to 15.72.