

CARROT AND STICK APPROACH IN ENGLISH MEDIATION – THERE MUST BE ANOTHER WAY

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ABSTRACT

Intending to achieve costs savings and delivering value in the dispute management process in both civil and commercial disputes, parties are “encouraged” to engage in mediation according to the decisions handed down in Halsey and PGF II by the English courts. The suspicion of de facto or implied compulsory mediation was further expressed with the implementation of the EU Mediation Directive. Disputants are actively encouraged to take up mediation. Failing to do so, costs sanctions will be used as a “stick” to penalize for having unreasonably refused to mediate in the eyes of the courts. This development has seen the voluntary nature of mediation, the need to educate the parties and the need for a legislative framework being sidelined.

KEYWORDS: *mediation, compulsory mediation, ADR*

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Cajole them, *yes*. Encourage them, *yes*. But compel them, *no* in my view.

–Lord Dyson¹

I. INTRODUCTION

Lord Dyson, followed by the English court judges, and Genn stand firmly behind the view that “mediation may be about problem-solving, it may be about compromise . . . about repairing damaged relationships – but it is not about substantive justice”;² the English courts have always been adamant that unwilling parties cannot be compelled into mediation. However, at the same time the English courts have imposed cost sanctions on the successful party who had expressly or impliedly refused to engage in mediation, as seen in the latest *PGF II* case.³ This gives rise to the suspicion of *de facto* or implied compulsory mediation in the practice of English courts. Such concerns prompt the need for a close examination of the English courts practice against the aim for a higher take up rate in mediation, and against the nature of mediation.

Mediation is defined as a dispute resolution mechanism through its consensual and involving process⁴ in resolving disputes.⁵ Such a dispute resolution mechanism has attracted the attention of the EU invoking the important role mediation can play in commercial and civil disputes in aid of increasing court efficiency in terms of costs and resources. This

¹ Lord Dyson, *A Word on Halsey v. Milton Keynes*, 77(3) ARB. 337, 338 (2011).

² HAZEL GENN, JUDGING CIVIL JUSTICE 117-18 (2009).

³ *PGF II SA v OMFS Company 1 Limited*, [2013] EWCA (Civ) 1288.

⁴ Tony Allen, *Successful Defendant Can Be Deprived of Costs: Another Reading of Daniels v. Metropolitan Police Commissioner*, KEMP NEWS, Apr. 2, 2006, at 2; Andrew Agapiou & Bryan Clark, *An Empirical Analysis of Scottish Construction Lawyers' Interaction with Mediation: A Qualitative Approach*, 31(4) CIV. JUST. Q. 494, 505 (2012); Andrew Agapiou & Bryan Clark, *A Follow-Up Empirical Analysis of Scottish Construction Clients Interaction with Mediation*, 32(3) CIV. JUST. Q. 349, 349 (2013); Tony Bennett, *The Role of Mediation: A Critical Analysis of the Changing Nature of Dispute Resolution in the Workplace*, 41(4) INDUS. L.J. 479, 479 (2012); Lord Neuberger of Abbotsbury, Master of the Rolls, Speech in The Gordon Slynn Memorial Lecture 2010: Has Mediation Had Its Day? (Nov. 20, 2010), <http://kedah.kehakiman.gov.my/?q=system/files/document/Mediation.pdf>. However, Lord Dyson also stated that mediation is not necessary appropriate for every dispute. Dyson, *supra* note 1, at 337; see also Derek Roebuck, *Keeping An Eye on Fundamentals*, 78(4) ARB. 375, 375-76 (2012); Anthony Connerty, *ADR as A "Filter" Mechanism: The Use of ADR in the Context of International Disputes*, 79(2) ARB. 120, 133 (2013); Markus Petsche, *Mediation as the Preferred Method to Solve International Business Disputes? A Look into the Future*, 4 INT'L BUS. L.J. 251, 251 (2013)

⁵ John Sturrock, *The Role of Mediation in A Modern Civil Justice System*, 21 SCOTS L. TIMES 111, 112 (2010); Leonard Riskin, *Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1(7) HARV. NEGOT. L. REV. 7, 23 (1997).

development can be seen in the EU Directive,⁶ the Woolf Reform on Access to Justice,⁷ the Jackson Report⁸ on civil litigation costs in England, and the Wales and the Gill Report in Scotland.⁹ They all highlight mediation as a means of achieving costs savings and delivering value in the dispute management process¹⁰ in large insurance cases,¹¹ personal injury cases,¹² pre-action protocol for personal injury claims,¹³ bodily injury claims,¹⁴ small business disputes,¹⁵ housing claims¹⁶ and construction disputes.¹⁷

While using the word “encouragement”, the voluntary nature of mediation was highlighted in the Directive and the Reports.¹⁸ However different approaches have been taken regarding the question of whether parties shall be compelled into mediation. The Directive holds a possible view on this question, whereas the English Reports insist on the consensual nature of mediation¹⁹ which can be observed in *Halsey*²⁰ and *PGF II*.²¹

⁶ The EU Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters was introduced to provide for mediation in cross-border disputes as well as internal mediation process among the Member States. Council Directive 2008/52 of the European Parliament and the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, recital 8, 2008 O.J. (L136) 3, 3 (EU) [hereinafter the Mediation Directive]. It was implemented by the UK Government in The Cross-Border Mediation (EU Directive) Regulations, 2011, S.I. 2011/1133. See also Karen Akinc, *Mediation in Turkey and the Mediation Bill*, 78(3) ARB. 269, 269 (2012).

⁷ See generally LORD WOOLF, ACCESS TO JUSTICE – FINAL REPORT ch. 13 (1996), available at <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/final/sec3c.htm>. Since The Woolf Reform, a consensus that mediation is a suitable dispute resolution mechanism for many civil and commercial disputes has been reached among the Government and the courts which have carried out the policy to encourage parties to take up mediation as seen in the reform of the CPR provisions and the practice guides of the Chancery and Queen's Bench Divisions. Such an attitude can also be observed in the latest *PGF II* where the court, with caution, allowed empirical evidence of success to be used as the supporting evidence of the use of mediation. In *PGF II SA v OMFS Company 1 Limited*, [2013] EWCA (Civ) 1288, [24], the court used the 70 percent day-success rate and 20 percent post-mediation settlement rate provided by the Centre for Effective Dispute Resolution as the evidence.

⁸ See generally LORD JUSTICE JACKSON, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT (2010).

⁹ SCOTTISH EXECUTIVE, MODERN LAWS FOR A MODERN SCOTLAND: A REPORT ON CIVIL JUSTICE IN SCOTLAND 14, 18 (2007).

¹⁰ JACKSON, *supra* note 8, at 386.

¹¹ *Id.* at 216.

¹² *Id.* at 175-76.

¹³ *Id.* at 223.

¹⁴ *Id.* at 228.

¹⁵ *Id.* at 258.

¹⁶ *Id.* at 269.

¹⁷ *Id.* at 299.

¹⁸ *Id.* at 355; the Mediation Directive, *supra* note 6.

¹⁹ Julian Sidoli del Ceno & Peter Barrett, *Part 36 and Mediation: An Offer to Settle Will Not Suffice - PGF II SA v (1) OMFS Co and (2) Bank of Scotland Plc*, 78(4) ARB. 401, 403 (2012).

²⁰ See generally *Halsey v. Milton Keynes Gen. NHS Trust*, [2004] EWCA (Civ) 576, [2004] 1 W.L.R. 3002.

²¹ *PGF II SA v OMFS Company 1 Limited*, [2013] EWCA (Civ) 1288.

While waving the flag of consent, Lord Justice Jackson, nevertheless pointed out that the question of whether mediation is appropriate shall be answered by the experienced practitioners and the court. Consequently, the English courts have penalised successful parties at times with a refusal of awarding costs for having unreasonably failed to mediate in the eyes of the courts.²² With such a penalty in place and the courts acting as the guardians to determine the unreasonableness of the refusal, the aim to encourage both parties to be mutually engaged in mediation seems to be sidelined, despite Lord Dyson's famous statement that it is not the court's place or role to force compromise upon people who do not want to do so.²³ *PGF II* appears to continue to surreptitiously introduce compulsory mediation indirectly into the English courts by means of Civil Procedure Rules. The English ruling not only requires the parties to make it their duty to consider and engage in the settlement process, but also imposes on the parties a duty to respond to the invitation, and such a response will be scrutinised closely by the courts to ascertain its reasonableness.

Clearly, a carrot and stick attitude has been displayed in encouraging parties to use mediation to resolve their disputes in the strongest way. With concerns over implied compulsory mediation following developments in the case law, the purpose of this article intends to demonstrate that the decisions in the case law are technically sound in terms of their legal interpretations. However, while the decisions will be argued as sound, the author also intends to highlight how the measures taken by the court to encourage the parties to partake in mediation could sideline the consensus nature of mediation. Furthermore, the appearance of compulsory mediation may become apparent. Since the incorporation of mediation into the civil justice system is occurring, a critical view on the issues of mutual consent, educating disputants, the subjective view of the judges and the aims of efficiency and proportionality will be examined in terms of the ramifications of the relevant decisions. Finally, this article concludes with an analysis of the relevant issues against the practice of legislative compulsory mediation within some EU Member States, as well as in Hong Kong, Malaysia and Singapore, which have enjoyed a substantial legal congruence with the English practice.

II. POLICY DRIVEN CARROT APPROACH

As stated above, one has seen the carrot approach adopted in the pan-European policy of encouraging the use of mediation in the EU Directive on Mediation, the Civil Justice Reforms and UK case law. In the UK, the

²² Anna Poole, *Mediation Case Law: Current Issues*, 23 SCOTS L. TIMES 155, 156 (2008).

²³ *Halsey v. Milton Keynes Gen. NHS Trust*, [2004] EWCA (Civ) 576, [2004] 1 W.L.R. 3002, [11].

carrot approach started from Lord Woolf's words of encouragement, that "litigation is not the only means of resolving civil disputes, or necessarily the best and proposed",²⁴ as an early review reveals that mediation is said to have a positive impact on spiraling litigation costs in civil proceedings.²⁵ Consequently, it is less likely for judges to see cases where £50,000 has been spent by the parties fighting over £7,000 up and down the land, as expressed by Ward LJ in *Daniels*.²⁶ Lord Dyson further supported the consensus nature of mediation and refused to use court power to order parties to submit their disputes to mediation against their will. He stated:

It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court.²⁷

The strongest encouragement for the use of mediation in civil justice reform comes from the EU Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008, regarding certain aspects of mediation in civil and commercial matters.²⁸ It establishes the framework for mediation law in all Member States to "harmoniously balance mediation with each state's judiciary; to encourage the use of mediation and to ensure its homogeneous use throughout the Union"²⁹ This favouritism towards mediation was further taken up by Lord Justice Jackson³⁰ who highlighted the underuse of mediation.³¹ Considering the parties' rights to press on to court trial, as stressed in the Directive,³² Lord Justice Jackson suggested the civil justice reforms shall tackle the hemorrhage of wasted costs by encouraging the parties to consider mediation as an alternative dispute resolution, as well as to provide a coherent package designed to control disproportionate costs³³ and promote access to justice.³⁴

²⁴ WOOLF, *supra* note 7, ch. 14, ¶ 39.

²⁵ Paul Fenn et al., *The Impact of the Woolf Reforms on Costs and Delay* 1 (NOTTINGHAM UNIV. BUS. SCH. CTR. FOR RISK & INS. STUDIES, Discussion Paper No. 2009.I, 2009).

²⁶ Fiona Jane Daniels v. Comm'r of Police for Metropolis, [2005] EWCA (Civ) 1312, [35], [2006] C.P. Rep. 9.

²⁷ Halsey v. Milton Keynes Gen. NHS Trust, [2004] EWCA (Civ) 576, [2004] 1 W.L.R. 3002, [9].

²⁸ It was implemented by the UK Government in Statutory Instruments 2011 No. 1133 The Cross-Border Mediation (EU Directive) Regulations 2011.

²⁹ Akinc, *supra* note 6, at 269.

³⁰ JACKSON, *supra* note 8, at 49 (Chapter 4, ¶ 3.32).

³¹ *Id.* at 49 (Chapter 4, ¶ 3.31). The cause of such futile litigation is pointed out as (a) the failure by one or both parties to get to grips with the issues in good time or (b) the failure of the parties to have any effective dialogue.

³² The Mediation Directive, *supra* note 6, recital 14.

³³ *See id.*

³⁴ JACKSON, *supra* note 8, at i, 49.

With the policy driving the wider use of mediation in civil and commercial disputes, the carrot approach focused on the benefits the consensus nature of mediation can bring to disputants. The importance of parties' joint consensus based on good faith to partake in mediation has always been recognized in England as the key to mediation's success, because "parties are required to attempt to mediate their dispute, there is never any compulsion to reach a settlement and the parties are generally free to leave the mediation at any time".³⁵

A similar view was also expressed in the European Mediation Directive,³⁶ where, in Recital 6, the Council identifies with Genn's finding that mediation resulting from parties' agreements are more likely to be complied with and are more likely to preserve an amicable and sustainable relationship between the parties. This holds the key to the success of mediation, especially considering the benefits of engaging in mediation "become even more pronounced in situations displaying cross-border elements".³⁷ The importance of the voluntary nature of mediation forms the basis of the process that was further identified in Recital 10, "whereby two or more parties to a cross-border dispute attempt by themselves, on a voluntary basis, to reach an amicable agreement on the settlement of their dispute with the assistance of a mediator",³⁸ as well as art 3³⁹ and Recital 13⁴⁰ of the Directive.

The need for parties' voluntary participation in mediation was also stressed by Lord Justice Jackson, who stated "ADR should not be mandatory for all proceedings",⁴¹ and that "no-one should be forced to mediate, not least because mediation can be an expensive process. However, before small businesses opt to incur the even more substantial costs of litigation, their decision not to mediate must, at the very least, be properly informed".⁴²

Although Lord Justice Jackson stated: "no-one should be forced to mediate",⁴³ it is clear that the consensus nature of mediation is of paramount consideration in the rejection of the compulsory element in mediation. After all, "the parties remain in ultimate control of the decision to settle and the terms on which settlement is reached . . . , there is never

³⁵ Hazel Genn, *Quick Cheap and Satisfying*, in PROPORTIONATE DISPUTE RESOLUTION 1, 2 (Hazel Genn et al. eds., 2006).

³⁶ The Mediation Directive, *supra* note 6, recital 14.

³⁷ *Id.* recital 6.

³⁸ *Id.* recital 10.

³⁹ *Id.* art. 3.

⁴⁰ *Id.* recital 13.

⁴¹ JACKSON, *supra* note 8, at xxiii.

⁴² *Id.* at 262.

⁴³ *Id.*

any compulsion to reach a settlement and the parties are generally free to leave the mediation at any time”.⁴⁴

Although the importance of the consensus nature of mediation was acknowledged by the European Council in Recitals 6, 10 and Article 3 of the Mediation Directive, the Council’s view on mediation as a voluntary process controlled by the parties themselves is not limitless. The Council expressed the view in Recital 13 that Member States shall allow the court to impose time limits for a mediation process, so mediation does not turn into a long costly battle between the parties and defeat its original purpose. Sharing the Council’s view on the costs, Lord Justice Jackson⁴⁵ supports the role played by courts in determining the suitability of mediation to promote early settlement.⁴⁶ Further restrictions on the consensual element of mediation were imposed when the Council raised the possibility of compulsory, incentives or sanctions-led mediation in Recital 14 of the Directive. It reads:

Nothing in this Directive should prejudice national legislation making the use of mediation compulsory or subject to incentives or sanctions provided that such legislation does not prevent parties from exercising their right of access to the judicial system. Nor should anything in this Directive prejudice existing self-regulating mediation systems in so far as these deal with aspects which are not covered by this Directive.

These views plant the seed of compulsion, and further undermine the importance of parties’ good will and consensus, which are viewed as pillars of success for mediation in the Directive and the reports. It also attracts the concerns over the implied indirect compulsory mediation among academics and practitioners.

III. WHEN THE CARROT IS REPLACED BY THE STICK – ARE THE ENGLISH COURTS WRONG?

With litigation costs reaching a disproportionate level,⁴⁷ the English courts have displayed their readiness in applying the “stick” approach to encourage the use of mediation despite their deeply rooted belief in the voluntary nature in mediation. To address the issue of high legal costs, the Jackson Review has applied “the carrot and stick approach”. The carrot

⁴⁴ Genn, *supra* note 35.

⁴⁵ JACKSON, *supra* note 8, at 160, 229, 327, 349, 352.

⁴⁶ *Id.* at xxii.

⁴⁷ Fiona Jane Daniels v. Comm’r of Police for Metropolis, [2005] EWCA (Civ) 1312, [35], [2006] C.P. Rep. 9.

was presented to the parties by invoking the benefits which mediation brings in appropriate cases, and stressing that “[w]hat the court can and should do (in appropriate cases) is (a) to encourage mediation and point out its considerable benefits; (b) to direct the parties to meet and/or to discuss mediation”.⁴⁸ Nevertheless, when carrots fail to tempt the disputants to engage in mediation, the stick will make its appearance to penalise the reluctant parties who either expressly or impliedly make their rejection known to the other party; in terms of requiring “an explanation from the party which declines to mediate, such explanation not to be revealed to the court until the conclusion of the case; and . . . to penalise in costs parties which have unreasonably refused to mediate. The form of any costs penalty must be in the discretion of the court”.⁴⁹

This approach prompts the question of whether the English courts are wrong in applying the stick approach. Although the readiness in refusing to award costs to a successful party who has refused take up the mediation invitation appears to be indirectly undermining the voluntary of mediation, the English courts are correct in doing so from a legal perspective. Under the Civil Procedure Rules (CPR) which implements the suggestions made in the Woolf Report, the English courts, long before the Jackson Report, are empowered to impose cost sanctions on parties who unreasonably refuse to mediate. To achieve the overriding objectives of dealing with cases justly and proportionately regarding costs,⁵⁰ the courts are empowered to encourage “the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedures”⁵¹ through active case management.⁵² Such power was further strengthened by rule 44 of the CPR which allows the court to penalise parties by departing from the general rules⁵³ on awarding costs⁵⁴ for their unreasonable conducts⁵⁵ in refusing to take part in mediation “before, as well as during the proceedings”,⁵⁶ and the “admissible offer to settle made by a party”⁵⁷ under Part 36.⁵⁸

⁴⁸ JACKSON, *supra* note 8, at 361.

⁴⁹ *Id.* (“penalties may include (a) reduced costs recovery for a winning party; (b) indemnity costs against a losing party, alternatively reduced costs protections for a losing party which has the benefit of qualified one way costs shifting.”).

⁵⁰ Civil Procedure Rules, 1998, S.I. 1998/3132, r.1.

⁵¹ *Id.* r. 1.4 (2)(e).

⁵² *Id.* r. 1.4(2).

⁵³ *Id.* r. 44.2(2)(a).

⁵⁴ *Id.* r. 44.2(2)(b).

⁵⁵ *Id.* r. 44.2(4)(a).

⁵⁶ *Id.* r. 44.2(5)(a).

⁵⁷ *Id.* r. 44.2(4)(c).

⁵⁸ *Id.* r. 36.10A(4)(b).

Such a departure from the general rules⁵⁹ on awarding costs has been taken by judges in some frequently cited cases. For instance, Lord Justice Brooke *Dunnett v. Railtrack plc*⁶⁰ exercised the stick approach to ensure that the policy was brought to the attention of the legal practitioners who are standing in the front line while advising their clients about dispute resolution.⁶¹ Upholding the policy, both parties and the legal practitioners are told that the stick may be waived at them “if they turn it down out of hand of chance of alternative dispute resolution when suggested by the court”.⁶²

Famously, this stick approach has been given more teeth⁶³ since *Halsey*.⁶⁴ In *Halsey*, ignoring the concerns over the suitability of mediation in non-family disputes,⁶⁵ the judge applied rule 1.4 of the CPR and followed the political pledges issued by the Lord Chancellor and the Department for Constitutional Affairs⁶⁶ as the starting point, and indicated that practice directions and pre-action protocols have obliged the court to deal with cases justly through “active case management”,⁶⁷ which included “encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure”.⁶⁸ The English Court of Appeal established that the court may use its discretion to depart from the usual rule⁶⁹ stipulated in CPR Rule 36(10)(5), and confirmed that successful parties should not recover their costs if it can be shown that the successful party unreasonably refused to

⁵⁹ *Id.* r. 36.10(5). As the general rule, subject to the court orders, the claimant will be entitled to the costs of the proceedings up to the date on which the relevant period expired; and the offeree will be liable for the offeror’s costs for the period from the date of expiry of the relevant period to the date of acceptance.

⁶⁰ Susan Dunnett v. Railtrack PLC, [2002] EWCA (Civ) 303.

⁶¹ This is set out in Part One of the Civil Procedure Rules.

⁶² Susan Dunnett v. Railtrack PLC, [2002] EWCA (Civ) 303, [15].

⁶³ JACKSON, *supra* note 8, at 49.

⁶⁴ *Halsey v. Milton Keynes Gen. NHS Trust*, [2004] EWCA (Civ) 576, [2004] 1 W.L.R. 3002.

⁶⁵ HAZEL GENN, COURT-BASED ADR INITIATIVES FOR NON-FAMILY CIVIL DISPUTES: THE COMMERCIAL COURT AND THE COURT OF APPEAL 58-67 (2002). *See also* *Halsey v. Milton Keynes Gen. NHS Trust*, [2004] EWCA (Civ) 576, [6], [2004] 1 W.L.R. 3002.

⁶⁶ *Halsey v. Milton Keynes Gen. NHS Trust*, [2004] EWCA (Civ) 576, [7], [2004] 1 W.L.R. 3002 (The Court expressed that “We are also mindful of the position which had been taken by Government on this issue. Thus, in March 2001, the Lord Chancellor announced an ‘ADR Pledge’ by which all Government departments and Agencies made a number of commitments including that: ‘Alternative Dispute Resolution will be considered and used in all suitable cases wherever the other party accepts it.’ In July 2002, the Department for Constitutional Affairs published a report stated that the pledge as to the effectiveness of the Government’s commitment to the ADR pledge. . . . following initiative on the part of the National Health Service Litigation Authority”).

⁶⁷ Civil Procedure Rules, 1998, S.I. 1998/3132, r. 1.4(1); *Halsey v. Milton Keynes Gen. NHS Trust*, [2004] EWCA (Civ) 576, [4], [2004] 1 W.L.R. 3002.

⁶⁸ Civil Procedure Rules, 1998, S.I. 1998/3132, r. 1.4(2)(e); *Halsey v. Milton Keynes Gen. NHS Trust*, [2004] EWCA (Civ) 576, [4], [2004] 1 W.L.R. 3002.

⁶⁹ Civil Procedure Rules, 1998, S.I. 1998/3132, r. 36.10(5).

engage in ADR.⁷⁰ Nevertheless, in Lord Dyson's own words, the deprivation of a successful party's costs is "an exception" to the general rule that costs should follow the event.⁷¹ This led to *Daniels*,⁷² where Lord Justice Ward is in agreement with Lord Dyson.⁷³

While *Halsey* sent out a message that litigants cannot reject the invitations to mediate unreasonably and that reasonableness will be determined by the court, *PGF II* took this a step further and concluded that silence to the invitation is viewed as unreasonable behaviour which will deprive the winning party of costs. Lord Justice Briggs made it clear that based on sound practical and policy reasons,⁷⁴ silence in face of a serious invitation to engage in ADR was itself a refusal and is viewed as unreasonable.⁷⁵ A failure to provide reasons for a refusal is destructive to the real objective of encouraging parties to consider and engage with the ADR process.⁷⁶ Not only has *PGF II* held the view that a proper response to the call to mediate has to be made, but so has *Bruchell*,⁷⁷ and *Rolf*⁷⁸ also held that "[t]he parties cannot ignore a proper request to mediate simply because it was made before the claim was issued". This has further prompted the ADR Handbook⁷⁹ to set out the steps⁸⁰ for the recipient of the invitation to mediate, in order to avoid a costs sanction.

⁷⁰ A refusal can be deemed as unreasonable according to (1) the nature of the dispute, (2) the merits of the case, (3) the extent to which other settlement methods have been attempted, (4) whether the costs of ADR would be disproportionately high, (5) whether any delay in setting up and attending ADR would have been prejudicial, and (6) whether ADR had a reasonable prospect of success.

⁷¹ *Halsey v. Milton Keynes Gen. NHS Trust*, [2004] EWCA (Civ) 576, [13], [2004] 1 W.L.R. 3002.

⁷² *Fiona Jane Daniels v. Comm'r of Police for Metropolis*, [2005] EWCA (Civ) 1312, [35], [2006] C.P. Rep. 9.

⁷³ *Id.* [38] (Ward L.J. stated, "What else can the court do? It seems to me that if a party has behaved unreasonably then this may amount to conduct within CPR 44 which will justify departure from the usual order that costs follow the event. Unreasonable conduct is the keystone. What is unreasonable depends inevitably on all the circumstances of the case. Judges should not fear to investigate the question").

⁷⁴ *PGF II SA v OMFS Company I Limited*, [2013] EWCA (Civ) 1288, [35].

⁷⁵ *Id.* [34]. Lord Justice Briggs's extension was based on the considerations that the subjective standard, i.e. the parties' perception, should be examined in the assessment of unreasonableness of a refusal.

⁷⁶ *Id.* [37].

⁷⁷ *Burchell v Bullard & Ors*, [2005] EWCA (Civ) 358, [43].

⁷⁸ *Rolf v De Guerin*, [2011] EWCA (Civ) 78, [46].

⁷⁹ SUSAN BLAKE ET AL., *THE JACKSON ADR HANDBOOK* ¶ 11.56 (2013).

⁸⁰ *Id.* The steps are: "a.) Not ignoring an offer to engage in ADR; b.) Responding promptly in writing, giving clear and full reasons why ADR is not appropriate at the stage, based if possible on the *Halsey* guidelines; c.) Raising with the opposing party any shortage of information or evidence believed to be an obstacle to successful ADR, together with consideration of how that shortage might be overcome; d.) Not closing off ADR of any kind, and for all time, in case some other method than that proposed, or ADR at some later date, might prove to be worth pursuing".

IV. WILL THE STICK APPROACH TRANSLATE PARTICIPATION INTO GOOD WILL OF THE DISPUTANTS?

The condemnation of an unwilling party in terms of a costs sanction for not responding to the invitation to mediation as decided in *PGF II* may give rise to issues of whether such an attitude would genuinely promote the good faith required for a successful mediation, or whether such an attitude would artificially increase the number of mediations. Considering that the parties are indirectly forced into mediation for fear of a costs sanction by the courts, the number of takers may increase. However this would put the element of good faith in doubt. In expressing concerns over extra costs⁸¹ borne by the parties and the potentially fruitless resolutions of forcing parties to mediation, Lord Dyson stated that:

If the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process. If a judge takes the view that the case is suitable for ADR, then he or she is not, of course, obliged to take at face value the expressed opposition of the parties. In such a case, the judge should explore the reasons for any resistance to ADR. But if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it.⁸²

Lord Dyson's statement confirmed that good will based on the parties' consensus holds the key to the success of mediation, which corresponds with Genn's valid concerns over compulsory mediation. After all, the success rate of mediation, which can lead to efficiency and better use of court resources, is not about more parties going through mediation but failing to come to agreement. Instead, it is about more parties demonstrating good will in engaging in mediation with the hopes that a compromised resolution can be reached between them.

Linking the decision in *PGF II* with Lord Justice Briggs's view on the underuse of mediation, it is understandable that courts would like to see more litigants respond positively to the call for mediation. However the questions one has to ask are, whether the litigants are left without any choices but to mediate, simply because of the court's policy to promote the

⁸¹ Brenda Tronson, *Mediation Orders: Do the Arguments Against Them Make Sense?*, 25(2) CIV. JUST. Q. 412, 418 (2006); Sir Bernard Rix, *The Interface of Mediation and Litigation*, 80(1) ARB. 21, 22 (2014).

⁸² *Halsey v. Milton Keynes Gen. NHS Trust*, [2004] EWCA (Civ) 576, [10], [2004] 1 W.L.R. 3002.

use of mediation in order to achieve a high taking-up rate and to address the issues of underuse, as well as determine whether the element of good faith should be ignored in the process of achieving those aims.

Strictly speaking, relying on the CPR and the case law, the English courts have a legal basis to grant exceptions to the rules on awarding costs. However, the question that remains at issue is whether the English courts' decisions had drawn parties' attention to the advantages of mediation, as the Woolf and Jackson reports have hoped, or have drawn attention to the possibility of sanctions, which can be imposed in the case of failing to respond positively to the mediation request. From the alerts issued by law firms after *PGF II*, titles such as "Silence is far from golden",⁸³ "Remain silent at your peril!",⁸⁴ "Silence can be expensive",⁸⁵ "Cost sanctions for failing to respond to an offer to mediate: a warning to litigants in the UK",⁸⁶ "Should mediation be mandatory?",⁸⁷ "Damages for dilapidation",⁸⁸ "Costs order penalises failure to mediate",⁸⁹ "Pressure mounts on parties to engage in ADR",⁹⁰ and so on, have already shifted the centre of the debates from how parties can be educated about the positive features of mediation in resolving civil and commercial disputes, to the possibility of losing out on the costs later if the successful party does not take up mediation. Such a shift in arguments may see more unwilling parties taking up mediation in the near future due to the "strongest form of encouragement", which closely resembles threats of potential sanctions. Consequently, the element of good will is no longer essential, because one is already seeing disputants indirectly forced into mediation go through the requirements set by the courts, in the hope that no sanction will be imposed at a later stage.

This development has brought serious concerns over surreptitiously introduced implied compulsory mediation in the English court system.

⁸³ MEDIATION: SILENCE IS FAR FROM GOLDEN, <http://www.lexology.com/library/detail.aspx?g=a16c056e-30e9-476d-a96a-af10fd4a0676> (last visited Mar. 13, 2015).

⁸⁴ MEDIATION UPDATE: REMAIN SILENT AT YOUR PERIL!, <http://www.lexology.com/library/detail.aspx?g=6d28d0f5-b654-497f-868a-1225e20e98da> (last visited Mar. 13, 2015).

⁸⁵ SILENCE CAN BE EXPENSIVE: THE DANGERS OF IGNORING AN OPPONENT'S ADR REQUEST, <http://www.lexology.com/library/detail.aspx?g=804a5074-862a-4dd1-98ed-ee454fa47a5f> (last visited Mar. 13, 2015).

⁸⁶ COSTS SANCTIONS FOR FAILING TO RESPOND TO AN OFFER TO MEDIATE: A WARNING TO LITIGANTS IN THE UK, <http://www.lexology.com/library/detail.aspx?g=b5d296ea-3080-41a9-bedd-3563e0bd77ac> (last visited Mar. 13, 2015).

⁸⁷ SHOULD MEDIATION BE MANDATORY?, <http://www.lexology.com/library/detail.aspx?g=68019975-f314-4d43-8966-483af9e95667> (last visited Mar. 13, 2015).

⁸⁸ DAMAGES FOR DILAPIDATION, <http://www.lexology.com/library/detail.aspx?g=770340f0-61f7-4ecf-bf10-9b09f00f2b18> (last visited Mar. 13, 2015).

⁸⁹ COSTS ORDER PENALISES FAILURE TO MEDIATE, <http://www.lexology.com/library/detail.aspx?g=954ddc57-f50a-4568-8036-b4adbcb389b0> (last visited Mar. 13, 2015).

⁹⁰ PRESSURE MOUNTS ON PARTIES TO ENGAGE IN ADR, <http://www.lexology.com/library/detail.aspx?g=1d1ce828-d5b1-4532-9d5a-253531daef40> (last visited Mar. 13, 2015).

While Dyson’s words against compelled mediation are still ringing in one’s ears, the message sent out to the civil litigants is that, under *PGF II*, parties cannot unreasonably refuse to mediate, or parties cannot remain silent to the invitation to mediate as such silence will be inferred as a refusal. Furthermore, such refusals are viewed as unreasonable by the court. To be precise, the parties cannot say: “I do not want to mediate” as this will be seen as unreasonable. Similarly, the parties cannot stay silent, as silence will be inferred as a refusal. Putting the court’s view in a bold way, it is really saying that the civil and commercial disputants have a duty to engage with mediation, rather than “being encouraged”, as highlighted in the Woolf Report, *Halsey* or the Jackson Report.

This development in the English civil justice system indirectly removed the element of mutual consent from mediation and has been viewed as sneaking the practice of compulsory mediation through the backdoor. Although parties are not forced into mediation by statute, parties are locked in mediation with fear of being penalised in the later claim for costs. Parties’ mutual willingness, which forms the basis of a success of mediation, has been sadly ignored. The decision in *PGF II* has been seen as favouritism towards mediation. However, what the courts seem to forget is Lord Dyson’s words that: “mediation does not offer a panacea”.⁹¹

V. THE RAMIFICATIONS OF PGF II

A. *Mutual Consent No Longer Need?*

While no compulsory statutory mechanism for mediation is on the agenda, the parties’ engagement will still require mutual consent, forming the basis of a mediation agreement. If mutual consent is still to be upheld as the key to mediation, in the language of contract law, the claimant’s repeated letters inviting the respondent to engage in mediation in *PGF II* should be seen as an offer. An offer met with complete silence on the defendant’s part indicates that no acceptance was given to form the required mutual consent. By telling the disputants that their right to reject an offer is conditional, and their rejections will be reviewed by the court to ascertain reasonableness, the English court is trying to turn the invitation for mediation into a unilateral contract. A unilateral contract in the sense that mediation will almost be guaranteed to be engaged in by both parties under the threat of sanction costs, regardless of whether such an invitation is genuine or simply as a litigation tactic.

Removal of mutual consent would go against the Court of Appeal’s own view on the issue of compulsion. Although both Lord Dyson in *Halsey*

⁹¹ *Halsey v. Milton Keynes Gen. NHS Trust*, [2004] EWCA (Civ) 576, [16], [2004] 1 W.L.R. 3002.

and Briggs LJ in *PGF II* acknowledged that it was appropriate for the court to use its powers to encourage parties to settle their disputes other than by trial, nevertheless, “the court should not compel parties to mediate even it is within its power to do so”.⁹² In the eyes of the unwilling party, what the courts did is apply a robust encouragement in the form of cost sanctions to deprive the successful party’s decision on the choice of dispute resolution.

B. Replacing the Voluntary Nature of Mediation with the Subjective Views of Judges

As a voluntary dispute resolution mechanism, and taking all factors into consideration the parties shall be left alone to decide whether mediation is the best way to resolve their disputes. The decisions made by the English courts removed such powers from the parties. The focus of the interpretations of the non-exclusive list of six factors laid down in *Halsey* and *PGF II* is all placed on the subjective views held by the willing party and the court. None of these guidelines considered the unwillingness of the party who either objected to mediate or exercise their right to silence for genuine reasons.

While the parties’ unwillingness to engage in mediation or expressing negative view on mediation was deemed as irrelevant during costs claims, now the only task a successful party can carry out to avoid the sanction on costs is to persuade the courts that their specific types of disputes are not suitable for mediation. However, because of the policy “encouraging” the litigants to take up mediation and the aim to reduce caseloads for better resource management, one has seen judges own views replacing parties’ mutual consent to consider whether “the dispute was . . . eminently suited to mediation”.⁹³ To reinforce his view on the duty to engage in mediation, Briggs LJ further pointed out that mediation will be able to provide “the sort of insight which a trained and skilled mediator, experienced in the relevant field, can bring to an apparently entrenched dispute”.⁹⁴ Consequently, the judge’s view on the suitability of mediation forms the interpretation of the reasonableness for the unwilling party’s refusal.

C. The Objective of Educating the Parties Sidelined?

With the combination of the removal of parties’ right to consider the suitability of mediation, and the readiness in applying cost sanctions through the pursuit of a high take up rate, parties are no longer educated about the advantages of mediation, but threatened by the sanction of costs.

⁹² *PGF II SA v OMFS Company 1 Limited*, [2013] EWCA (Civ) 1288, [22].

⁹³ *Id.* [47] (Lord Justice Briggs).

⁹⁴ *Id.* [48].

Such a readiness in using sanctions should be applied only in exceptional circumstances. This approach may see the frustration with the original intentions of Woolf LJ and Jackson LJ, to educate parties to recognise the advantages of mediation in order to truly embrace mediation as the main mechanism in resolving future disputes.

After a series of decisions on costs sanctions, the parties and their legal advisers are well aware of the court position on mediation. Consequently one may see a higher take-up rate in mediation. However it can be very likely that, the parties' decision to embrace mediation is reached for the wrong reasons, i.e. the fear of costs sanction. Such fear has already made the need of education and good faith redundant. The issue of underuse of mediation will certainly be addressed, as more parties will take up mediation willingly or unwillingly. However whether a higher success rate depends on the good will of the parties remains to be seen.

D. Achieving the Aims of Efficiency and Proportionality?

As Toulmin pointed out “[m]uch of the recent public impetus for referral to mediation as part of the civil legal disputes procedure, on either a voluntary or compulsory basis, has come from a failure of domestic legal systems to provide adequate dispute resolution within the court system”.⁹⁵ This indicates that the judicial system fails to provide the parties with a reliable mechanism to resolve their disputes within a reasonable time, and at a reasonable cost, within the court framework. This is the situation faced by the English courts, which have chosen a diversion from the routes of encouragement and education, to the route of punishment. However this is also where the concerns over compulsory mediation lie.

While the court systems cannot provide efficient cost saving mechanisms for the parties, the measures placed to help divert the cases away from courts cannot be viewed as wrong or inappropriate providing such measures take the nature of alternative routes into consideration. Yet given the readiness of the English courts and the EU Directive using costs sanctions to strongly encourage the parties to take up mediation, one wonders whether litigation costs is being used as a decoy, while the real agenda behind such encouragement is to save the court time and resources. Lord Justice Briggs's statement may reveal some clues to the question, as he stated that “a positive engagement with an invitation to participate in ADR may lead in a number of alternative directions, each of which may save the parties and the court time and resources”.⁹⁶ Taking this policy and the development of the case law into consideration, it appears that mutual

⁹⁵ John Toulmin, *Cross-Border Mediation and Civil Proceedings in National Courts*, 10(4) ERA FORUM 511, 512 (2009).

⁹⁶ *PGF II SA v OMFS Company 1 Limited*, [2013] EWCA (Civ) 1288, [39].

consent forming a successful basis of mediation is gradually giving way to the aim to divert cases away from the courts, with the ultimate intention to make the courts more efficient in terms of time and resources. Such an undermining of the consensual element of mediation would simply attract a group of unwilling parties to go through mediation, fearing costs sanctions imposed by the courts before seeking the ultimate settlement. From the parties' view, the high costs of dispute resolution highlighted by the Jackson Review are not addressed, as it may turn out to be an expensive exercise for them in terms of costs for mediation as well as court litigation. With parties returning to the court system, the aim to provide a cost effective court system will remain in doubt.

Given that wider use of ADR is high on the agenda, instead of being entangled in the web of good will, consensus, cost sanctions and all the concerns over the implied compulsory mediation, one should look beyond England and consider whether mediation can be promoted in any other ways which may bring a more positive experience to the disputants, and could ultimately be a better designed dispute settlement mechanism. In the next section, the focus will be on the legality of compulsory mediation and other forms of court annexed mediation applied in other jurisdictions.

VI. INTERNATIONAL PRACTICE

A. *Is Compulsory Mediation Wrong?*

The main concern over compulsory mediation is its lack of requirement regarding consent from both parties. As Shipman puts it, "where mediation is compulsory there is no question of waiver of the right of access to court: the individual is obliged to mediate and the issue depends solely on whether compulsory mediation falls within the state's margin of appreciation".⁹⁷ Lord Dyson was extremely clear about the English courts' viewpoint on the issue of compulsory mediation, when he refused to compel the parties to engage in it. Two strands of his conclusion are found in human rights issues and the voluntary nature of mediation. While the arguments on the voluntary nature of mediation still stands as examined above, nevertheless, Lord Dyson's arguments on the breach of Article 6 of the ECHR in compulsory mediation was not only retracted by him later,⁹⁸ but also rejected by Lightman Justice, Advocate General Kokott and the ECJ in the case of *Rosalba Alassini v. Telecom Italia SpA*.⁹⁹

⁹⁷ Shirley Shipman, *Compulsory Mediation: The Elephant in the Room*, 30(2) CIV. JUST. Q. 163, 166 (2011).

⁹⁸ Dyson, *supra* note 1, at 337.

⁹⁹ Case C-317/08-C-320/08, *Rosalba Alassini et al v Telecom Italia SpA et al.*, Opinion of Advocate General Kokott, 2010 E.C.R. I-02213, ¶ 9 [hereinafter *Rosalba*].

In contrast with arbitration, Lightman J was of the opinion that the order to mediate only acts as a temporary delay, and hopefully allows the parties to reach a settlement. Kokott viewed the introduction of a mandatory requirement, i.e., that an attempt (compulsory mediation) to be made to settle the dispute out of court, is suitable for attainment of the objectives of effective judicial protection and proportionality.¹⁰⁰ Consequently, concerns over the breach of human rights to access to the courts are ill-founded, because “the right to effective judicial protection is not granted unconditionally”.¹⁰¹ In terms of procedural rules and conditions of admissibility, Member States enjoyed “a particularly broad discretion”¹⁰² to determine the potential restrictions, as long as they correspond with the objectives in the general interest and proportionality. This view corresponds with the wordings of Article 3 of the Mediation Directive.

Recital 14 of the Directive ultimately ends the debate surrounding compulsory mediation. It allows national legislation to make the use of mediation compulsory, or subject to incentives or sanctions, provided that such legislation does not prevent parties from exercising their right of access to the judicial system. To bring mediation into the topic of access to justice and ensure better use of such mechanisms, the Council actually prompted the Member States to ensure that “parties having recourse to mediation can rely on a predictable legal framework”.¹⁰³ Such predictability is essential in terms of introducing a legislative framework for addressing key aspects of civil procedure. Since compulsory mediation has been given a green light, the English courts could stop being condemned for surreptitiously introducing implied compulsory mediation into its civil justice system. However if it is the policy of the English justice system to use mediation to reduce dispute settlement costs and the wasting of court resources, it would be appropriate for the Parliament enacting legislation to implement the policy stipulated in Recital 14 of the Directive.

B. An Alternative Way?

The reality is that concerns over implied compulsory mediation in England simply refuse to go away. With reservations regarding compulsory mediation, the pressure exercised by the English courts¹⁰⁴ would need to be

¹⁰⁰ *Id.* ¶ 46.

¹⁰¹ *Id.* ¶ 44.

¹⁰² *Id.*

¹⁰³ The Mediation Directive, *supra* note 6, recital 7.

¹⁰⁴ As far as the Scottish practice is concerned, Irvine was of the view that compelled mediation was perhaps neither likely to happen in Scotland nor to impose cost sanctions. *See* Charlie Irvine,

justified. Consequently, it would be interesting to look beyond England and examine the practice of some jurisdictions whose policy makers have introduced “an element of compulsion” by means of policy driven legislation.¹⁰⁵ The role played by such legislation reflects Sturrock’s view, that the civil justice review leading to a series of court decisions in favour of mediation does not have the final word, as the best use of resources is a matter of policy in achieving the goals of appropriation and proportionality. This is especially the case after *Rosalba Alassini*¹⁰⁶ and the Directive demonstrating the possibility of using regulations to offer legitimacy to divert cases to mediation.¹⁰⁷

C. The Importance of a Legislative Framework Implementing Pro-Mediation Policy

Despite Lord Rodger and Genn implying that a fundamental right would be lost if an attempt at mediation is interposed between citizen and court within a legislative framework, this may not be the case in other jurisdictions. As Advocate General Kokott has pointed out, compulsory mediation is simply an alternative avenue for dispute resolution without the right to a fair hearing being lost.¹⁰⁸ To utilize mediation to achieve the overriding aim of access to justice, the European Council actually prompted the Member States to ensure “a predictable legal framework”.¹⁰⁹ Such predictability is essential in terms of introducing a legislative framework for addressing key aspects of civil procedures. A legislative framework would ensure that parties are well informed about the possibility of mediation, as Lord Dyson suggested. The use of legislation has been also seen in some jurisdictions outside of Europe where governments and the judiciary teamed up to promote the use of mediation by providing a clear legislative framework on a combination of courts,

The Sound of One Hand Clapping: The Gill Review’s Faint Praise for Mediation, 14(1) EDINBURGH L. REV. 85, 88 (2010).

¹⁰⁵ *Id.* at 86. See also generally H GENN ET AL., TWISTING ARMS: COURT REFERRED AND COURT LINKED MEDIATION UNDER JUDICIAL PRESSURE 200 (2007) (in England); R G HANN ET AL., EVALUATION OF THE ONTARIO MANDATORY MEDIATION PROGRAM (RULE 24.1): FINAL REPORT – THE FIRST 23 MONTHS (2001) (in Canada); G De Palo & P Harley, *Mediation in Italy: exploring the contradictions*, 21(4) NEGOTIATION J. 469 (2005) (in Italy); D Spencer, *Mandatory mediation and neutral evaluation: a reality in New South Wales*, 11 AUSTRALASIAN DISP. RESOL. J. 237 (2000) (in Australia); K Funken, *Court-connected mediation in Japan and Germany* (UNIVERSITY OF QUEENSLAND SCHOOL OF LAW, Working Paper No. 867, 2001) (in Germany); R Wissler, *The effectiveness of court-connected dispute resolution in civil cases*, 22(1-2) CONFLICT RESOLUTION QUARTERLY 55 (2004) (in the USA).

¹⁰⁶ *Rosalba*, *supra* note 99.

¹⁰⁷ Sturrock, *supra* note 5 at 111-13.

¹⁰⁸ *Rosalba*, *supra* note 99.

¹⁰⁹ The Mediation Directive, *supra* note 6, recital 7.

court annexed mediation and case management.¹¹⁰ In relation to the types of disputes, civil and commercial disputes are considered suitable for mediation in most jurisdictions. Among them, some provisions use the amount in disputes as the threshold for deciding whether mediation shall be attempted at the first instance. Some jurisdictions allow commercial and civil disputes containing factual issues for mediation, whereas the disputes on the legal issues are reserved to trial judges.¹¹¹ Such a distinction between factual and legal issues corresponds with the call made by Sturrock, who views the courts as the place dealing with legal issues while mediation can be used to deal with factual issues.¹¹²

Consequently, one has seen legislative support being provided in Germany, Austria and Spain. In Germany, the EU Directive on Mediation 2008 was implemented by the “Act to Promote Mediation and Other Methods of Out-of-court Dispute Resolution”¹¹³ in July 2012. In the amended ZPO 2012, courts are minded about the possibility of amicable settlement at every stage of the proceedings.¹¹⁴ Judges are also empowered to propose mediation or alternative out-of-court settlement.¹¹⁵ If such proposal is accepted by the parties, the court proceedings will be suspended and, which will be continued only if an agreement cannot be reached. . Judges, other than the one sitting on the case,¹¹⁶ are allowed to practice mediation within judicial conciliation by playing a conciliatory role to make use of the methods of mediation.¹¹⁷ Lenz pointed out that mediation is widely promoted in Austria¹¹⁸ and Spain¹¹⁹ where new legislations was already promulgated in 2012 to implement the Mediation Directive 2008/52.

Beyond Europe, in the case of Hong Kong, and parallel with the development in English courts, mediation is also regarded as a reasonable practice to facilitate dispute settlement to achieve the underlying objectives of costs effectiveness, proportionality, speedy procedures and the

¹¹⁰ Hong-Lin Yu, *Is Court-Annexed Mediation Desirable?*, 28(4) CIV. JUST. Q. 515, 545 (2009).

¹¹¹ ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], Dec. 05, 2005, BUNDESGESETZBLATT, Teil I [BGBL. I] 3202, amended by Gesetz zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung, July 21, 2012, BGBL. I at 1577, §278a (Ger.) [hereinafter ZPO] (Mediation, außergerichtliche Konfliktbeilegung).

¹¹² Sturrock, *supra* note 5, at 111-13.

¹¹³ Gesetz zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung, July 21, 2012, BGBL. I at 1577.

¹¹⁴ ZPO, *supra* note 111, §278(1).

¹¹⁵ *Id.* §278a(1).

¹¹⁶ A judge previously involved in a mediation is excluded from serving as judge on the case according to ZPO, *supra* note 111, §41 (8).

¹¹⁷ ZPO, *supra* note 111, §278(2), (5). In such practice, the judge does not have to be different from the judge conducting the court proceeding.

¹¹⁸ Cristina Lenz, *Mediation law in Germany, Austria and Switzerland*, 75(4) ARB. 514, 516 (2009).

¹¹⁹ Miguel Torres, *Spain: Commercial Litigation - Mediation and Conciliation*, 23(12) INT'L COMPANY AND COMMERCIAL L. REV. N63, N63 (2012).

facilitation of dispute settlement in the Hong Kong civil justice system.¹²⁰ With the introduction of the Rules of the High Court 2008, judges in Hong Kong have a statutory duty to take a proactive role in managing cases¹²¹ and actively encourage the disputants to cooperate with each other during the proceedings, and to consider the use of mediation to resolve the dispute if the court considers that appropriate.¹²² At the same time, the parties and their legal representatives are also required by law to assist the courts to further the underlying objectives mentioned above.¹²³ Given the clear legislative mandate, one sees the judges are willing to exercise their power in deciding the unsuitability of disputes to be dealt with by the courts. For instance, in *Paul Y Management Ltd v. Eternal Unity Development Ltd.*¹²⁴ all three judges¹²⁵ encouraged the litigants to approach their disputes with good commercial sense and with some degree of co-operation amongst them. The court drew the counsel's attention on their advice given to the parties in terms of dispute resolution, in order to avoid the high costs of trial.¹²⁶ Hon Lam J stated, echoed by Hon A Cheung J:

As I see it the case cries out for mediation. Before the parties spend more resource and efforts in this piece of litigation, they would be well-advised to sit down to explore the option of mediation with their lawyers. From a business point of view, it is much better to spend management time and costs on restoring the project than on a piece of litigation which may ultimately result in a 'no win' situation for both parties.¹²⁷

Similar legislation can also be seen in the Singaporean legal system. The integration of mediation into the Singaporean culture and the civil justice system has been seen as the key to its successful civil justice reform since the 1990s.¹²⁸ Following the establishment of the Singapore Mediation Center and the promulgation of the Community Mediation Centres Act in 1998,¹²⁹ disputants are offered choices between private mediation and

¹²⁰ The Rules of the High Court, (2008) Cap. 4A, 4, order 1A (H.K.). See also Shahla Ali & Felicia Lee, *Lessons Learned from A Comparative Examination of Global Civil Justice Reforms*, 53(4) INT'L J. OF L. & MGMT. 262, 266 (2011); A. K. C. Koo, *Pre-Trial Mediation in Mainland China and Hong Kong: Rationales, Regulations and Ramifications*, 32(3) CIV. JUST. Q. 385, 394-95 (2013).

¹²¹ The Rules of the High Court, (2008) Cap. 4A, 4, order 1A, r. 4(2), order 25 (H.K.).

¹²² *Id.* Order 1B, r. (1)(2)(1).

¹²³ *Id.* Order 1A, r. 3.

¹²⁴ *Paul Y. Management Ltd. v. Eternal Unity Development Ltd. et al.*, [2008] HKCA 315 (C.A.).

¹²⁵ Hon Cheung JA, Hon Lam and Hon A Cheung J.

¹²⁶ *Paul Y. Management Ltd. v. Eternal Unity Development Ltd. et al.*, [2008] HKCA 315, [48] (C.A.).

¹²⁷ *Id.* [50-52].

¹²⁸ Ali & Lee, *supra* note 120, at 263.

¹²⁹ Community Mediation Centres Act, 1998 (Sing.).

court-connected mediation.¹³⁰ In Malaysia, legislative support is also provided by the Practice Direction of Mediation 2010,¹³¹ and offers the disputants the choice of statutory mediation and court-annexed mediation in order to resolve disputes.¹³²

D. Should Mediation Be an Insider or Outsider in the Civil Justice System – Informed Choices and Costs?

The practice of the English courts is to strongly encourage the parties to take up private mediation outside of the courts. However, concerns over the extra costs which may incur and the low take up rate were expressed by practitioners on behalf of their clients regarding possible engagement for private mediation. This has become one of the issues that needs to be addressed in order to eliminate the negative perception regarding the introduction of mediation into the English civil justice system.

While the English courts are experiencing negative comments on implied compulsory mediation, it is worth pointing out that a common feature of the incorporation of mediation within the civil court systems was noted in the comparative study of jurisdictions examined in this article. All the relevant jurisdictions examined in this paper which claim success in using mediation to achieve the better resource management in the civil justice system incorporate legislation providing the legal basis for the practice of judge-mediators, separate settlement judges from trial judges, or internal mediation services within the courts. A combination of courts and mediation within the court system provides a clear message that mediation is viewed by the courts as a serious alternative dispute resolution mechanism to the disputants who are considering court action. In some jurisdictions, instead of just punishing, encouraging or referring parties to a private mediation outside of the civil court system, judges have taken a pro-active role in advising the parties. Instead of directly or indirectly forcing the parties to go through mediation, judges or the court clerks have been carrying out better case management in reviewing the suitability of the cases to be mediated. With a pro-active role played by judges in explaining to the parties the pros and cons of court action and mediation, as well as the likely outcome of the disputes, they have applied a more hands-on approach, to ensure the effective case management the Jackson and Gill Reports had been hoping for. This method will not only maintain the consensual nature of mediation, but also ensure that the parties have a true understanding of their positions. Such practices can be seen in Hong Kong,

¹³⁰ *Id.* §12.

¹³¹ Practice Direction of Mediation, 2010 (Malay.).

¹³² Khutubul Zaman Bin Bukhari, *Arbitration and Mediation in Malaysia*, 5-6 (2003), http://www.aseanlawassociation.org/docs/w4_malaysia.pdf.

Singapore, Malaysia, Germany and Austria. For instance, the role played by mediation in the Hong Kong civil justice system was further strengthened in *S v. T*,¹³³ which involved the issue of confidentiality of mediation processes where Hon Rogers VP maintained that in Hong Kong mediation has now become part of the process with the court's approval.¹³⁴

E. Concerns over costs

Similar to the concerns expressed by Ward LJ,¹³⁵ the call to use mediation to achieve a less stressful and less costly conclusion was also made by Hon Yuen JA in *MKGWH v. RKSH*¹³⁶ and Hon Bharwaney J¹³⁷ in *Chiang Ki Hun Ian v. Lin Yin Sze* in the Hong Kong Court of Appeal. A similar conclusion to the concerns expressed by Ward LJ in *Daniels*¹³⁸ was reached in the comments on the consequences for failing to consider ADR.¹³⁹ However, the expectation of less costs incurred in mediation will only be reached if both parties are not forced into mediation, but partake in good will. However, the incentive to entice parties to seriously consider mediation as an option should not be the cost sanctions, but a low mediation cost. Faced with high mediation costs over and above potential litigation costs in England, it is not surprising that the disputants expressed serious concerns over the comments on implied compulsory mediation and cost sanctions. However, such concerns should be addressed with a policy towards low mediation costs. The incentive of having low mediation costs surely would attract disputants to consider mediation as a suitable method to resolving their disputes.¹⁴⁰ Given its popularity, the caseloads in the civil

¹³³ *S v. T*, [2010] 4 H.K.C. 501, 503 (C.A.).

¹³⁴ *Id.* ¶ 3.

¹³⁵ *Fiona Jane Daniels v. Comm'r of Police for Metropolis*, [2005] EWCA (Civ) 1312, [37], [2006] C.P. Rep. 9.

¹³⁶ *MKKWH v RKSH*, [2011] 1 H.K.L.R.D. 1048, ¶ 66. (C.A.).

¹³⁷ *Chiang Ki Hun Ian & Chow Yuen Man Louise v Lin Yin Sze*, [2011] 6 H.K.C. 93, ¶ 23 (C.A.) (where Hon Bharwaney J made a costs order, but stressed that the costs are wholly disproportionate to the value of the claim. "The resolution of this case either by negotiation or mediation would have been a far better and more sensible option than by litigation,... And substantial and wholly disproportionate costs to be incurred in engaged senior counsel to argue the matter in the Court of Appeal."). *See generally* Gao Haiyan and Xie Heping v. Keeneye Holdings Ltd. and New Purple Golden Resources Development Ltd., [2012] 1 HKC 335 (C.A.); Lam Chi Tat Anthony and Cheng Shui Yee v. Kam Yee Wai, Andrew, [2013] 3 HKC 270 (C.A.); Champion Concord Ltd. & Craigsides Investments Ltd. v. Lau Koon Foo & The District Lands Officer, Sai Kung, [2011] 14 HKCFAR 534 (C.F.A.).

¹³⁸ *Fiona Jane Daniels v. Comm'r of Police for Metropolis*, [2005] EWCA (Civ) 1312, [33], [2006] C.P. Rep. 9.

¹³⁹ *iRiver Hong Kong Ltd. v. Thakral Corporation (HK) Ltd.*, [2008] 6 H.K.C. 391, ¶ 98 (C.A.) (where the judge stated: "The total damages are just over \$1 million. However, we are told that the total legal costs incurred by the parties, including costs of this appeal, run up to about \$4.7 million.").

¹⁴⁰ *See Yu, supra* note 110, at 537-38.

courts would be reduced, thus enabling the effective redistribution of resources. In Malaysia, parties are allowed choose to have their disputes resolved by judge-led mediation or private mediation (within its court-annexed mediation). While the costs of private mediation depend on the fees of mediators, judge-led mediation is free of charge to the parties, providing that solicitors and barristers are not involved in the settlement process. If a jurisdiction is serious considering compulsory mediation, such policies driven towards low costs should be in place.

F. Policy of One-Way or Three-Way Awareness?

As examined in the previous section, the lack of goodwill not only ensure a low success rate in the positive outcome of mediation, but also fosters resentment from unwilling parties, who are indirectly forced into mediation. Being seen as a barrier to the development of mediation due to the adversarial system lawyers are used to,¹⁴¹ guidelines have been issued on counsel's duty to provide their clients with relevant and appropriate information about a range of dispute resolution procedures, including discussing suitable options for them on when to advise their clients on alternative dispute resolution.¹⁴² One has also seen the Italian civil justice system imposing further duties on lawyers to offer information to their clients on mediation for disputes arising from employment contracts, divorce and various agricultural matters.¹⁴³ The burdens imposed upon legal representatives can be seen in calls for further education provisions for lawyers. Barrett and del Ceno have also noted that cultural and educational change is required in order to remove the reticence of some lawyers for engaging in mediation.¹⁴⁴ However, the question to be asked is whether the burden should only be imposed upon the parties and their legal representatives.

Given that the power of judges was strengthened in controlling court procedures, but they are still not trained in mediation,¹⁴⁵ the present researcher is of the opinion that the one-way direct imposition of burdens on the lawyers and their clients should be replaced by a three-way awareness among the judges, lawyers and disputants, in order to ensure the

¹⁴¹ Agapiou & Clark, *supra* note 4, at 502. See BRYAN CLARK, *LAWYERS AND MEDIATION* ch. 2 (2012) (for a review of the evidence); Petsche, *supra* note 4, at 260-61 (2013).

¹⁴² This guidance issue by the Law Society of Scotland came into effect on 1 November 2013. GUIDANCE RELATED TO RULE B1.9: DISPUTE RESOLUTION, <http://www.lawscot.org.uk/rules-and-guidance/section-b/rule-b1-standards-of-conduct/guidance/b19-dispute-resolution/> (last visited Apr. 21, 2015).

¹⁴³ Sturrock, *supra* note 5, at 111-14. Sturrock also cited the practice of South African, India, Japan, Dubai, Bulgaria, Bosnia, Croatia, Serbia, Macedonia, Albania and England which encourage the attempt of mediation.

¹⁴⁴ Sidoli del Ceno & Barrett, *supra* note 19.

¹⁴⁵ Woolf, *supra* note 7, recommendations 89, 96; Toulmin, *supra* note 95, at 517.

success of mediation in civil justice reform. Taking Hong Kong as an example, while the judges actively draw disputants' attention to mediation, at the same time, the parties and their legal representative are also required by law to assist the courts to further the underlying objectives of efficiency and proportionality.¹⁴⁶ With a clear mandate underlying a three-way system of awareness and involvement in case management, a strong emphasis on the adversary roles seen in courts is hoped to be significantly reduced. Judges will be allowed to take a pro-active role in explaining the suitability of mediation to the parties and will neither be seen as unilaterally dictating or imposing the unwelcome policy, and nor be viewed as a scapegoat in the essential evolution the civil justice reform.

G. Who Shall Mediate?

With the raising of awareness of meditation among all players, cultural changes in dispute management will happen gradually. Essentially, this will have to be supported by a well-structured system supported by policy and legislation providing a clear framework for the disputants and their legal representatives, and a concrete mandate for the judges to deliver the policy without ambiguity. However, given the success of mediation in the above jurisdictions which allows sitting judges or settlement judges to mediate, the level of judicial involvement should be addressed. Toulmin argues against the idea of the judge-mediator and its place within the Mediation Directive,¹⁴⁷ and insists on a distinction between procedures controlled by the judges of the national courts and those carried out separately.¹⁴⁸ In Europe, one has seen §278 and 278a of ZPO 2012 offering German judges the legislative support to consider the possibility of the parties reaching a mutually agreed settlement before the judgment is made.¹⁴⁹ The level of judicial involvement ranges from the suggestion of private mediation to mediation within judicial conciliation through the courts, where judges, can be called on to assist the parties to reach amicable settlement.¹⁵⁰

The practice of settlement judges is also practiced in Singapore and Malaysia. In Singapore, settlement judges have a high level of involvement in the method of court-connected mediation under the Community Mediation Centres Act in 1998.¹⁵¹ Accordingly, mediation can be

¹⁴⁶ The Rules of the High Court, (2008) Cap. 4A, 4, order 1A, r. 3 (H.K.).

¹⁴⁷ Toulmin, *supra* note 95, at 559. Toulmin argues that "A mediation carried out by a judge as part of the court procedure is essentially part of the legal system of the Member State and should not be included within the Directive."

¹⁴⁸ *Id.*

¹⁴⁹ ZPO, *supra* note 111, §278a.

¹⁵⁰ ZPO, *supra* note 111, §278(2), (5).

¹⁵¹ Community Mediation Centres Act, 1998 (Sing.).

conducted by a district judge as a settlement judge any time before the trial.¹⁵² With the assistance of the settlement judge, the disputants are fully informed of the merits of the case and probable outcomes should the case proceed to trial. The settlement judge will conduct mediation on a non-prejudiced basis, and all information revealed in the mediation remains confidential. This system is said to be highly evaluative or rights based, where an objective perspective is adopted throughout the process.¹⁵³ Once the disputants mutually agree to a settlement, the agreement can be recorded as a consent judgment, a court order, or a consent arbitral award.¹⁵⁴ This type of court connected mediation has a high settlement rate of 96 percent, with a total 4,988 cases between January and August 2003.¹⁵⁵ Similar to the practice of court-based mediation in Singapore, under the Practice Direction of Mediation 2010¹⁵⁶ the Malaysian court-annexed mediation empowers the sitting judge to transfer the dispute to a settlement judge, who will help the parties to reach a mutually agreed settlement. Similarly, in the case of a settlement agreed upon between the parties, the settlement will be recorded as an agreed court judgment. Failing any settlement, the disputes will be referred back to the original judge who will resume the trial. Over and above its intention to promote the use of mediation, the Malaysian Government was mindful that the willingness of “both” parties holds the key to the flourishing of mediation in Malaysia.¹⁵⁷

Given the high successful rate of mediation and the outcome of mediation elsewhere, it may be worthwhile to consider the implementation of a system of settlement judges or mediation services within the court system, in order to build a three-way channel to ensure the co-ordination of case management and reinforce the seriousness of the policy among the stakeholders.

VII. CONCLUSION

With the concerns over the consensual nature of mediation being removed by the implied compulsory mediation¹⁵⁸ following the application of s 44 of the CPR and the case law expressed among the English

¹⁵² Goh Joon Seng, *Mediation in Singapore: the Law and Practice*, 162-63, http://www.aseanlawasociation.org/docs/w4_sing2.pdf.

¹⁵³ Ali & Lee, *supra* note 120, at 264.

¹⁵⁴ *Id.* The Code of Ethics also applies to the settlement judges who are required to follow the Model Standards of Practice for Court Mediators of the Subordinate Court and the Code of Ethics for Court Mediators of the Subordinate Courts of Singapore.

¹⁵⁵ Seng, *supra* note 152, at 162-63.

¹⁵⁶ Practice Direction of Mediation, 2010 (Malay.).

¹⁵⁷ Ali & Lee, *supra* note 120, at 267.

¹⁵⁸ Richard Ingleby, *Court Sponsored Mediation: The Case against Mandatory Participation*, 56(3) MOD. L. REV. 441, 443 (1993).

practitioners, Lord Dyson was correct in stating that “[c]ajole them, *yes*. Encourage them, *yes*. But compel them, *no* in my view”.¹⁵⁹ This is because the consensus nature of mediation must be maintained to ensure that goodwill between the parties can contribute to the success of mediation as a viable alternative dispute resolution mechanism. A removal of this feature will distort the jurisprudence of mediation which is centred on the parties’ agreement.

Although the decisions delivered by the ECJ and the English courts are correctly decided on the basis of efficiency and proportionality, as well as on the correct interpretations of the CPR and its precedents, it does raise concerns and, possibly, fear over the practice of implied compulsory mediation through the costs sanctions imposed by the courts. Because of the concerns over the cost sanctions, disputants are indirectly forced into mediation despite no compulsory final settlement being imposed on the parties. However, such an indirect compulsion would drive unwilling parties further away from mediation or simply attract unwilling disputants to go through mediation as pre-court proceedings, in order to be on the right side of the courts. This situation is far from ideal and demands a re-think on how to have pro-mediation policies filtered through the civil justice system.

The current research established that the messages received by the practitioners is not about the advantages mediation would bring to the civil and commercial dispute resolution, but the implications of costs following the invitation to mediate, as well as further sanctions due to “unreasonable behaviours” interpreted by the courts. The issue was further exacerbated by the debates arising from the consensual nature of mediation and compulsory mediation. Under these circumstances, it may be appropriate for the English courts to look beyond its borders, and understand that mediation can exist within other jurisdictions, with its consensual nature maintained to ensure that the goodwill of the parties forms the basis of its success. The success of the jurisdictions examined in this article demonstrates that there is indeed an alternative way, such as mediating judges, settlement judges or in-house mediation services to implement pro-mediation policies in a cheaper and more user-friendly approach, which would maintain the consensual nature of mediation in England. This analysis will answer the critics of the civil justice system by Lord Woolf in 1996 and Jackson LJ in 2010.¹⁶⁰ However, such a pro-mediation policy can only take root in the civil justice system, with a clear set of legislative rules for its structure and case management, a clear mandate allowing judge’s

¹⁵⁹ Dyson, *supra* note 1.

¹⁶⁰ Woolf, *supra* note 7, overview, ¶ 2. The concerns were raised by Lord Woolf in the report “Access to Justice” over inequality, high expenses, uncertainty, slow speed, complicated and fragmented system and the adversarial nature.

involvement in the parties' choice, a policy driven towards low mediation costs to attract disputants, and finally, a three-way coordinated education among all stakeholders of the civil justice system.

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