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Implied compulsory mediation

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Cases cited

[Shirayama Shokusan Co Ltd v Danovo Ltd \(No.1\)](#) [2003] EWHC 3306 (Ch); [2004] B.L.R. 207; [2003] 12 WLUK 140 (Ch D)

[Guinle v Kirreh](#) [2000] C.P. Rep. 62; [1999] 8 WLUK 24 (Ch D)

[Dunnett v Railtrack Plc](#) [2002] EWCA Civ 303; [2002] 1 W.L.R. 2434; [2002] 2 WLUK 604 (CA (Civ Div))

[Halsey v Milton Keynes General NHS Trust](#) [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002; [2004] 5 WLUK 215 (CA (Civ Div))

[Alassini v Telecom Italia SpA \(C-317/08\)](#) EU:C:2010:146; [2010] 3 C.M.L.R. 17; [2010] 3 WLUK 497 (ECJ (4th Chamber))

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[CPR r.1.4](#)

European Convention on Human Rights 1950 art.6

**C.J.Q. 151* Introduction

The requirement that parties to a civil dispute consider and, more significantly, engage in a settlement process has never been as important as it is in the current climate of austerity. The huge financial burdens on the courts to manage civil cases and the need to introduce much needed reforms to the issue of costs in civil litigation has further reinforced the central role which alternative dispute resolution processes play in the English civil justice system.

In his thorough and comprehensive review of costs in civil litigation, Jackson L.J. noted the benefits of mediation¹ as a valuable and effective alternative dispute resolution process in resolving civil disputes:

"... [T]he most important form of ADR ... is mediation. The reason for the emphasis upon mediation is two fold. First, properly conducted mediation enables many (but certainly not all) civil disputes to be resolved at less cost and greater satisfaction to the parties than litigation. Secondly, many disputing parties are not aware of the full benefits to be gained from mediation and may, therefore, dismiss this option too readily."²

In its contribution to the Jackson review, the Centre for Effective Dispute Resolution alluded to the need to introduce compulsory mediation and was of the view that mediation should be incorporated into the case management timetable and went as far as to suggest that

"[a] degree of oversight and if need be compulsion may even be needed to be exercised over procedural judges in terms of implementing such a policy."³

**C.J.Q. 152* However, despite Jackson L.J.'s endorsement of mediation, he expressly rejected the idea of compelling parties to engage in mediation or incorporating it within case management. Rather, Jackson L.J. reiterated the orthodox position in English civil justice: mediation is not, and should not be, compulsory. His Lordship proceeded to provide guidance as to the steps a court should take when dealing with the issue of settlement through mediation and said:

"What the court can and should do ... is (a) encourage mediation and point out its considerable benefits; (b) to direct the parties to meet and/or to discuss mediation; (c) to require an explanation from the party which declines to mediate ... (d) to penalise in costs parties which have unreasonably refused to mediate."⁴

This article challenges the notion that mediation is not compulsory within the English civil justice system and seeks to argue that despite the express rejection of the concept of court compelled mediation, judicial attitudes, government policy, recent empirical research, and the structure of the Civil Procedure Rules indicate that the powers of the courts and judicial attitudes towards alternative dispute resolution processes (in particular mediation) have the inevitable consequence of compelling parties to engage in alternative dispute resolution processes. This compulsion is largely driven by existing court powers which allow it to punish a party in costs for failing to participate in settlement processes.

Part I of this article considers the concept of mediation, its development and its continued acceptance by the courts and the government as being the most favoured ADR process for civil and commercial matters.⁵ Part II analyses critically judicial and extra-judicial statements on whether the courts can and should compel parties to engage in alternative dispute resolution processes in order to reach a settlement. Part III argues that the continuing evolution of judicial attitudes in endorsing mediation as a necessary and fundamental pillar of English civil justice system together with the court's powers under the civil procedure rules has resulted in what the author terms "Implied Compulsory Mediation". The author argues that, despite the official position that mediation is not and should not be made compulsory, Implied Compulsory Mediation exists and will continue to form part of the civil justice landscape. In Pt IV the author relies upon findings from empirical research which appear to suggest that legal advisors perceive the increasingly robust judicial encouragement of mediation and the threat of costs penalties as strong reasons for participating in mediation. Finally, the author evaluates how **C.J.Q. 153* compulsory mediation may be given a clearer procedural framework within the English civil justice system.

Part I--Mediation: Judicial acceptance, government promotion and the Scottish approach⁶

There is no doubt that mediation is the most preferred of all consensual ADR processes. This preference for mediation over, for example, conciliation, is reflected in: judicial and extra-judicial statements; government papers and pilot schemes which have promoted mediation; and key developments within the European Union which have introduced compulsory mediation for civil and commercial cross border disputes.⁷ Therefore, there is a strong drive on the national and international level to reduce the number of disputes continuing to the courts and for parties to settle their disputes through mediation.

The very nature of mediation presents it as an attractive consensual ADR process as opposed to the adversarial and lengthy process of litigation. It is entirely voluntary and involves a neutral third party who actively assists the parties to the dispute to broker a settlement. Mediation is a flexible yet formal process. It strikes a balance between allowing the parties to retain effective control over when the mediation is to take place, the structure the mediation will adopt and who the mediator will be, while at the same time, it creates a formal setting within which the parties are able to present their arguments and seek a solution tailored to their dispute. In order to assist the mediation process, the parties concede some control to the neutral third party in order to facilitate an atmosphere of co-operation and settlement. The process is confidential and the parties may leave during the mediation process. Settlement through mediation generally saves the parties a great deal of cost and time which otherwise would be incurred if the matter continued to trial.⁸ The latter advantages were recognised by Jackson L.J. in his costs review when he stated:

"ADR is relevant to the present Costs Review in two ways. First, ADR (and in particular mediation) is a tool which can be used to reduce costs. At the present time disputing parties do not always make sufficient use of that tool. Secondly, an appropriately structured costs regime will encourage the use of ADR. It is a sad fact at the moment that many cases settle at a later stage, when substantial costs have been run up. Indeed some cases which ought to settle ... become incapable of settlement as a result of the high costs incurred. One important aim of the present Costs Review is to encourage parties to *C.J.Q. 154 resolve such disputes at the earliest opportunity, whether by negotiation or by any available form of ADR." ⁹

Like Jackson L.J., Lord Neuberger M.R. has also emphasised the economy of time and expense which made mediation an effective ADR process. Lord Neuberger M.R. observed:

"Over the past ten years, mediation and ADR more widely have been rightly endorsed by many, including me. It plays a significant role in the satisfactory resolution of disputes. And, rightly used, in terms of the appropriate case and appropriate timing, mediation saves a lot of money, court time, headache, and effort." ¹⁰

Andrews has gone further in his praise of mediation and its growing status within the English civil justice system. Andrews argues that mediation "is a pillar of civil justice" and goes far as to suggest that "mediation is a valuable substitute for civil proceedings, or at least a possible exit from such proceedings". The increased use of mediation has, in the opinion of Andrews, resulted in, "... a significant reduction in litigation before the ordinary courts, especially in the High Court." ¹¹

Lord Phillips C.J. (as he then was), however, noted a major draw-back to mediation and that is the desire of one or both of the parties to establish their legal rights. ¹² This can only be achieved by pursuing the dispute through to trial and any legal remedy can only be obtained and enforced through the courts. As his Lordship explains:

"If what you are after is your just rights according to the law, then mediation is not the place for you--but you need to consider carefully the cost of seeking those rights. Above all, so it seems to me, mediation is really suited for two parties who are in genuine dispute. Sometimes it is necessary for a defendant to stand his ground and challenge the claimant to prove his case in court, because if he does not do so, he will find himself facing claims that are not made in good faith but are brought by fraudsters, relying on the fact that the defendant may think that it is cheaper to reach a settlement agreement than to fight the action, even if successful." ¹³

Judicial attitudes in favour of mediation have also found expression in judgments. The need to encourage parties to consider and engage in mediation rather than incur disproportionate costs and time in litigating a matter have formed the principal reasons for judicial endorsement of mediation as an alternative to adversarial court processes. I explore in detail judicial and extra-judicial comments as part of the *C.J.Q. 155 discussion on compulsory mediation but it is worth noting here some of the judicial comments which have embraced mediation and ADR more generally.

In *Dyson v Leeds City Council*, ¹⁴ Lord Woolf M.R. held:

"... [T]his is pre-eminently the category of case in which, consistent with the overriding objective of the Civil Procedure Rules and the court's duty to manage cases as set out in r.1.4 (2) (e), we should encourage the parties to use an alternative dispute resolution procedure to bring this unhappy matter to the conclusion it now deserves sooner than later."

Ward. J. in *Egan v Motor Services (Bath) Ltd* was explicit in recognising the benefits of mediation over other forms of ADR when he stated:

"Mediation can do more for the parties than negotiation. In this case the sheer commercial folly could have been amply demonstrated to both parties sitting at the same table but hearing it from somebody who is independent. The cost of such mediation would be paltry compared with the costs that would mount from the moment of the issue of the claim ... Mediation is a perfectly proper adjunct to litigation. The skills are now well developed. The results are astonishingly good." ¹⁵

Commenting on the many neighbour disputes in the courts, Mummery L.J. observed:

"Greater use should be made of the services of local mediators, who have specialist legal and surveying skills and are experienced in alternative dispute resolution. An attempt at mediation should be made right at the beginning of the dispute and certainly

well before things turn nasty and become expensive ... Litigation hardens attitudes. Costs become an additional aggravating issue."¹⁶

It is also now well established that the courts will uphold and enforce ADR clauses which are validly incorporated into contracts.¹⁷ Thus, in *Flight Training International Inc v International Fire Training Equipment Ltd*,¹⁸ Cresswell J. upheld a clause which purported to refer future disputes to mediation.

The need to ease the substantial strain on public finances and therefore court resources has been a major factor in the government's emphasis on and promotion of mediation as the most successful method of resolving civil disputes. In its recent consultation paper, "Solving disputes in the county courts: creating a simpler, quicker and more proportionate system--A consultation on reforming civil justice in England and Wales, March 2011",¹⁹ the Ministry of Justice set out its aims to *C.J.Q. 156 reform the civil justice system. One of the key proposals put forward by the Ministry of Justice is the need for the greater utilisation of ADR processes and, in particular, mediation. This would mean, in the words of the Lord Chancellor and Justice Minister:

"... [F]ewer cases coming to court unnecessarily, more rapid resolution, lower costs to participants and thus a system that delivers justice more effectively."²⁰

And mediation is perceived by the Ministry of Justice as the key channel for the effective settlement of civil disputes. The Lord Chancellor and the Justice Minister make this point clear when setting out their proposals for reform:

"... [E]xpanding significantly other appropriate forms of dispute resolution by requiring all cases below the small claims limit to have attempted settlement by meditation, and introducing mediation information/assessment sessions for claims above the small claims limit."²¹

Ultimately the policy rationale underpinning the proposals is to achieve the desired consequence of reducing public funding of the courts. This policy rationale is also recognised as a fundamental basis upon which ADR processes and, in particular, mediation is promoted. In their "Report on the State of Civil Justice in England", Levy and Zuckerman note that the inability to provide access to justice at proportionate cost means that, "... the Government and the judiciary have developed policies designed to put pressure on litigants to refer their disputes to mediation."²²

Mediation has not been accepted in other jurisdictions as enthusiastically as it has been accepted in England. In this regard it is interesting to note the comments and recommendations of Lord Gill in his recent review of the Scottish Civil Courts.²³ Although recognising positive elements of mediation, the Gill report takes a more cautionary approach when reflecting upon the role of mediation in civil justice. The advantages of mediation are recognised but the emphasis remains firmly on the need to provide access to justice which is access to the courts. Mediation is perceived as "... supplementing an effective court system, rather than being alternative to it ...".

Lord Gill's observations and attitude towards mediation stand in stark contrast with the evolving approach that has been adopted by the judiciary and government in England, which is to view mediation as occupying an increasingly significant role within the civil justice landscape.²⁴ Agreeing with Dame Professor Hazel Genn's contentions that we should not be indiscriminately attempting to drive *C.J.Q. 157 cases away or compelling them, unwillingly, to enter into an additional process,²⁵ Lord Gill places importance upon an efficient court system as providing the primary means of resolving civil disputes. His Lordship argues:

"Mediation may, in some cases, offer advantages over litigation, particularly in cases where it is important to preserve relationships. But an efficient court system which is, and is seen to be, capable of resolving disputes expeditiously, economically and fairly is the cornerstone of the civil justice system."²⁶

Part II--Judicial attitudes towards compulsory mediation: An analysis

The orthodox position amongst the senior judiciary is that mediation is not compulsory nor should it be made compulsory. However, this orthodox position is, in the opinion of the author, open to debate since the comments and opinions of senior judges, both judicially and extra-judicially, casts doubt on the view that mediation is not compulsory and that parties cannot be

compelled to engage in mediation. In order to investigate this matter further one must consider judicial comments and attitudes reflected within established case law and extra-judicial speeches given by current and former members of the senior judiciary.

The emergence of jurisprudence concerning the role of ADR and, in particular mediation, in litigation became clearer shortly after the enactment of the civil procedure rules. Thus, in *Cowl v Plymouth City Council*,²⁷ Lord Woolf M.R. stated:

"The courts should then make appropriate use of their ample powers under the CPR to ensure that the parties try to resolve the dispute with the minimum involvement of the courts."

He went on to indicate that the courts could require the parties to provide an explanation as to the steps which they have taken to try to settle the matter:

"To achieve this objective the court may have to hold, on its own initiative, an inter parties hearing at which the parties can explain what steps they have taken to resolve the dispute without the involvement of the courts. In particular the parties should be asked why a complaints procedure or some other form of alternative dispute resolution has not been used or adapted to resolve or reduce the issues which are in dispute. If litigation is necessary the courts should deter the parties from adopting an unnecessarily confrontational approach to the litigation. If this had happened in this case many thousands of pounds in costs could have been saved and considerable stress to the parties could have been avoided."

The Court of Appeal in *Muman v Nagasena*,²⁸ a case which concerned a dispute involving a charity, made an order that the matter be stayed and that the parties **C.J.Q. 158* should attempt to resolve the matter through mediation. Mummery L.J. was clear in highlighting the adverse financial consequences of litigation and held:

"In this case very substantial sums of money have been spent on litigation without achieving a resolution. The spending of money on this kind of litigation does not promote the religious purposes of this charity. It is time for mediation. No more money should be spent from the assets of this charity until:

- (1) the Charity Commissioners have authorised the proceedings and counterclaim; and
- (2) all efforts have been made to secure a mediation of this dispute in the manner suggested."

Blackburn J. in *Shirayama Shokusan Company Ltd v Danovo Ltd*²⁹ adopted a stricter approach towards mediation. He appeared to be of the view that the courts did maintain jurisdiction to compel parties (whether or not they were willing) to engage in mediation and that this approach was consistent with the overriding objective. As a result, Blackburn J. did not hesitate in ordering the parties to mediation. In support of his views, Blackburn J. argued:

"There is no doubt that courts have assumed such a jurisdiction. That is apparent from an unreported decision of Mrs Justice Arden, as she then was, in the case called *Guinle v Kirreh, Kinstreet Limited v Balmargo Corporation Ltd*, judgment in which was given on 3rd August, 1999. A submission had been made that the court did not have such a jurisdiction. One party at any rate was not willing to undergo ADR. The court nevertheless directed ADR and did so in a form which has been largely followed in the draft Order attached to the application before me. Mrs Justice Arden took the view that Rule 1.1 of the Civil Procedure Rules, setting out the overriding objective, opened the way and that Appendix 7 to the Admiralty and Commercial Courts Guide provided the structure for such an Order."

Blackburn J. also rejected Lightman J.'s comments in *Hurst v Leeming*³⁰ in which Lightman J. expressed the opinion that mediation could only be ordered where both parties are willing.

Blackburn J.'s strict approach to mediation is also reflected in the judgment of Coleman J. in *Cable & Wireless Plc v IBM United Kingdom Ltd*.³¹ Commenting upon the use of ADR orders in the Commercial Court, Coleman J. acknowledged that the courts maintained the power to order even *unwilling* parties to engage in ADR. Coleman J. explained:

"The making of such orders in appropriate cases is now commonplace, even where one party objects to such an order being made. Occasionally, the circumstances of a dispute may appear to the court so strongly to demand a reference to ADR that, even in the face of objections from both parties, such orders have been made and have led to settlements much to the surprise of the parties concerned."

**C.J.Q. 159* The rhetoric of the need for parties to seriously consider and engage with ADR processes was taken a step further by Brooke L.J. in the leading case of *Dunnett v Railtrack Ltd.*³² In this case the Court of Appeal dealt with the issue of the defendant's unreasonable refusal to consider mediation. The defendant had been successful in defending an appeal by the claimant and sought its costs of the appeal but had previously rejected an invitation by the claimant to seek a settlement through mediation. On appeal, the defendant argued that it was not willing to engage in mediation as it was not willing to offer more than what they have previously offered by way of settlement. Brooke L.J. did not hesitate in rejecting the defendant's arguments and refused to award its costs. His Lordship observed that the defendant had been wrong in rejecting mediation out of hand even though it did not consider that it would bring about a settlement of the matter. In Brooke L.J.'s opinion, this was a misunderstanding of the purpose of ADR. Brooke L.J. emphasised the need for the courts to further the overriding objective through active case management, which included encouraging the parties to consider ADR procedures and for the parties to also further the overriding objective in this respect. In disallowing the defendant's costs, Brooke L.J. concluded with a stern warning to lawyers who failed to consider and engage in ADR processes:

"It is to be hoped that any publicity given to this part of the judgment of the court will draw the attention of lawyers to their duties to further the overriding objective in the way that is set out in CPR Pt 1 and to the possibility that, if they turn down out of hand the chance of alternative dispute resolution when suggested by the court, as happened on this occasion, they may have to face uncomfortable costs consequence."

Brooke L.J.'s judgment raises a number of points. The court adopted a favourable attitude towards settlement through ADR. Brooke L.J. eloquently advocated the positive elements of ADR and, in particular, the skills and benefits of mediators in resolving disputes and their unique ability in achieving outcomes which may be beyond the scope of the court and lawyers. Further, although the court did not provide specific guidelines as to the assessment of unreasonableness, the court adopted a strong policy approach in promoting ADR with the real threat of punishing a party in costs for failing to not only consider ADR but, more significantly, engage in ADR. Brooke L.J. also mentions "turning down out of hand the chance of ADR". It follows from this that regardless of whether a party considers ADR to be appropriate will be wholly irrelevant. Brooke L.J. seems to indicate that if a court suggests ADR then the parties must consider ADR. Both observations are reinforced by Brooke L.J.'s concluding remark which is the threat of "uncomfortable cost consequences" for parties who refuse ADR. Therefore, *Dunnett*, like *Shirayama*, appear to undermine the established view that mediation is not and should not be compulsory within the English civil justice system.

Despite the early signs of jurisprudence emerging which appeared to indicate the courts own recognition of its discretion to compel mediation (or ADR generally), Dyson L.J. dismissed the concept of court compelled mediation in the controversial case of *Halsey v Milton Keynes General NHS Trust.*³³ *Halsey* may **C.J.Q. 160* be seen to be controversial on a number of grounds. Some commentators, including members of the judiciary, have criticised *Halsey* because of the guidelines given by the court as to when a party who has refused mediation will be perceived as unreasonable by the courts.³⁴ Others find *Halsey* unfair because it places a heavy burden on the party who contends that the other has unreasonably refused mediation to prove unreasonableness.³⁵ However, the main area of controversy has been Dyson L.J.'s obiter reasoning that for a court to require unwilling parties to mediate would breach art.6 of the European Convention on Human Rights, which provides the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.³⁶ Although Dyson L.J. noted the benefits of mediation and ADR generally, he dismissed the notion that courts could compel parties to mediate their dispute. He argued that to do so would breach their fundamental right to a fair trial. His Lordship 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. The court in Strasbourg has said in relation to article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms that the right of access to a court may be waived, for example by means of an arbitration agreement, but such waiver should be subjected to 'particularly careful review' to ensure that the claimant is not subject to 'constraint': see *Deweert v Belgium* (1980) 2 EHRR 439, para 49".

Dyson L.J. went on to recognise that the form of encouragement by the courts may be "robust". The strongest form of encouragement would, according to Dyson L.J., take the form of an ADR order made in the Admiralty and Commercial Court in the form set out in Appendix 7 to the Guide.³⁷ A less "robust" form of encouragement was an Ungley Order which requires that the parties consider ADR but if a party is of the opinion that ADR is not suitable then it must justify that decision at the

conclusion of the trial.³⁸ Any party who fails to take part in ADR **C.J.Q. 161* after a court order has been made or who refuses to consider whether ADR is suitable will, Dyson L.J. warned, be at risk of having an adverse costs order being made against him.

A number of observations can be made of Dyson L.J.'s judgment before we embark on a discussion of the art.6 issue. First, Dyson L.J. fails to reconcile his opinion (although obiter dicta) that a court cannot compel mediation with Blackburn J.'s comments in *Shirayama* and the approach taken by Arden J. in *Guinle* in which the court made an ADR order even though one of the parties was unwilling to take part in ADR. Clearly the Court of Appeal is not bound by the decision of the lower courts, however Dyson L.J. failed to consider two cases that dealt directly with one of the central issues in *Halsey*--can the courts compel unwilling parties to mediate? Despite Dyson L.J.'s obiter comments, *Shirayama* and *Guinle*, both high court authorities, remain the law. Secondly, there appears to be a paradox within Dyson L.J.'s reasoning as to the issue of encouragement of ADR by the courts. His Lordship purports to support his argument that the courts may encourage ADR in the form of, for example, an ADR order in the Commercial Court or an Ungley Order. If Dyson L.J. contends that parties cannot be compelled to mediate then his notion of court encouragement of ADR is contradictory. When one considers the wording of both the above orders it is clear that there exists an element of compulsion. The ADR order in the Commercial Court requires the parties to engage in ADR but also goes further and, in the event that the parties are unsuccessful in resolving their dispute through ADR, places a burden on the parties to provide reasons as to why the matter could not be settled. Therefore, it is argued that the concept of "encouragement" of ADR by the courts is a term which is unclear and misleading in the light of the *Halsey* jurisprudence. What appears from *Halsey* is the courts desire to actively encourage ADR but at the same instance compelling parties to consider, engage and even settle their dispute with the threat of adverse costs consequences as the driving force in directing the court's approach.

One of the main criticisms of *Halsey* is that it was fundamentally wrong on the issue that the court could not compel the parties to engage in mediation as it breached art.6 of the ECHR. These criticisms have been eloquently and forcefully made by former and current members of the senior judiciary. Lightman J. has been the most explicit in his disapproval of the decision in *Halsey*.

³⁹ The requirement that the party seeking the imposition of costs sanctions to prove that the other has been unreasonable and the judgment that a court cannot compel parties to mediate their dispute were, according to Lightman J., "... unfortunate and (I would suggest) clearly wrong and unreasonable."

As to the art.6 point, Lightman J. argued that the court appeared to have been unfamiliar with the mediation process and to have confused an order for mediation with an order for arbitration or some other order which places a permanent stay on proceedings. An order for mediation did not interfere with the right to a trial: at most it merely imposes a short delay to afford an opportunity for settlement and **C.J.Q. 162* indeed the order for mediation may not even do that, for the order for mediation may require or allow the parties to proceed with preparation for trial. Lightman J. went on to state that the Court of Appeal appears to have been unaware that the practice of ordering parties to proceed to mediation regardless of their wishes was prevalent elsewhere throughout the Commonwealth, the United States and other jurisdictions.

Speaking of the developments in mediation, Colman J. also appeared to endorse the concept of the courts maintaining jurisdiction to make parties to arbitration proceedings engage in ADR.⁴⁰ He stated that the courts considering an application under the Arbitration Act 1996 could adjourn the application:

"... [S]o that the parties can try ADR, even over the objection of one of the parties. As I see it, there is no reason in principle why such an order should not be made."

Agreeing with Lightman J.'s contentions on the art.6 issue, Lord Clarke M.R. observed that European states such as Belgium and Greece, both signatories to the ECHR, have introduced compulsory ADR schemes without a successful art.6 challenge.⁴¹ Further, the EU Mediation Directive, now implemented by the majority of EU states including the United Kingdom, has introduced mediation in respect of civil and commercial cross-boarder disputes. Lord Clarke M.R. cast doubt over the use of the European case of Dewar in *Halsey*. That case was one which dealt with the claimant agreeing to pay an amount in settlement of a fine and thereby waiving his right to referring the dispute to a tribunal. The court in that case held that the claimant's waiver did not amount to a violation of his right to a free trial. Therefore, mediation did not waive a party's right to a fair trial. Lord Clarke M.R., as with Lightman J., recognised the court's jurisdiction to require parties to engage in mediation:

"... [D]espite the *Halsey* decision it is at least strongly arguable that the court retains jurisdiction to require parties to enter into mediation."

Mediation could, according to Lord Clarke M.R.,

"... be factored into and become an integral part of standard directions and the court's power would derive from its general case management powers under the CPR."

Delivering a speech at the International Centre for Alternative Dispute Resolution, New Delhi in March 2008, Lord Phillips C.J. adopted a slightly more cautionary approach to the decision in *Halsey*. Lord Phillips C.J. observed that a litigant's right to justice would be breached if he was ordered to mediate by the court and refused to mediate and was subsequently refused the right to continue with his litigation then there would be a strong argument that there was a breach of art.6. However, Dyson L.J. has significantly reduced the pressure on parties to mediate by placing the burden on demonstrating unreasonable behaviour upon the party seeking costs sections against the party who refused to mediate. Lord Phillips C.J. *C.J.Q. 163 proceeded to "number" himself with Lightman and Colman JJ. as an enthusiastic supporter of ADR. Lord Phillips C.J. spoke of the need to "strongly encourage" the parties to attempt mediation before resorting to litigation and that if litigation is commenced then, as with Lord Clarke M.R.'s recommendations, mediation should be built within the litigation process.

Lord Dyson was presented with an opportunity to counter his critics in his speech at the Chartered Institute of Arbitrators Third Mediation Symposium. He reiterated that unwillingly parties should never be compelled to mediate but went onto to argue, as he did in *Halsey*, that adverse costs orders would be an appropriate means of encouraging parties to use mediation. However, in the light of the European Court of Justice ruling in the case of *Alassini v Telecom Italia SpA*,⁴² his Lordship modified his position regarding ordering parties to mediate and its impact on art.6 of the ECHR.⁴³ *Alassini* concerned an action which was brought by customers of two telecoms companies for breach of contract under the EU Directive on the Provision of Electronic Communications Network.⁴⁴ The Italian Government made legal action pursuant to the Directive conditional on a prior attempt to settlement the matter before bringing proceedings. The Italians went further and if a party declined to engage in settlement discussions before commencing an action then that party would lose its right to bring an action in the courts. Did the Italian law breach art.6? The court rejected the contention. The Italian law, in the opinion of the Advocate General Kokott, pursued legitimate objectives in the general interest in the quicker and less expensive resolution of disputes. Advocate General Kokott also held that the measure of requiring parties to engage in settlement discussions before commencing court proceedings was proportionate because no less restrictive alternative existed to the implementation of a mandatory procedure since the introduction of an out-of-court settlement procedure, which is merely optional, is not as efficient a means of achieving those objectives. The Italian law did not seek to replace court proceedings and therefore access to the court was not denied but, at worst, delayed by 30 days. It followed, Lord Dyson observed, that

"... in and of itself compulsory mediation does not breach art. 6 but that "compulsory mediation is more effective when it is voluntary."

Lord Dyson went on to argue that the ruling in *Alassini* did not mean that compulsory mediation will never breach art.6 and that in some circumstances where, for example, the costs of mediation were very high compelling a party to mediate could still be considered a denial of access to justice. There was also, in Lord Dyson's opinion, a moral question: should a party be forced to attend mediation rather than exercising his right to go to court? Lord Dyson answered:

"It doesn't seem to me that it is the role of a court of law to force compromise upon people who do not want compromise."

*C.J.Q. 164 On the issue of cost sanctions as an effective means of encouraging parties to engage in mediation, Lord Dyson reinforced his position as propounded in *Halsey*. He stated that an adverse costs order

"... is an appropriate midway point between those who advance a sanction-based solution and those who favour incentives. It acts as a future threat of financial penalty on a party who unreasonably refuses to mediate."

Although Lord Dyson correctly modified his position regarding the art.6 ECHR issue, there still appears to be a dichotomy between the acknowledgement that courts have the power to order mediation but that they should not when dealing with unwilling parties, and that the court has the power to punish parties unwilling to engage in mediation. The power of the court to make adverse costs orders against parties who do not engage in mediation is clearly an indirect or implied way or compelling parties to mediation. Even if a party is truly unwilling, in the words of Lord Dyson, to engage in mediation then that party will surely be punished in costs at a later stage in the litigation process if that party is unable to provide persuasive arguments for refusing mediation. Further, since the development of jurisprudence in the area of ADR and since *Halsey*, the court, on the whole, have exercised their powers to make adverse cost orders for failure to engage in mediation (or other forms of ADR) and this has been, both by the rules of court and by case law, categorised as unreasonable behaviour which deserves punishment. For

example, in *Carleton v Strutt & Parker (A Partnership)*,⁴⁵ Jack J. extended the *Halsey* guidelines on assessing unreasonable refusal to consider ADR to include unreasonable behaviour during the mediation. Jack J. held that where a party adopts an unreasonable position during mediation then this action can be taken as demonstrating an unreasonable refusal to mediate. Therefore, Lord Dyson's arguments are not, in the opinion of the author, convincing.

Part III--Implied Compulsory Mediation

One of the fundamental features of mediation is that it is considered to be a consensual form of dispute resolution⁴⁶ in that parties are permitted the freedom to engage in this form of ADR process. The parties to a commercial contract, for example, may agree at the drafting stage of the contract that any future disputes are to be resolved through mediation. Or, if the parties have either not provided for mediation (or another form of ADR process) in their contract, they may still agree to engage in mediation at the time of the dispute. The flexible nature of mediation is therefore attractive to a commercial party who will be concerned with minimising his legal costs as well as dealing with and disposing of a problem quickly whilst possibly maintaining his commercial relationship with the other party.

As noted above, despite the considerable benefits of mediation, the orthodox position in English civil justice is to advocate the voluntary nature of mediation and to reject the formal introduction of compulsory mediation. Jackson L.J. in his review notes the benefits of ADR and mediation when he states:

**C.J.Q. 165* "(i) Both mediation and joint settlement meetings are highly efficacious means of achieving a satisfactory resolution of many disputes"

However, his Lordship proceeded to reject the notion of compulsory mediation:

"[I]n spite of the considerable benefits which mediation brings in appropriate cases, I do not believe that parties should ever be compelled to mediate."

Despite this explicit rejection of compulsory mediation, Jackson L.J. provided guidance as to the steps which court could take to "encourage" parties to participate in mediation. However, Jackson L.J.'s view on compulsory mediation and subsequent guidance on encouraging mediation seems to create a paradoxical approach towards mediation. Jackson L.J. states the courts may encourage mediation

"... (b) to direct the parties to meet and/or to discuss mediation; (c) to require an explanation from the party which declines to mediate ...; and (d) to penalise in costs parties which have unreasonably refuse to mediate. The form of any costs penalty must be in the discretion of the court. However, such penalties might include (a) reduced costs recovery for a winning party; (b) indemnity costs against a losing party"

It is this paradox which currently exists in English civil justice: on the one hand, the courts' official approach to mediation is that it should not be made compulsory but, on the other hand, judicial and extra-judicial statements, the structure of the civil procedure rules and recent empirical research (which will be considered later) indicates that there exists a form of compulsory mediation within the English civil justice system. Neither the courts nor the CPR state explicitly that mediation is or should be compulsory. However, the notion of Implied Compulsory Mediation can be taken from the CPR's structure, which provides the courts with enhanced powers to punish a party that has failed to engage in settlement processes. Also, government policy and extra-judicial comments provide further evidence of the increasingly robust attitude towards the acceptance of mediation. An analysis of the CPR and, in particular, the pre-action protocols is not carried out. It considers judicial and extra-judicial comments in order to illustrate and highlight the concept of Implied Compulsory Mediation.

Lord Woolf in his final report, *Access to Justice*,⁴⁷ described what he referred to as "the new landscape" of civil litigation. The new civil procedure rules introduced a new and effective court rule regime which required courts to actively manage cases in furthering r.1 of the CPR: the overriding objective. Lord Woolf introduced a number of key mechanisms which embedded within the CPR the concept of settlement through alternative dispute resolution processes. The central aim of this was to achieve a shift away from an adversarial approach to litigation which had the undesired effect of causing delays, increasing costs and causing a drain on the courts resources and to move towards a regime which recognised ADR processes as an important feature of the CPR.

The rules place a duty upon the parties to consider and engage in settlement processes which may result in a resolution of the matter at an early stage or, if this **C.J.Q. 166* is not possible, then for the parties to continue to consider settlement throughout the litigation process.⁴⁸ The court also has enhanced case management powers to encourage and refer parties to ADR processes. The courts also possess wider powers to punish a party in costs if it fails or refuses to engage in ADR processes. Therefore, the Civil Procedure Rules have equipped the courts with the necessary powers to refer parties to ADR rather than allowing matters to continue to be litigated.

The central premise upon which civil justice and the civil procedure regime rests is the overriding objective.⁴⁹ The court is required to further the overriding objective by actively managing cases and a fundamental feature of active case management includes the need to consider settlement options.⁵⁰ Therefore, r.1.4 provides that as part of its active case management responsibility the courts must encourage parties to use an alternative dispute resolution procedure if the court considers that appropriate and if it does consider that to be appropriate then the court must facilitate the use of such procedure. Rule 1.4 also requires the court to help parties to settle the whole or part of the case.⁵¹ Rule 1.4 is significant for a number of reasons. First, following his investigations, Lord Woolf concluded that in order to surmount the problems associated with the adversarial nature of the civil justice system, there was a real need to have provisions dealing with settlement, something which was missing under the previous rules. Therefore, the introduction of r.1.4 was the first time that ADR was officially recognised as a central feature of the rules of court. Secondly, the courts and the parties must always give attention to settlement and the courts must actively "encourage" the parties to consider ADR processes.

The pre-action protocols are arguably the most effective mechanism which seeks to promote settlement and require the parties to engage in ADR before formal proceedings are issued. Lord Woolf stated that the protocols were "... intended to build on and increase the benefits of early but well-informed settlements which genuinely satisfy both parties to a dispute." The theme which runs throughout the protocols is that of settlement and this is clear from their overall aims. The Practice Direction--Pre-action Conduct sets out two main aims. The first is to enable parties to settle the issues between them without the need to start proceedings. The second is to support the efficient management by the court and the parties of proceedings that cannot be avoided.⁵²

The court expects parties to have complied with this Practice Direction or any relevant pre-action protocol. The court may ask parties to explain what steps were taken to comply, prior to the start of any claim. Where there has been a failure of compliance the court may ask that party to provide an explanation.⁵³ The need for **C.J.Q. 167* parties to seriously consider and follow the prescribed pre-action conduct is reinforced by the courts powers to punish a party who has failed to follow the protocols--this punishment includes the courts making an adverse costs order against the defaulting party. An indicative form of behaviour that may result in a costs sanction is the failure of a party to consider ADR. Starting proceedings should usually be a step of last resort, and proceedings should not normally be started when a settlement is still actively being explored. Although the Practice Direction does not state that ADR is compulsory, the parties should consider whether some form of ADR procedure might enable them to settle the matter without starting proceedings. The court may require evidence that the parties considered some form of ADR.

A body of case law has now emerged which centres upon the approaches the court is likely to adopt when considering circumstances in which a party has failed to comply with the pre-action protocols. The emphasis by the protocols upon the need for settlement and ADR has, in the author's opinion, influenced judicial approaches to punishing parties who fail to consider and engage in ADR and thereby indicating that even though the protocols speak of ADR not being compulsory, the protocols and judicial attitudes in seeking to punish defaulting parties can be taken as evidence that ADR is something the parties *must* consider and engage with in order to avoid adverse cost consequences. This is evidence of Implied Compulsory Mediation. A recent case illustrates the point.⁵⁴

In the case of *Rolf v De Guerin*,⁵⁵ the Court of Appeal considered various issues including the correct cost consequences of a Pt 36 offer but, more importantly for our purposes, defendant's refusal to mediate. In *Rolf*, the claimant entered into an agreement with the defendant for the construction of an extension to the claimant's house. The day-to-day control of the building works was left in the hands of the claimant's husband. As a result of the claimant's failure to make payments to the defendant and, as the trial judge found, the claimant's husband's aggressive and interfering role in the matter, the defendant ceased work and treated the contract as repudiated. The claimant issued proceedings against the defendant. However, both before and after issuing proceedings, the claimant made various invitations to the defendant to enter settlement discussions and, later, mediation which the defendant rejected. On appeal, when asked by the court why he had been unwilling to mediate, the defendant stated

that if he had participated in mediation then he would have had to accept "his guilt" and that he would not have been able to demonstrate to a mediator what the claimant's husband was like, as this could only be done at trial. In any event, he wanted his "day in court". Rix L.J. did not hesitate in dismissing these reasons and found that the defendant's refusal to mediate was unreasonable behaviour for the purposes of CPR 44(5) and, as a consequence, the court was entitled to exercise its discretion and make an order as to costs. Rix L.J. held:

**C.J.Q. 168* "As for wanting his day in court, that of course is a reason why the courts have been unwilling to compel parties to mediate rather than litigate: but it does not seem to me to be an adequate response to a proper judicial concern that parties should respond reasonably to offers to mediate or settle and that their conduct in this respect can be taken into account in awarding costs."

Rix L.J. drew heavily upon the judgments given in *Dunnett, Burchell v Bullard, Halsey* and related cases in arguing that a party's refusal to engage in mediation would be a relevant factor when assessing costs. Rix L.J. also observed that particular cases, such as small building disputes, should use the courts only as a last resort and would, therefore, benefit from mediation:

"In particular, as I will develop below, the nature of the case, namely a small building dispute between a householder and a small builder, is well recognised as one in which trial should be regarded as a solution of last resort, and one which is likely to give an unsatisfactory outcome to the parties at disproportionate cost, to which should be added the cost of disproportionate anxiety."

Despite acknowledging that mediation may not have produced a solution in this matter, Rix L.J. was of the opinion that it was suitable for mediation nonetheless:

"It is possible of course that settlement discussions, or even mediation, would not have produced a solution; or would have produced one satisfactory enough to the parties to have enabled them to reach agreement but which Mr Guerin might now, with his hindsight of the judge's judgment, have been able to say did him less than justice. Nevertheless, in my judgment, the facts of this case disclose that negotiation and/or mediation would have had reasonable prospects of success. The spurned offers to enter into settlement negotiations or mediation were unreasonable and ought to bear materially on the outcome of the court's discretion, particularly in this class of case."

Rolf raises a number of interesting points. Although Rix L.J. acknowledged that the courts have been unwilling to compel parties to mediate, his Lordship reinforced the trend that parties will be expected to consider and engage in mediation, and a refusal to do so will be considered as unreasonable behaviour which will justify the making of an adverse costs order against the defaulting party. Any reason for refusing mediation must be strong and grounded in the facts and law for it to withstand judicial scrutiny--any reason which is slightly weak, for example the defendant's argument that a judge would be in a better position to see the claimant's unreasonable behaviour and its relevance to the issue of repudiation will be dismissed by the courts and will amount to legitimate "circumstances" in making an adverse costs order. Further, Rix L.J. also acknowledged that mediation may not have been successful in producing a resolution of the matter but that, in his judgment:

"... [T]he facts of this case disclose that negotiation and/or mediation would have had reasonable prospects of success. The spurned offers to enter into settlement negotiations or mediation were unreasonable and ought to bear **C.J.Q. 169* materially on the outcome of the court's discretion, particularly in this class of case."

Rix L.J. appears to take the approach which has developed through the jurisprudence in the area of ADR and mediation, and which supports the notion of Implied Compulsory Mediation. His judgment confirms, that although mediation may not always produce a solution or a satisfactory solution for the parties, the court will expect parties to engage in mediation as a matter of course. Also, the court appears to have carved out, like the *Jackson Report*, a class of cases which the court perceives as being appropriate for resolution through mediation. It follows, therefore, that small construction disputes will increasingly be categorised by the courts as ADR or "mediation friendly" and it is argued that these types of cases will be indirectly compelled to engage in mediation. *Rolf* is further evidence which undermines Lord Dyson's contention that truly unwilling parties should not be compelled to mediate.

Part IV--Empirical research

Thus far this article has presented a detailed analysis of the emerging jurisprudence and modern trends which have resulted in the formulation of Implied Compulsory Mediation within the civil justice system. In order to further investigate the concept of Implied Compulsory Mediation and the interrelationship between the favourable attitudes of the courts towards mediation and the effect this may be having upon parties who are involved in litigation, the author carried out research between September

and December 2011. The data was collated using a questionnaire which set out a number of questions relating to the use of mediation in litigation. The questions were designed to ascertain the opinions as well as the experiences of legal advisors who have participated in mediation.⁵⁶ The objectives of the research were to ascertain the views and experiences of legal advisors who have participated in mediation and to investigate the reasons why parties engage in mediation.⁵⁷ The research also sought to ascertain the effects which court recommended or ordered mediation has on settlement and the experiences of legal practitioners in this regard. The questionnaire also sought to ascertain the views of legal advisors as to whether mediation should be made compulsory.

This study does not include lawyers practising in property litigation, construction and engineering disputes or personal injury/clinical negligence disputes as similar research has already been carried out in these areas.⁵⁸

The questionnaire was sent to 110 legal advisors at firms that engaged in civil and commercial litigation and which described themselves as having experience **C.J.Q. 170* of resolving disputes through mediation.⁵⁹ In order to ascertain the views of a broad range of legal practitioners, the questionnaires were sent to a wide range of law firms including small and medium sized national firms and large national and international firms. One of the respondents was a civil and commercial litigator but was also a trained and qualified mediator.

Of the 110 questionnaires that were sent out, 32 were returned. This equates to a response rate of 29 per cent. However, despite the low response rate, the comments of the respondents were interesting and in most cases, detailed. Further, the low response rate corresponds with response rates in similar types of studies such as that by Ceno,⁶⁰ who conducted research into attitudes of property lawyers towards mediation.

All of the respondents indicated that they had participated in mediation and that they had advised their clients of the need to explore settlement through mediation or other forms of ADR processes, such as conventional negotiations.⁶¹

All of the respondents showed a clear understanding of the need for disputing parties to explore settlement throughout the litigation process. All respondents indicated that they advised their clients of the need to engage in mediation or other forms of ADR and that this advice was given to client before and during the litigation process. Furthermore, 27 of the respondents specifically explained that advice to clients regarding settlement and, in particular, the need to consider mediation as an effective ADR process was provided to clients as part of the pre-action protocols' requirements. It was clear that the need to consider and appreciate ADR processes as a vital element of the litigation process and as an integral part of the Civil Procedure Rules was ingrained in the approaches taken by the respondents when advising clients. This also showed an appreciation of mediation as an established and popular ADR procedure.

The question which explored the reasons why the respondents engaged in mediation produced interesting comments. Fifteen of the respondents indicated that the main reason for participating in mediation was to settle the matter without having to incur further costs for the client in pursuing the matter through the courts and to avoid, as one respondent explained, "the stress which clients experience with litigating a case in the courts". Ten of the respondents indicated that they advised on and engaged in mediation because they wanted to avoid their clients being punished in costs at a later stage in the litigation process. As one respondent put it, "we wanted to avoid costs sanctions later on if the matter did not settle at the mediation for some reason." It was also interesting to note that seven of the respondents indicated that they engaged in mediation in order to obtain a tactical advantage if the matter did continue to be litigated. One respondent stated the mediation and other forms of ADR such as without prejudice meetings which failed to produce a settlement

**C.J.Q. 171* "allowed us to assess the weaknesses in our own arguments and to assess the strengths and weaknesses in the opponent's arguments and try to take a tactical advantage if we continued to litigate."

When asked whether mediation had been ordered by the court, the majority of respondents indicated that the court had recommended or ordered mediation. For example, five of the respondents explained that the Commercial Court had made an ADR order and had specifically stated that mediation be used. When asked whether because of the fact that the court had recommended or ordered mediation the parties felt under pressure to settle the matter, all respondents who had indicated that they had engaged with mediation pursuant to a court order or recommendation, stated that they did feel under some pressure to settle the matter. One respondent explained:

"The fact the court has said 'settle' and made an order to that effect then you would be stupid not to push for a settlement at the mediation. You don't want to be going back to the same judge to tell him you didn't settle."

Another respondent explained:

"We would have to explain why we did not settle and then possibly be punished in costs. We did not want that possibility for the client."

Despite feeling some pressure in participating in mediation, all of the respondents indicated that mediation resulted in a successful settlement. When asked to identify the factors which were significant in achieving a settlement, the most common factor cited by respondents was the court ordering or recommending mediation. Other common reasons included the fact that the parties were able to assess the weaknesses in their own case and to then make an assessment as to whether to continue to litigate or settle at the mediation. As one leading mediator and legal advisor stated:

"It is unheard of that a party has refused mediation even if a court simply recommends it (i.e. not formally ordered by the court). Parties will always participate and will feel obliged to participate."

Some respondents stated that the mediation provided their clients with a forum to directly express their opinions to the other side. As one respondent explained:

"The mediation allowed our clients to speak their mind and to express their opinions. It also allowed both sides to really consider whether they wanted to actually go to court and incur the time and cost in doing so."

Another respondent emphasised the significance of mediation in allowing commercial parties to maintain their trading relationship. This respondent stated:

"It gave our clients the chance to think about what was happening. It allowed our clients to say to the other side 'look, we need each other to make money for our businesses!'"

Finally, all of the respondents stated that mediation should not be made compulsory for all cases. Most respondents explained that not all cases would be suitable for mediation and therefore the parties may simply incur additional costs of engaging **C.J.Q. 172* in settlement discussions and then having to pursue the matter to trial. This was also one of the principal justifications put forward by the Law Society in the Jackson review for not making mediation compulsory. The Law Society, with whom Jackson L.J. agreed, stated:

"... [M]ediation is not the panacea which some consider it to be and is not appropriate in all cases. Neither should it be made mandatory. Indeed, there are views among practitioners that there is no consistency about which cases are suitable for mediation--some may well be mediated which are more suitable for trial, and vice versa." ⁶²

A number of general conclusions can be drawn from the research. It is clear that mediation is perceived by practitioners as an effective dispute resolution mechanism for a variety of reasons including the ability for parties to express their personal views whilst at the same time finding a solution without damaging their trading relationship. Furthermore, the courts appear to be actively engaged in "encouraging" settlement by, for example, making ADR orders. It is also interesting to note that court ordered or recommended mediation does place some pressure upon legal advisors to settle the dispute in mediation. This pressure appears to emanate from the real possibility of being punished in costs at a later stage if the matter reverts to the courts. But despite this, court ordered or recommended mediation does result in a successful settle of disputes.

Conclusion

This article has attempted to demonstrate the existence of Implied Compulsory Mediation within the English civil justice system. Early authorities have recognised the courts power to compel parties to engage in mediation and the courts have exercised this power. In the light of statements from members of the judiciary and the government's desire to promote mediation as an effective alternative to litigation, it is suggested that the courts will increasingly expect and compel parties to mediate. Further, although the study carried out is short, it does provide a valuable insight into the factors which influence parties to engage in mediation. The study also provides a strong basis upon which further empirical research must be conducted.

Jackson L.J. did not recommend that any rule changes be made in order to promote ADR.⁶³ But if courts have the power to compel mediation with the background threat of adverse costs sanctions and, in some instances, require parties to provide an explanation if a matter does not settle, how can mediation be better dealt with during the litigation process? How can it be better framed within the existing rules?

One suggestion is that mediation should form an integral part of the case management process. This would not require a change of the existing Civil Procedure Rules as it would form part of standard directions during the allocation stage or at the first case management conference. This is an option forwarded by *C.J.Q. 173 Lord Clarke M.R. In his speech to the Second Civil Mediation National Conference,⁶⁴ Lord Clarke M.R. suggested:

"It seems to me that the court has sufficient powers at present routinely to direct the parties to take part in a mediation process or attend a mediation hearing during the course of the pre-trial stage of any proceedings. I think of it like this. It could not be seriously argued that the case management judge could not direct the parties, say, to meet in the first week in June in order to discuss settlement. I would like to see such a direction as routine, if it is not already routine."

The advantages of such an approach may be obvious. As acknowledged by Lord Clarke M.R., court directed mediation would allow both parties to prepare for a discussion on the case at the same time. It would avoid the case from proceeding too far down the litigation path before eventually settling at the door of the court. By that stage, the parties will already have incurred a substantial amount of time and expense. Also, the direction for mediation will take effect at allocation or during case management and therefore at a significant stage in the litigation process when the parties will be clear as to the issues and arguments in the dispute.

Lord Clarke M.R. further explained that an order for mediation could be routinely made on allocation or at the first case management conference:

"They could easily be factored into and become an integral part of standard directions. To my mind the power exists under a combination of the court's case management powers under CPR 1.4(2)(e) which specifies that 'encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure' and CPR 3.1(2)(m), which enables the court to take any step in managing a case to further the overriding objective."

Interestingly, Lord Clarke M.R. also stated that the courts should not penalise parties for not taking part in mediation, save in exceptional circumstances, and that whether a party is penalised in costs should depend on the circumstances of the particular case. However, removal of costs penalties would have an adverse effect on the expectation that the parties engage in mediation. It has been demonstrated that the courts possess the power to compel parties to mediate and that they are willing to punish a party in costs. Adverse costs consequences pose as a real threat to parties who fail to engage in mediation and this appears be an effective tool in forcing parties to mediate and settle their disputes. There is some support for this argument from the emerging jurisprudence and the evidence collated from the study. It will be recalled that respondents perceived the threat of cost consequences as a major factor in engaging in mediation and settling their disputes.

An alternative approach may be taken from the Australian experience where mediation is given statutory force and is integrated within the court rules.⁶⁵ Pursuant to Pt 4 of the Civil Procedure Act 2005 (NSW), the courts in New South Wales have the power to order parties to undertake compulsory mediation. The parties are not, however, "forced" to settle but they are required to engage in mediation *C.J.Q. 174 in order to ascertain whether a settlement can be reached. If the matter cannot be settled then the parties may continue litigation without being punished in costs. This was noted by Einstein J. in *Idoport Pty Ltd v National Australia Bank Ltd*⁶⁶ when he noted that if mediation failed then the parties "may continue litigation without penalty". Einstein J. also noted that the power under the 2005 Act did not mean that the parties are forced to settle although they must participate in "good faith". As Tronson explains, the provisions are designed to encourage settlement rather than force it upon parties.

The Australian approach appears to go further than Lord Clarke M.R.'s approach. He was of the opinion that the court has the power to "direct" parties to mediation and this could be done during the case management stage but without cost penalties for parties who did not take part in mediation. The Australian model provides the courts with a power to order mediation; this power is expressly recognised by statute and procedural rules. More significantly, the Australian model appears to recognise that parties must engage in mediation but are not required to settle once they do engage in mediation. But the approach is clearer and more forceful than in the English civil justice system. Even though the parties are not forced to settle, as recognised by Einstein

J., they are forced to engage in mediation. Therefore, it follows that parties may be punished in costs if they refuse to engage in mediation and as a consequence there clearly exists a great degree of compulsion which is reinforced by costs penalties.

If Lord Clarke M.R.'s and the Australian model have short comings, can we take lessons from both models for an alternative approach? There are two elements which would, in the opinion of the author, provide a clearer and more effective framework for mediation within the civil justice system. First, there must be formal recognition (i.e. not implied recognition as argued in this article) that the English courts can compel parties to take part in mediation. This would then allow mediation to take a clearer role and more structured role within the procedural rules. It will also provide much needed certainty to the courts and the parties as to when mediation may be ordered by the courts. In this regard, Lord Clarke M.R.'s approach may be adopted and the court can direct parties to mediation at the allocation stage or at the first case management conference. This would have the benefit of avoiding parties incurring potentially huge costs in continuing to litigate but eventually settling at the door of the court. The earlier mediation is directed the better for the parties and the court. If the parties do engage in mediation and cannot settle then, drawing upon the Australian approach, the parties should be entitled to continue to litigate without fear of any costs penalties at a later stage. Clearly engagement in mediation must be in good faith as noted by Einstein J. in *Idoport Pty Ltd*. This would not require the parties to explain why the matter did not settle and therefore the parties would not feel compelled to settle their dispute and would be required to engage in mediation in order to ascertain whether a settlement can be reached. Secondly, there would be a need to retain the courts powers to exercise costs sanctions against parties who fail to participate in mediation. As we have seen from the study, the threat of cost sanctions for failing to participate in mediation is a major factor in pushing parties to engage in mediation and eventually such cases do settle. To remove this threat would remove *C.J.Q. 175 the driving force behind the role of mediation and ADR more generally within the civil justice system.

As government policy concerning ADR as an economical and effective form of justice continues to take shape and Jackson L.J.'s recommendations are eventually implemented, there is no doubt that ADR and, in particular, mediation will continue to play an increasingly important role within the English civil justice system.

I would like to thank all the respondents who provided their detailed comments to the questionnaires which formed part of this article. I would also like to thank Professor Zuckerman for his encouragement and Dr Sorabji and an anonymous referee for their helpful comments on an earlier draft of this article. The usual disclaimer applies.

Footnotes

- 1 The Centre for Effective Dispute Resolution has defined mediation as "a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution." (<http://www.cedr.com/?location=/news/archive/20041101.htm> [Accessed February 1, 2012]). It should be noted that the previous CEDR definition of mediation included reference to mediation being voluntary. However, this was removed from the revised definition because of the increasing requirement that parties engage in mediation. It is interesting to note the definition given by The Code of Practice for Mediation in Scotland which maintains the voluntary nature of mediation: "A process in which disputing parties seek to build agreement and/or improve understanding with the assistance of a trained mediator acting as an impartial third party. Mediation is voluntary and aims to offer the disputing parties the opportunity to be fully heard, to hear each other's perspectives and to decide how to resolve their dispute themselves."
- 2 Jackson L.J., *Review of Civil Litigation Costs Final Report*, January 14, 2010, Ch.36, p.355 ("the Review").
- 3 Jackson L.J., *Review of Civil Litigation Costs Final Report*, Ch. 36, p.356.
- 4 Jackson L.J., *Review of Civil Litigation Costs Final Report*, Ch.36, p.361. See also Practice Direction--Pre-Action Conduct 8.1 which recognises that ADR is not compulsory in England: "Although ADR is not compulsory, the parties should consider whether some form of ADR procedure might enable them to settle the matter without starting proceedings."
- 5 Mediation is also accepted as an effective method of dispute resolution in many countries and some jurisdictions have promulgated statutory laws which provide the parties with the power to submit their disputes to mediation. For example, it is interesting to note that Mongolia has both voluntary and compulsory mediation and it has three domestic mediation providers which facilitate and provide mediation services, which include: The Association of Mongolian Advocates; The Mongolian National Arbitration Court; and The Legal Assistance Centre--see S. Tsevenjav, "Mediation in Mongolia" (2011) 77 *Arbitration* 332. Also,

in its attempts to promote the settlement of disputes through ADR, Ghana has recently enacted the Alternative Dispute Resolution Act 2010 (Act 798) which, inter alia, places mediation within a statutory framework and thereby provides disputing parties with the opportunity to submit their dispute to a mediator (s.63(1)). See further <http://mariancrc.org/wp-content/uploads/2011/09/Alternative-Dispute-Resolution-Act-2010-Act-798.pdf> [Accessed February 1, 2012].

- 6 Some jurisdictions do have court compelled mediation. For example, Taiwan has long had a system of both voluntary mediation and court compelled mediation and both have operated successfully in assisting parties in settling their disputes and thereby reducing the number of cases proceeding to trial--see H. Yu "Is court-annexed mediation desirable?" (2009) 28 C.J.Q. 515.
- 7 Directive 2008/52 of the European Parliament and of the Council of May 21, 2008 on certain aspects of mediation in civil and commercial matters, available at: http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=EN&numdoc=32008L0052 [Accessed February 1, 2012]. The Directive is considered later in this article.
- 8 However, mediation could be expensive if the parties fail to settle and subsequently revert to the courts. See the comments of Lord Gill in *The Report of the Scottish Civil Courts Review*: "If ADR is successful, it is generally less expensive than litigation, but if it is unsuccessful, it can increase costs ...".
- 9 Jackson L.J., *Review of Civil Litigation Costs Final Report*, Ch.36, pp.355-356.
- 10 Lord Neuberger of Abbotsbury M.R., "Has Mediation Had Its Day?", The Gordon Slynn Memorial Lecture 2010, November 10, 2010, available at: <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/moj-speech-mediation-lectureA.pdf> [Accessed February 1, 2012].
- 11 Available at: http://www.dike.fr/IMG/pdf/Mediation_in_England_by_N_1_-_H_Andrews_Cambridge_.pdf [Accessed February 1, 2012]. See also N. Andrews, *The Modern Civil Process: Judicial and alternative forms of dispute resolution in England* (Tübingen, Germany: Mohr Siebeck, 2008).
- 12 See also the comments of Lord Neuberger M.R. "Has Mediation Had Its Day?", The Gordon Slynn Memorial Lecture 2010, November 10, 2010, available at: <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/moj-speech-mediation-lectureA.pdf> [Accessed February 1, 2012].
- 13 Lord Phillips of Worth Matravers C.J., "Alternative dispute resolution: an English viewpoint" (2008) 74 *Arbitration* 406.
- 14 *Dyson v Leeds City Council* [2000] C.P. Rep. 42.
- 15 *Egan v Motor Services (Bath) Ltd* [2008] 1 W.L.R. 1589.
- 16 *Bradford v James* [2008] EWCA Civ 837.
- 17 The courts may also be willing to award damages for breach of an ADR award, see *Union Discount v Zoller* [2002] 1 W.L.R. 1517.
- 18 *Flight Training International Inc v International Fire Training Equipment Ltd* [2004] EWHC 721 (Comm); [2004] 2 All E.R. (Comm) 568. The clause at the centre of the dispute provided that future disputes would be referred to: "... Advisory, Conciliation and Arbitration Services (ACAS) London. Legal fees and costs shall be paid by either party which does not prevail at mediation." Cresswell J. was of the opinion that the clause specifically referred to mediation as opposed to arbitration or other form of alternative dispute resolution.
- 19 "Solving disputes in the county courts: creating a simpler, quicker and more proportionate system, A consultation on reforming civil justice in England and Wales, March 2011", available at: <http://www.justice.gov.uk/downloads/consultations/solving-disputes-county-courts.pdf> [Accessed February 1, 2012].
- 20 A consultation on reforming civil justice in England and Wales, March 2011, available at: <http://www.justice.gov.uk/downloads/consultations/solving-disputes-county-courts.pdf>, p.5 [Accessed February 1, 2012].
- 21 A consultation on reforming civil justice in England and Wales, March 2011, available at: <http://www.justice.gov.uk/downloads/consultations/solving-disputes-county-courts.pdf>, p.5 [Accessed February 1, 2012].
- 22 I. Levy and A. Zuckerman, "Report on the state of Civil Justice in England" (2011) 1 I.J.P.L. 71.
- 23 *The Report of the Scottish Civil Courts Review*, available at: <http://www.scotcourts.gov.uk/civilcourtsreview/> [Accessed February 1, 2012].
- 24 Lord Clarke M.R. has expressed the view that ADR in general and mediation in particular: "... must become an integral part of our litigation culture. It must become such a well established part of it that when considering the proper management of litigation it forms as intrinsic a part of our lexicon and of our thought processes, as standard considerations like what, if any, expert evidence is required ..." Lord Clarke M.R., "The Future of Civil Mediation" (2008) 74 *Arbitration* 419.

- 25 Dame Professor Hazel Genn, *Judging Civil Justice* (Cambridge: Cambridge University Press, 2009). For an interesting rebuke of Dame Professor Hazel Genn's and Lord Gill's positions, see C. Irvine, "The sound of one hand clapping: the Gill review's faint praise for mediation" (2010) 14 *Edin. L.R.* 85.
- 26 *The Report of the Scottish Civil Courts Review*, p.170.
- 27 *Cowl v Plymouth City Council* [2001] EWCA Civ 1935; [2002] 1 W.L.R. 803.
- 28 *Muman v Nagasena* [2000] 1 W.L.R. 299.
- 29 *Shirayama Shokusan Company Ltd v Danovo Ltd* [2003] EWHC 3306 (Ch); [2004] B.L.R. 207.
- 30 *Hurst v Leeming* [2002] C.P. Rep. 59.
- 31 *Cable & Wireless Plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm).
- 32 *Dunnett v Railtrack Ltd* [2002] EWCA Civ 3030; [2002] 1 W.L.R. 2434.
- 33 *Halsey v Milton Keynes General NHS Trust* [2004] 1 W.L.R. 3002.
- 34 For a detailed discussion of Lord Dyson's guidance, see S. Shipman, "Court approaches to ADR in the civil justice system" (2006) 25 C.J.Q. 181. See also J. Sorabji, "Costs--further developments from Halsey: Nigel Witham Ltd v Smith & Isaacs and S v Chapman" (2008) 27 C.J.Q. 427.
- 35 For example, Lightman J., "Mediation: An Approximation to Justice", S.J. Berwin, June 28, 2007, available at: http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/berwins_mediation.pdf [Accessed February 2, 2012].
- 36 Article 6(1) specifically states: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."
- 37 *The Admiralty & Commercial Courts Guide*, 9th edn (2011). Dyson L.J. went on to describe the main features of an ADR order which is made pursuant to the Guide: "It requires the parties to exchange lists of neutral individuals who are available to conduct 'ADR procedures', to endeavour in good faith to agree a neutral individual or panel and to take 'such serious steps as they may be advised to resolve their disputes by ADR procedures before the neutral individual or panel so chosen'. The order also provides that if the case is not settled, 'the parties shall inform the court ... what steps towards ADR have been taken and (without prejudice to matters of privilege) why such steps have failed'. It is to be noted, however, that this form of order stops short of actually compelling the parties to undertake an ADR."
- 38 An order named after Master Ungley and which is widely used in clinical negligence cases. The exact wording of this order is: "The parties shall ... consider whether the case is capable of resolution by ADR. If any party considers that the case is unsuitable for resolution by ADR, that party shall be prepared to justify that decision at the conclusion of the trial, should the trial judge consider that such means of resolution were appropriate, when he is considering the appropriate costs order to make. The party considering the case unsuitable for ADR shall, not less than 28 days before the commencement of the trial, file with the court a witness statement without prejudice save as to costs, giving the reasons upon which they rely for saying that the case was unsuitable."
- 39 Lightman J., "Mediation: An Approximation to Justice", S.J. Berwin, June 28, 2007, available at: http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/berwins_mediation.pdf [Accessed February 2, 2012].
- 40 A. Colman, "Mediation and ADR: A Judicial Perspective" (2007) 73 *Arbitration* 403.
- 41 Lord Clarke M.R., "Mediation -- An Integral Part of our Litigation Culture", Littleton Chambers Annual Mediation Meeting, Gray's Inn, June 8, 2009.
- 42 *Alassini v Telecom Italia SpA* (joined cases C-317-320/08) [2010] 3 C.M.L.R. 17 ECJ.
- 43 See in particular the comments of H. Dundas, "Court-Compelled mediation and the European Convention on Human Rights article 6" (2010) 76 *Arbitration* 343. For a discussion of the wider implications of the *Alassini* case, including a detailed analysis of its effect on consumer rights within EU law, see J. Davies and E. Szyzczak, "ADR: Effective Protection of Consumer Rights" (2010) 35 *E.L Rev.* 695.
- 44 Directive 2002/22 on universal services and users' rights relating to electronic communications network and services (Universal Services Directive) [2002] OJ L108/51.
- 45 *Carleton v Strutt & Parker (A Partnership)* [2008] EWHC 616 (QB).
- 46 Other consensual forms of ADR include conciliation and negotiation for a discussion of these ADR processes see S. Shipman, "Court approaches to ADR in the civil justice system" (2006) 25 C.J.Q. 181

- 47 Lord Woolf, *Final Report to the Lord Chancellor on the civil justice system in England and Wales* (HMSO, July 1996).
- 48 For example, when the parties' legal advisers are required to complete the Allocation Questionnaire as part of the case management process under the civil procedure rules they are specifically asked whether they have advised their client about settlement option. The Allocation Questionnaire also asks whether the parties require a one month stay to attempt settlement. And finally, the Allocation Questionnaire asks whether the parties have followed the pre-action protocols, if not then a written explanation must be given for any failure to follow the protocols.
- 49 CPR 1.1(1) and (2).
- 50 It should be noted that the parties are also required to assist the court in furthering the overriding objective (see CPR 1.3).
- 51 CPR 1.4(e) and (f) respectively. The Glossary which accompanies the CPR provides a definition of alternative dispute resolution as set out in CPR 1.1(e) as: "Collective description of methods of resolving disputes otherwise than through the normal trial process."
- 52 Practice Direction--Pre-action Conduct 1.1.
- 53 Practice Direction--Pre-action Conduct 4.2.
- 54 In the recent case of *Thornhill v Sita Metal Recycling Ltd* [2011] Env. L.R. 33, the Court of Appeal noted that the claimant, who had failed to follow the Pre-Action Protocol and therefore had failed to engage in settlement discussions with the defendant, had already been punished in costs following their application for an interim injunction and was required to pay 80 per cent of the defendant's costs (see Sir Henry Brooke at [47]).
- 55 *Rolf v De Guerin* [2011] EWCA Civ 78; [2011] C.P. Rep. 24 CA. See E. Suter "Building towards compulsory mediation" (2011) 77 *Arbitration* 375.
- 56 Respondents were required to answer a range of questions, including questions relating to the stages at which mediation was considered and recommended to clients and the reasons for such recommendation; whether the courts recommended mediation and in what form this recommendation was made; and whether, if the courts recommended/ordered mediation the respondents felt pressurised to settle their disputes in mediation.
- 57 The term "legal advisors" has been used to include qualified solicitors and legal assistants. It was clear from one set of returns from a leading law firm that legal assistants had actively participated in mediations for clients and their participation included extensive preparation for and attendance at mediations.
- 58 See, for example, J. Ceno, "An investigation into lawyer attitudes towards the use of mediation in commercial property disputes in England and Wales" (2011) 3 I.J.L.B.E. 182 and P. Brooker, "Criteria for the appropriate use of mediation in construction disputes: Judicial statements in the English Technology and Construction Court" (2009) 1 I.J.L.B.E. 82-97.
- 59 Many of the firms described themselves as having "Dispute Resolution Departments" rather than using the term "litigation". This clearly reflects the growing change in culture within the legal community as to how disputes should now be resolved. It was interesting to note that these firms emphasised, from the outset, their experiences and successes in resolving disputes through an ADR process, usually mediation.
- 60 See, J. Ceno, "An investigation into lawyer attitudes towards the use of mediation in commercial property disputes in England and Wales" (2011) 3 I.J.L.B.E. 182.
- 61 Without prejudice, meetings were cited as the most common form of negotiation in commercial disputes.
- 62 Jackson L.J., *Review of Civil Litigation Costs Final Report*, p.358, para.2.9.
- 63 Jackson L.J., *Review of Civil Litigation Costs Final Report*, p.363, para. 4.1.
- 64 Lord Clarke M.R., "The Future of Civil Mediation" (2008) 74 *Arbitration* 419.
- 65 See B. Tronson "Mediation orders: do the arguments against them make sense?" (2006) 25 C.J.Q. 412.
- 66 *Idoport Pty Ltd v National Australia Bank Ltd* [2010] N.S.W.S.C. 427.