

**MODERN EUROPEAN FORMS OF NON-VOLUNTARY MEDIATION:
THE CASE OF ENGLAND IN COMPARATIVE PERSPECTIVE**

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ABSTRACT

The objective of my research is to investigate and analyze the modern forms of non-voluntary mediation implemented for civil and commercial matters in Europe through a comparative analysis between England and two other European countries namely France and Italy. My research first outlines the existing paradox between the essential characteristic of voluntariness in mediation and the growing implementation in Europe of modern forms of non-voluntary mediation. Non-voluntary mediation can be defined as any measure of coercion exerted over the decision-making of the parties in a court context towards mediation. All legal systems in Europe fundamentally share the view that mediation provides a flexible alternative to solving conflicts based on the principle of the voluntary choice of the parties. Voluntariness is reflected in the control of the mediation procedure by the parties. However, given the low uptake of voluntary mediation in Europe, many if not all European legal systems, incentivized by the European Directives, are today taking steps to integrate non-voluntary mediation in their judicial system. The aim of these regulations and the reasons for implementing them can vary: for some countries such as England cost reduction is put forward as the main reason, whereas in Italy it is the relief of the judiciary's workload. The interest of a comparative study is also reinforced by the cultural and legal differences existing in Europe. The work undertaken aims to answer the following question: to what extent should non-voluntary mediation be implemented in civil justice systems? To answer that question, the thesis will be divided into three parts: the first part introduces the concept of non-voluntary mediation, the second part analyzes the various forms of non-voluntary mediation in the selected countries and the third part questions the future of non-voluntary mediation in light of the Online Court project in England.

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- Rules of Superintendence for the Courts of Ohio
- Texas Civil Practice and Remedies Code

LIST of ABBREVIATIONS

ACAS	Advisory, Conciliation and Arbitration Service
ADR	Alternative Dispute Resolution
APC	Atlantic Pipe Corporation
AUS	Australia
BLR	Building Law Reports
BPTC	Bar Professional Training Course
CA	Cour d'Appel
CAN	Canada
CADR	Consumer Alternative Dispute Resolution
CDR	Civil Dispute Resolution
CEDR	Centre for Effective Dispute Resolution
CEPEJ	European Commission for the Efficiency of Justice
CFR	Charter of Fundamental Rights
Ch	High Court, Chancery Division
CJEU	Court of Justice of the European Union
CMC	Civil Mediation Council
COD/COM	European Commission Document
Comm	High Court, Commercial Court
CPC	Code de Procédure Civile
CPR	Civil Procedure Rules
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECLI	European Case Law Identifier
ECtHR	European Court of Human Rights
EMEDEU	Electronic Mediation and E-Mediator European Union
ENE	Early Neutral Evaluation
EU	European Union
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
FMC	Family Mediation Council
FR	Final Report

GEMME	European Association of Judges for Mediation
HMCTS	Her Majesty's Courts and Tribunals Services
HMOC	Her Majesty's Online Court
HOS	Housing Ombudsman Service
IR	Interim Report
LASPO	Legal Aid, Sentencing and Punishment of Offenders
MIAM	Mediation Information and Assessment Meeting
NADRAC	National Alternative Dispute Resolution Advisory Council
NCPC	Nouveau Code de Procédure Civile
NFM	National Family Mediation
NSW	New South Wales
NSWSC	New South Wales Supreme Court
OC	Online Court
ODR	Online Dispute Resolution
Qld	Queensland
RICS	Royal Institution for Chartered Surveyors
RRO	Revised Regulations of Ontario
SCMS	Small Claims Mediation Service
SRA	Solicitors Regulation Authority
TCC	High Court, Technology and Construction Court
UNCITRAL	United Nations Commission on International Trade Law

INTRODUCTION

Background

Mediation is defined as ‘a voluntary process in which a neutral third party assists disputing parties to reach a consensual solution to their dispute’.¹ As such, mediation is seen as an out-of-court conflict resolution process and can be interchangeably named voluntary, contractual, consensual or private mediation. Among the wide spectrum of existing dispute resolution methods (arbitration, ombudsman schemes, ENE, med-arb, etc.), mediation differs from other techniques as it allows parties to have full control over their dispute resolution process. In effect, mediation is one of the major, if not the major Alternative Dispute Resolution (ADR)² process used today and is accessible and regulated in a vast majority of EU States.³

At the same time, there is another approach to mediation which has emerged. Indeed, many legal systems have started to regulate the use of mediation in the context of court litigation (before or during proceedings) with the aim of diverting cases from judicial resolution. In doing so, they have modified the concept of traditional mediation in inserting some elements of coercion into it. The main characteristics of this new approach to mediation remain the same as for voluntary mediation: a dispute, the intervention of a neutral third party and a free agreement between the parties. However there are two main differences, namely the free choice of the mediation process by the parties is altered and mediation is taking place in the context of court litigation, before or during the judicial procedure. If we want to try to define very broadly the trend at this stage, we could say that it covers

¹ Hazel G Genn, *Judging Civil Justice*, vol The Hamlyn Lectures 2008 (Cambridge University Press 2010) 82.

² Please note that ADR will be used throughout the thesis for Alternative Dispute Resolution.

³ Klaus J Hopt and Felix Steffek, *Mediation: Principles and Regulation in Comparative Perspective* (Oxford University Press 2012) 94; Commission, Study for an evaluation and implementation of Directive 2008/52/EC – the ‘Mediation Directive’, Final Report, October 2013, updated March 2016 (Publications Office of the European Union 2016).

any measure of coercion exerted over the decision-making of the parties in a court context towards mediation.

It has emerged everywhere in Europe. Some observers explain it by the decline of traditional civil justice⁴ but in fact the reasons are more complex and vary from one country to another. In some countries like England,⁵ it has been promoted as a cost-savings measure for the parties and the government; in others, like Italy, it was needed to relieve the workload of the judiciary.⁶ This new approach of mediation has also been boosted by the adoption of an EU Directive on mediation in 2008, The Mediation Directive, which established a common framework for cross-border mediation for civil and commercial matters and which, in its article 5, acknowledges that strong incentives and even mandatory requirements may be enacted in national legislation.⁷

The present study will adopt the scope of the Directive, ie civil and commercial cases with the exclusion of family law and employment law, although some references will be made to practices that have been implemented in these areas of law whenever they provide valuable models and benchmarks. In addition, it will show that the situation is quite diverse across Europe because of different legal cultures, legal systems and approaches to ADR. Thus, the comparison indicates that interferences in the decision-making process of the parties can vary in extent, in intensity and in forms from one country to another.

The present thesis will focus on England and compare its situation with Italy and France. England presents a very specific picture on the topic, very much influenced by other common law countries in the wider world. As such, it is at the forefront in Europe of the development of ADR in the context of court litigation. Indeed, although it has avoided so far to formally implement mandatory mediation, it offers

⁴ Genn, *Judging Civil Justice* (n 1).

⁵ Note that any references to 'England' in this study refer to England and Wales.

⁶ See ch1, 14.

⁷ Directive 2008/52/EC of the European Parliament of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L136/3.

nevertheless a unique range in Europe of non-voluntary mediation options.⁸ Also, since England has belonged to the EU for over four decades and has implemented EU directives and orientations on ADR in its domestic law, it is interesting to compare the situation within the EU legal framework.

The present thesis has chosen to compare it more precisely with two EU Member States, Italy and France. Indeed, although different from England on many aspects, ie different legal background, legal culture and legal system, both civil law countries have faced crisis in their judicial systems which have forced them to consider the ADR option as part of their judicial landscape. Italy has been the first country in Europe in 2010⁹ to explore mandatory mediation as part of its civil proceedings on a large scale. Although this legislation has been replaced since by a less coercive scheme,¹⁰ it remains very innovative and proactive with respect to ADR, in particular mediation, which is constantly promoted in the context of court litigation. On the contrary, France, rooted in its confrontational judicial tradition, has been very reluctant to promote ADR within the court context for a long time but is now catching up at a sustained pace throughout various recent legislative provisions in 2015 and 2016.¹¹

It will also be shown that, although firmly established in Europe in the present time, coercion in mediation has been implemented in a pragmatic and anarchistic manner to answer the needs of each individual country and appears, not only at domestic levels but also at the European level, as a group of disorganized and uncoordinated practices. In addition, everywhere this practice is now being challenged outside the court context through regulated and unregulated offers of ADR such as Ombudsman schemes. However, according to Prince, 'such processes offer a form of ADR but they

⁸ See Pt 2, 86ff.

⁹ Decreto Legislativo 4 marzo 2010, no 28: Attuazione dell'articolo 60 della legge 18 giugno 2009, no 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali.

¹⁰ The 2010 decree has been updated by the Decree-Law no 69 of 21 June 2013, converted by Law no 98 of 9 August 2013.

¹¹ Décret no 2015-282 du 11 Mars 2015 relatif à la simplification de la procédure civile, à la communication électronique et à la résolution amiable des différends (Décret 2015-282); Loi no 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIème siècle (Loi 2016-1547).

are not transparent and inconsistent in their approach and do not seem to help promote a general culture that might promote out-of-court resolution to the wider public'.¹²

Overall a potential litigant today has more than ever a multiple choice of alternatives to court litigation offered to him to resolve a dispute; but paradoxically pathways to those ADR processes are not clearly sign posted and the public needs to find its way through a very complex maze of public and private offers making access to justice in the end more and more difficult. Therefore there is a need to clarify the place of ADR, and in particular of mediation, outside and inside the court system, otherwise the ADR story will not have added anything but confusion and disillusion.¹³

The present thesis intends to address this issue of clarification within the limited framework of what is happening between mediation and coercion in the context of court litigation with regard to the existing situation in England in comparison to what is happening in France and Italy in the field of civil and commercial matters.

The aim of the study

The aim of the study is to clarify the relationship between coercion and mediation within the court context by introducing a concept which has not yet been developed by scholarly research and would address this need. There already exist in scholarly literature concepts which incorporate coercion into mediation: mandatory mediation, compulsory consideration of mediation, unwilling mediation, etc.¹⁴ The aim is to gather all these forms of mediation through a comparative approach and

¹² Susan Prince, "Access to Court? 'Encouraging' Consumers to use Court-Connected Mediation in Small Claims and Other Cases" in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 79, 94.

¹³ Genn, *Judging Civil Justice* (n 1).

¹⁴ Franck E Sander, H William Allen and Debra Hensler, 'Judicial (Mis)use of ADR? A Debate' (1996) 27 *The University of Toledo Law Review* 885; Dorcas Quek, 'Mandatory Mediation: an Oxymoron? Examining the Feasibility of Implementing a Court-mandated Program' (2010) 11.2 *Cardozo Journal of Conflict Resolution* 479; Jacqueline M Nolan-Haley, 'Is Europe Headed Down the Primrose Path with Mandatory Mediation?' (2012) 37/4 *North Carolina Journal of International Law and Commercial Regulation* 981; Melissa Hanks, 'Perspectives on Mandatory Mediation' (2012) 35/3 *University of New South Wales Law Journal* 929.

place them under an overarching concept that can be used to analyze their growing importance in European legal systems.

When searching for measures that have been taken in the court context to promote the use of mediation across Europe, it appears that it basically targets always the same three levels of action: the information of the public on mediation, consideration by the potential litigants of the use of mediation, and lastly participation of the potential litigants in a full process of mediation, all of this on a voluntary basis. However, given the low impact of such actions on the use of mediation (1% of the cases in court),¹⁵ many European countries have started to introduce, at each level of action identified, some elements of coercion. The present study will keep this tripartite classification of 'information', 'consideration' and 'participation' to analyze the different levels of coercion used to increase the recourse to mediation and will place them under the denomination of 'non-voluntary mediation'.

This operating concept will help to establish a clear and comprehensive overview of the existing forms of non-voluntary mediation in England in comparison with two civil law countries, Italy and France. It will then assist in evaluating the efficiency as well as the obstacles of the existing mechanisms in England in order to provide ultimately answers and pathways to increase the use of mediation within the court context in light of the recent Online Court project.¹⁶

It will be shown that the key issue is how to increase the use of mediation through non-voluntary mediation while preserving the basic principles of mediation together with the right to judicial resolution for every litigant. This issue is of great importance as it raises more profoundly the question of the new contours of the fundamental right of access to justice, and the way it will be addressed will

¹⁵ European Parliament, "Rebooting' the Mediation Directive: assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU' (Directorate General for Internal Policies Legal Affairs, Study PE 493.042, January 2014) 1.

¹⁶ Briggs LJ, 'Civil Courts Structure Review: Interim Report' (Judiciary of England and Wales, December 2015) (Briggs IR); Briggs LJ, 'Civil Courts Structure Review: Final Report' (Judiciary of England and Wales, July 2016) (Briggs FR).

undoubtedly have a long- term effect on our judicial systems. In other words, the work undertaken in this thesis aims at answering the following question: to what extent should non-voluntary mediation be implemented in civil justice systems?

Summary of contents

To answer that question, the research is divided into three parts:

1. Non-voluntary mediation in context
2. Non-voluntary mediation in practice
3. Non-voluntary mediation at a turning point

Part I introduces the concept of non-voluntary mediation and is divided into two chapters:

➤ **Chapter 1** explains the genesis of non-voluntary mediation and the tripartite classification of levels of action on mediation (information, consideration, participation). The purpose of this chapter is to set the limits of the concept. This will be done through an explanation of the emergence of this new hybrid form of dispute resolution, but first presupposes looking at the cultural, political, economic and social climate surrounding the birth of non-voluntary mediation as well as at the different perceptions of the concept of mediation itself.

➤ **Chapter 2** gives first an overview of similar mechanisms in place outside Europe, namely in three common law countries (the USA, Canada and Australia), where they have been in use for much longer than in Europe and provide therefore valuable models and benchmarks. We will then describe the institutional efforts of the European Union, which has funded projects, issued consultation papers and reports, adopted resolutions and finally enacted the Mediation Directive in 2008, and more recently the Consumer ADR Directive and the Consumer ODR Regulation in 2013. It will also examine the decisions of the European Courts of Justice on the subject matter.

Part II gives a critical overview of the various forms of non-voluntary mediation in England and a comparison with France and Italy. It contains two chapters:

➤ **Chapter 3** focuses on the first category of non-voluntary mediation identified in the study, ie mandatory mediation information. It defines and analyzes its stage of development in England compared to France and Italy.

➤ **Chapter 4** concentrates on the two other forms of non-voluntary mediation, namely mandatory consideration of mediation and mandatory participation in mediation. The chapter recalls England's formal rejection of mandatory mediation, then demonstrates how mandatory consideration of mediation has been transformed into an implied requirement to participate in mediation through the policy of cost sanctions. It will also observe how the same approach is emerging in France and in Italy.

Part III questions the situation of each category of non-voluntary mediation through the situation of England, which is at a turning point, torn between its existing legal framework designed to encourage the use of mediation and the new Online Court project where mediation is incorporated into the judicial process. It also contains two chapters:

➤ **Chapter 5** concentrates on the issue of mandatory participation in mediation and questions its ability to increase the use of mediation in England in a comparative perspective with France and Italy and in light of the latest project mentioned above.

➤ **Chapter 6** addresses the issues of mandatory mediation information and consideration in England compared with the situation in Italy and France and demonstrates their relevance to promote mediation through a new proposal which takes into account the current Online Court project.

Methodology

The main objective of the study is to clarify the relationship between coercion and mediation in the context of court litigation. To that extent, a classification based on the existing levels of coercive action to increase the use of mediation has been identified and used to build the present research. These levels (information, consideration and participation) form the three different categories of non-voluntary mediation.

The thesis explores this classification by combining different methods of legal research. First, as explained before, the research adopts a comparative approach. Indeed, it focuses on the situation of non-voluntary mediation in England, at a turning point between encouragement and compulsion towards mediation in the context of court litigation, and compares its situation with Italy and France. A comparative analysis seems appropriate as these countries, impelled by the Mediation Directive, are all experimenting today non-voluntary mediation on a national scale. For instance, Italy has implemented mandatory pre-action consideration of mediation for some civil cases and France has introduced compulsory conciliation on a large scale. The study compares the different initiatives of non-voluntary mediation and their outcome. I have chosen these particular EU countries because of my language skills and also because of their cultural and legal differences with England. It is also of interest to compare contrasted approaches on ADR, including mediation. In addition to this European comparative approach, the study also investigates the experiences carried out in this field by other countries outside Europe, in particular the USA, Australia and Canada.

Secondly the thesis concentrates on normative aspects. The methodology is based on a detailed analysis of primary sources including EU texts and cases but also domestic statutes, cases, official reports of each country of investigation. For instance, the thesis discusses EU Directives, reports from the European Commission, decisions from the European Courts of Justice¹⁷ but also national reports such as the

¹⁷ See para 2.2, 66ff.

Briggs Reports in England. Furthermore, it undertakes a comprehensive review of secondary sources of books, articles and other works produced on the topic by academics and experts such as Genn¹⁸ or Steffek.¹⁹

Finally, the study aims at assessing the impact of the European and national legal provisions put in place in relation to non-voluntary mediation. Given the time constraints I have not undertaken empirical research myself but rather collected statistics and empirical findings on the different forms of non-voluntary mediation put in place in those countries in order to identify their impact, the best practices and their perspectives. However, it must be mentioned that there are some limitations to this approach because of the difficulty to find such statistics and empirical findings on the different methods/schemes of non-voluntary mediation. For example, in France, there is no official statistical data available on mediation. The *Annuaire Statistique de la Justice* edited by the French Ministry of Justice does not mention the number of cases referred to mediation in France.²⁰ Another challenge is to find empirical data on the subject matter. This concern is confirmed by EU Institutions in a recent report which highlights the difficulty to obtain statistical data on mediation, eg the number of mediated cases, the average length and success rate of mediation processes, and remarks that it is due to the unofficial nature of mediation compared to formal court proceedings. The report recommends a more solid database which would be of significant importance to further promote the use of mediation as there is no comprehensive and comparable data for entire jurisdictions.²¹ In addition, most regulations on the topic in our three countries of investigation have recently been enacted and it is too early to assess their impact.²²

¹⁸ Genn, *Judging Civil Justice* (n 1).

¹⁹ Felix Steffek and Hannes Unberath, *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (Hart Publishing 2013).

²⁰ Ministère de la Justice, 'Tableaux de l'annuaire statistique, Les chiffres-clés de la Justice - Édition 2014' <www.justice.gouv.fr/statistiques-10054/annuaire-statistiques-de-la-justice-10304/tableaux-de-lannuaire-statistique-27054.html> accessed 25 February 2015.

²¹ Commission 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters' COM (2016) 542 final 5.

²² eg Children and Families Act 2014; Decreto-Legge 12 settembre 2014, no 132: Misure urgenti di degiurisdizionalizzazione ed altri interventi per la definizione dell'arretrato in materia di processo

Contribution of the research to the academic debate

Although the issue of coercion in relation to mediation is not new, domestic studies on the topic are rare and in general are limited to compulsory mediation or they concern ADR in general. There are a number of academic publications on comparative overview of mediation in Europe but describing it country by country.²³

Moreover, among the existing academic debate, it appears that the term and the concept of mandatory mediation are invariably used to designate in practice many different forms of coercion in relation to mediation. This thesis intends to bring a classification for those various situations under the new concept of non-voluntary mediation and to conduct a cross-sectional analysis. Indeed it will present the issue category by category rather than country by country. It will examine for each category of non-voluntary mediation first the situation in England and then in France and Italy.

This thesis seeks to offer a comprehensive assessment of the dissemination of non-voluntary mediation in our countries of investigation with the aim of determining which category of non-voluntary mediation is best suited to increase the use of mediation while at the same time preserving the basic principles of mediation and the right of access to justice.

Lastly, the present research incorporates the recent English project of Online Court presented by Briggs LJ in 2016 which intends to offer a radically new and different procedural and cultural approach to the resolution of civil disputes²⁴ and 'bring ADR and mediation out of the shadows and explicitly into the litigation process'.²⁵

civile, convertito con modificazioni dalla L. 10 novembre 2014, no 162; Décret 2015-282; Loi 2016-1547.

²³ eg Steffek and Unberath (n 19); Hopt and Steffek (n 3).

²⁴ Briggs IR and Briggs FR.

²⁵ Prince, 'Access to Court?' (n 12) 98.

PART I

NON-VOLUNTARY MEDIATION IN CONTEXT

INTRODUCTION

Mediation has emerged in many civil justice systems across the world through the wave of the modern ADR movement¹ which introduced new methods, including mediation, to resolve legal disputes outside the court system. It was experienced from the 1970's in the USA, then expanded into Australia, Canada and New Zealand, and in the late 1980's into Europe.

The same pioneering countries, especially the USA, started also to insert coercion into mediation very rapidly and to embed it in their judicial practices.² Europe took hold of the movement more slowly but the 2008 European Directive³ on 'Certain Aspects of Mediation in Civil and Commercial Matters' in relation to cross-border disputes, seeking to promote mediation as an out-of-court alternative means but also allowing Member States to enact national legislation making mediation compulsory, enhanced this trend.⁴ Indeed many countries (eg Italy), used this opportunity either to reinforce or to introduce in their domestic legal system, mandatory elements in the mediation process. The implementation of such type of mediation has been observed in the context of court litigation either at a pre-stage action or during the court proceedings. The purpose of this first part of the thesis is to identify those forms of mediation, classify them and place them under an

¹ Carrie J Menkel-Meadow, *Mediation: Theory, Policy and Practice* (Ashgate Publishing 2001) Introduction.

² Carrie Menkel-Meadow, 'Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the 'Semi-formal'' in Felix Steffek and Hannes Unberath (eds), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (Hart Publishing 2013) 419, 434.

³ Directive 2008/52/EC of the European Parliament of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L136/3 (The Mediation Directive).

⁴ Klaus J Hopt and Felix Steffek, *Mediation: Principles and Regulation in Comparative Perspective* (Oxford University Press 2012) 7.

overarching concept called non-voluntary mediation that can be used to analyze their growing importance in European legal systems.

The first chapter will set up the outline of this new concept of non-voluntary mediation. This will be done through an explanation of its emergence in the court context, but first presupposes looking at the cultural, political, economic and social climate surrounding its birth as well as at the different perceptions of the concept of mediation itself.

Such presentation could not be comprehensive without addressing in a second chapter the institutional efforts of the European Union, which has funded projects, issued consultation papers and reports,⁵ adopted resolutions⁶ and finally enacted the 'Mediation Directive' in 2008,⁷ the Consumer ADR Directive and the Consumer ODR Regulation in 2013;⁸ nor could it be exhaustive without examining the decisions of the European Courts of Justice on the matter. But the chapter first explores the regulations and methods of non-voluntary mediation existing outside Europe, in particular in the USA, in Canada and in Australia where it has been implemented for a longer period, providing models and benchmarks and offering some very interesting points of comparison.

Therefore, the first part addresses the context in which non-voluntary mediation has emerged through a first chapter explaining its genesis, and a second chapter analyzing the existing European legal framework after an overview of similar mechanisms in place outside Europe.

⁵ eg Commission, 'Green Paper on alternative dispute resolution in civil and commercial law' COM(2002) 196 final.

⁶ eg European Parliament legislative resolution of 29 March 2007 on the proposal for a directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters (COM (2004) 0718-C6-0154/2004 - 2004/0251(COD)).

⁷ The Mediation Directive.

⁸ Directive 2013/11/EU on Alternative Dispute Resolution for Consumer Disputes [2013] OJ L165/63 (The ADR Directive); Regulation 524/2013 on Online Dispute Resolution for Consumer Disputes [2013] OJ L165/1 (The ODR Regulation).

CHAPTER 1

THE EMERGENCE OF NON-VOLUNTARY MEDIATION IN EUROPE

Introduction

Most civil European justice systems were redefined after the Second World War on the principle of court-based litigation and with the introduction of legal aid on a wide scale. Legal aid schemes, implemented for example in England in 1949⁹ and France in 1962,¹⁰ were seen as one of the pillars of the Welfare State politics put in place in Europe at that time as a way to provide access to justice for all.

Several decades later, in the early 1990s, an uncontrolled growth of civil litigation was observed, particularly in family and commercial matters.¹¹ Most countries were struggling to control legal aid expenditure as a result of an escalating demand. In England, the Legal Aid Board reported a continued rise in expenditure on all forms of civil and family legal aid with a 19% increase in spending between 1993 and 1998.¹²

This led to what has been named in Western countries the 'civil justice crisis' which is described by Genn as follows:

In many parts of the world, both the criminal and the civil courts are overloaded. In some places, cases take years to be processed and concluded. Legal costs are often high and disproportionate. Enforcement is difficult. Some legal systems are corrupt. In many places, there is little or no public funding for legal aid so little means of law-income groups obtaining quality legal representation.¹³

⁹ Legal Aid and Advice Act 1949

¹⁰ Loi no 72-11 du 3 janvier 1972 Instituant l'Aide Judiciaire (Loi 72-11).

¹¹ Henry J Brown and Arthur L Marriott, *ADR Principles and Practice*, (3rd edn Sweet & Maxwell 2011).

¹² Department for Constitutional Affairs, *A Fairer Deal for Legal Aid* (Cm 6591, July 2005) para 2.8.

¹³ Hazel G Genn, *Judging Civil Justice*, vol The Hamlyn Lectures 2008 (Cambridge University Press 2010) 115.

In England, the crisis was mainly based on budget issues for the parties and the government because of the high cost of traditional court litigation and the need to control expenditure on civil justice. In his book on Consumer ADR in Europe, Hodges highlights the very high cost of the basic hourly rate of the lawyers in England observing 'the absence until recently of any ability to control costs on the basis of proportionality to the sum in dispute'.¹⁴

In the rest of Europe, with systems of civilian tradition, the crisis was more closely linked to a large backlog in pending court cases. In Italy alone, a backlog of more than five million cases in the court system was reportedly due to a lack of court resources but also to a legal culture strongly grounded in litigation.¹⁵ Data published by the Council of Europe for the year 2014 reported that the average duration of litigious cases in civil and commercial matters in first instance courts was 348 days in France and 532 days in Italy. The study points out that these results lead also to a high litigation cost for litigants and courts.¹⁶

Although the situation was different across Europe between civil and common law jurisdictions, there was for the last three decades a general attempt to control civil justice expenditure, notably by reducing significantly legal aid for civil claims or trying to find ADR processes to court litigation.

In this context ADR, particularly mediation, became one of the favoured solution to resolve the civil justice crisis as noted by Genn:

The common solutions that emerged from civil justice reviews around the world were the wholesale introduction of ADR, cost control, stripping down of

¹⁴ Christopher J S Hodges, Iris Benöhr and Naomi Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing 2012) 254.

¹⁵ Giuseppe De Palo and Lauren Keller, 'Mediation in Italy: Alternative Dispute Resolution for All' in Klaus J Hopt and Felix Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford University Press 2012) 667, 687.

¹⁶ European Commission for the Efficiency of Justice, *European Judicial Systems: Efficiency and Quality of Justice* (Council of Europe, CEPEJ Studies No 23 Edition 2016 (2014 data) 2016).

procedure and active case management by the judiciary to save costs to the justice system and the parties.¹⁷

Indeed, inspired by the ADR movement initiated in the 1970's in the USA , began to emerge a European mediation movement,¹⁸ which found its inspirations in various sources,

(...) including the desire for qualitatively better options and solutions for dispute resolution problem solving in substance and more party participation and empowerment in procedure and process, as part of larger political movements seeking democratic participation in the polity and the legal system.¹⁹

This movement rapidly gathered adherents in political and legal circles in Europe where ADR, particularly mediation, was seen as a more participatory process which could benefit the community as a whole. From that period in Europe, ADR, more particularly mediation, was no longer seen as 'an exotic and eccentric practice'²⁰ by governments and judiciary but as a major way to resolve the civil justice crisis by diverting cases from courts with many advantages for litigants. Hopt observes that:

The promise of mediation comprises sustained conflict resolution, just results in the interest of all parties concerned, an integrative and constructive method, a reduction of court caseloads and cost as well as time savings for the parties and state treasuries.²¹

England for example, has been through an extensive process of civil justice reform since the late 1990's under Lord Woolf's leadership, who recommended among other suggestions to promote ADR at the earliest moment and avoid court

¹⁷ Genn, *Judging Civil Justice* (n 13) 68.

¹⁸ Brown and Marriott (n 11) x.

¹⁹ Menkel-Meadow, 'Regulation of Dispute Resolution' (n 2) 422.

²⁰ Neil H Andrews, *Andrews on Civil Processes - volume 1: Court Proceedings* (1st edn, Intersentia Publishing Ltd 2013) para 1.42.

²¹ Hopt and Steffek (n 4) Preface.

proceedings.²² Indeed, from 1998, ADR has received increasing support from government policy and the judiciary,²³ even though Sir Rupert Jackson considered in his 2010 costs regime report that in England 'ADR is, however, under-used, its potential benefits are not as widely known as they should be'.²⁴ Following his report and a government's consultation in 2011,²⁵ the Jackson proposals were introduced in April 2013, implementing many procedural changes, reviewing civil litigation costs and supporting the increase use of ADR.²⁶

Developments in England have been mirrored in the rest of Europe, in Western Europe (eg France, Italy, Germany, Norway) and in Eastern European countries (eg Romania, Poland, Hungary) where ADR, in particular mediation, has been largely implemented²⁷ and promoted with the continuous support of the European Union funding projects, issuing consultation papers, reports and directives and promulgating a Code of Conduct for Mediators.²⁸ Mediation has undoubtedly seen a major development as an out-of-court dispute resolution process although it is reported to be largely under-used across Europe despite the implementation of the Mediation Directive.²⁹

²² Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (Lord Chancellor's Department ed, HMSO 1996).

²³ Civil Procedure Rules (CPR) rr 1.4 and 26.4; Susan Prince, *An Evaluation of the Exeter Small Claims Mediation Scheme* (Department for Constitutional Affairs, September 2006); Jill Enterkin and Mark Sefton, *An Evaluation of Reading Small Claims Mediation Scheme* (Department for Constitutional Affairs, December 2006).

²⁴ Jackson LJ, *Review of Civil Litigation Costs: Final Report* (TSO 2010) xxii para 6.3 (Jackson Report on Civil Litigation Costs).

²⁵ Ministry of Justice, *Reforming Civil Litigation Funding and Costs in England and Wales - Implementation of Lord Justice Jackson's Recommendations: The Government Response* (Cm 8041, March 2011).

²⁶ Jackson Report on Civil Litigation Costs.

²⁷ Commission, 'Study for an evaluation and implementation of Directive 2008/52/EC - the 'Mediation Directive', Final Report, October 2013, updated March 2016 (Publications Office of the European Union 2016) V (Study for Evaluation and Implementation of the Mediation Directive).

²⁸ European Code of Conduct for Mediators 2004
<http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf> accessed 7 May 2014.

²⁹ Jackson Report on Civil Litigation Costs; Hopt and Steffek (n 4) 94-95; European Parliament 'Rebooting' the Mediation Directive: assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU', (Directorate General for Internal Policies Legal Affairs, Study PE 493.042, January 2014) ('Rebooting' the Mediation Directive).

In response to this low use of out-of-court mediation as an alternative to court, another type of mediation inserting compulsion throughout the process expanded within the court system, promoted by governments and the judiciary. This movement has led to a pragmatic but disorganized dissemination of coercion across Europe in relation to the use of mediation. The present study in its first chapter offers to classify and gather these practices under the unique denomination of non-voluntary mediation.

This chapter therefore will first outline the concept of non-voluntary mediation and its complexity, compared to traditional mediation but also compared to other dispute resolution mechanisms, and will then explain how it has evolved in a court context, provoking a shift in the notion of access to justice.

1.1. A new concept of mediation

According to Wilson et al, the term ADR is ‘an umbrella term which describes a range of methods of resolving legal disputes without recourse to litigation in the courts’.³⁰ There are many methods of ADR, such as for example arbitration, conciliation, negotiation, facilitation, among which mediation is predominant. The purpose of this section is to recall the original concept of mediation in order to be able to define non-voluntary mediation and to compare it with other dispute resolution mechanisms.

1.1.1. The main characteristics of the traditional concept of mediation

Mediation is defined by Menkel-Meadow as a technique ‘to resolve disputes, manage conflict, plan future transactions or reconcile interpersonal relations and improve communications’.³¹

³⁰ Steve Wilson and others, *English Legal System* (Oxford University Press 2014) 554.

³¹ Menkel-Meadow, *Mediation: Theory, Policy and Practice* (n 1) xiii.

This proposition is hardly new. Anthropologists have observed that in most societies, even among early nomadic hunters, 'meeting and talking' has been used to resolve some disputes.³² Historians date the use of mediation from AD 500:

In [his] work Professor Roebuck has traced the use of settlement facilitation (including specific references to mediation) in England from around the 8th century, through Anglo-Saxon assemblies, 12th century efforts to bring about settlement, Elizabethan commissions, 18th and 19th century efforts to settle disputes, leading to the 20th century and the creation of the profession of mediator.³³

Although the practice of mediation has a long history, the term mediation has no agreed definition. Essentially, mediation is 'a voluntary and confidential process in which a neutral third party, the mediator, assists disputing parties to reach a consensual solution to their dispute'.³⁴ A comparison of definitions reveals a large consensus in terms of the existence of:

- (a) a dispute;
- (b) the intervention of a neutral third party;
- (c) the voluntary nature of the process;
- (d) the confidentiality of the process.

(a) A dispute

As an ADR process, mediation is often only seen as an alternative to resolve legal disputes that could potentially be submitted to the courts. But, in reality, mediation as a non-adjudicative process offers the advantage not only to be confined to resolution of legal conflicts but also to be considered for conflicts with little or no legal dimension.

³² Simon Roberts, *Order and Dispute: an Introduction to Legal Anthropology* (Penguin 1979) 26.

³³ Brown and Marriott (n 11) referring to Derek Roebuck, *The Myth of Modern Mediation* (Oxford: Holo Books ed, 2010) 30.

³⁴ European Code of conduct for Mediators
<http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf> accessed 7 May 2014.

It also means that within the process, even though mediation is usually rights-based, parties can include other considerations than rights and law to resolve their conflict. For example, parties can consider principles of fairness and equity of their own perception, commercial or personal considerations such as the preservation of a business or a family relationship which may be reflected in their agreement by arrangements based on the degree of sensitivity of each person concerned.

Although mediation can offer to take into account a wider scope of considerations beyond legal issues, there are some circumstances in which mediation may not be suitable or even forbidden. There is no exhaustive list of all the situations where mediation is not appropriate and the decision to consider a mediation process appropriate or not rests with the mediator.

However, in England for instance, the Jackson ADR Handbook³⁵ gives some examples of unsuitable situations for mediation such as the need for a precedent or a court order or when there is power imbalance between the parties because, for example, of domestic violence.

In some circumstances, mediation might be simply forbidden. The Mediation Directive not only confines its application to civil and commercial cross-border disputes but stipulates that the text does not apply in relation to rights and obligations that parties are not free to decide themselves under the applicable law and excludes expressly from its application administrative, revenue and customs matters and issues involving acts of government.³⁶ Although these exclusions only concern the scope of the Directive, it seems that, in some countries, similar exclusions have been expressed in national legislation. For example, England excludes from ADR cases involving public policy.³⁷

³⁵ Susan H Blake, Julie Browne and Stuart Sime, *The Jackson ADR Handbook* (2nd edn, Oxford University Press 2016) paras 2.49- 2.56. (it is the Jackson's reform official manual commissioned for use by the judiciary first published in 2013, and updated in 2016).

³⁶ The Mediation Directive art 1.2.

³⁷ Susan H Blake, Julie Browne and Stuart Sime, *A Practical Approach to Alternative Dispute Resolution* (3rd edn, Oxford University Press 2014) para 3.20.

(b) The intervention of a neutral third party

A further central characteristic of mediation is the intervention of a neutral third party, which means that the disputing parties, instead of going to court, have chosen the assistance of a neutral practitioner to help them break the deadlock. The mediator's role is then to facilitate with neutrality, independence and impartiality, through a structured process, what is needed by the parties to resolve the dispute. Indeed, though the mediation process is informal, the mediator assists the parties through four key formalized stages which are the opening stage, the exploration stage, the negotiation stage and the closing stage.³⁸ Along the process, his role is to help the communication between parties without having the power to impose a solution. The mediator is not a decision maker but rather 'a lateral thinker'.³⁹

However, differences can emerge in relation to the degree of implication of the mediator. The main distinction is the one existing between facilitative and evaluative mediation: in the first approach, which is the norm, the mediator helps the parties only as a facilitator in an impartial manner, whereas in an evaluative mediation the mediator goes beyond and evaluates the merits of the case to help the parties reach a decision.⁴⁰ This distinction is helpful but a little too simplistic. In practice mediation is multiple and tends to be always facilitative with a flexible amount of evaluation, which can vary from no or little evaluation to the expression of the merits of the case by the mediator. The present study will retain a flexible approach of the role of the mediator.

(c) The voluntary nature of the mediation process

Voluntariness is the essential element of mediation. It is the essence of mediation, its central axiom, the element that makes the specificity of ADR and particularly mediation. It is usually considered as the key element that strengthens the parties

³⁸ Blake, Browne and Sime, *The Jackson ADR Handbook* (n 35) paras 15.04-15.07.

³⁹ Edward De Bono, *The Use of Lateral Thinking* (Jonathan Cape 1967) cited in Brown and Marriott (n 11) 31.

⁴⁰ Blake, Browne and Sime, *The Jackson ADR Handbook* (n 35) paras 14.03-14.16.

in a collective and independent perspective and gives a wider acceptance of the results, what Fiss describes as the 'individualistic, unanimous consent exalted by the social contract tradition'.⁴¹ It covers mainly two aspects of the mediation process: the voluntary participation of the parties which guarantees their freedom of choice and the voluntary reach of a mediation agreement which leaves in their hands its outcome.

Firstly, the voluntary nature of mediation implies that the parties choose to mediate voluntarily. Once the dispute has arisen, mediation can in theory be decided freely by the parties at any stage up to court and even in some circumstances during the court process if the court stays the proceedings. But the parties may also have contractually bound themselves by a mediation clause forcing them to attempt mediation before going to litigation. In some countries, the issue of the enforcement of such clauses is considered to be conflicting with the voluntary nature of the mediation process, although the parties still settle their agreements.⁴² However, most European legal systems guarantee the enforceability of contractual agreements to mediate and apply to them their general legal rules with some specific provisions. In England for example, mediation clauses are enforceable in principle⁴³ although the agreement to mediate must be sufficiently certain. The elements of certainty have been identified in the case *Holloway v Chancery Mead*:

- (i) the absence of further negotiation on the appropriateness of mediation;
- (ii) an agreement on how the mediator should be selected; and
- (iii) the process should be specified or identified.⁴⁴

Secondly, the principle of voluntariness implies that the outcome of the process is in the hands of the parties and that they bear the responsibility to resolve or not their dispute. If an agreement is reached, it can be put in writing and form a binding

⁴¹ Owen Fiss, *The Law as it could be* (New York University Press 2003) 57.

⁴² Hopt and Steffek (n 4) 29-31.

⁴³ *Cable & Wireless v IBM* [2002] EWHC 2059 (Comm).

⁴⁴ [2007] EWHC 2495 (TCC), [2008] 1 All ER (Comm) 653 at [83].

contractual settlement which, in some countries, can be made enforceable in court.⁴⁵ If not, traditional court litigation is still open to them.

(d) *The confidentiality of the mediation process*

Finally, it is important to mention the confidential nature of mediation although it is not explicitly mentioned in all definitions. Confidentiality runs generally for all types of mediation in order to allow the parties to negotiate freely without any fear. It means that the mediator and the parties will keep confidential what happens during the process and that the process will be protected from disclosure. Any statement made or information furnished by either of the parties, and any document produced or prepared for mediation cannot be used in any proceedings without the consent of all parties. The principle is recalled in all agreements and also in all Codes of Mediation applying to professionals.⁴⁶

But confidentiality might be compromised when the mediation process fails and the parties return to court or when mediation is taking place in the context of court litigation. In addition, although regulated as a fundamental principle in article 7 of the Mediation Directive, Schonewille and Lack remark that confidentiality is one of the 'common principles that are not common'.⁴⁷ Indeed they observe that whereas the need to restrict the third parties' possible use of information obtained during the mediation process seems to be largely accepted among Member States, it is not at all obvious with regard to the parties themselves and suggest that the provisions of Article 7 should be extended to cover all those involved in a mediation process.⁴⁸

⁴⁵ Hopt and Steffek (n 4) 45-47.

⁴⁶ European Code of Conduct for Mediators
<http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf> accessed 7 May 2014 art 4.

⁴⁷ Manon Schonewille and Jeremy Lack, 'Mediation in the European Union and Abroad: 60 States Divided by a Common Word?' in Manon Schonewille and Fred Schonewille (eds), *The Variegated Landscape of Mediation* (Eleven International Publishing 2014) 19, 24.

⁴⁸ *ibid* 25.

1.1.2. Non-voluntary mediation: the necessity of definition

(a) An ambiguous concept

Non-voluntary mediation could be simply defined as mediation without the voluntariness of the parties. Indeed, as non-voluntary mediation emanates from mediation, their features are similar: a dispute, the intervention of a neutral third party with no power to impose a solution and the aim to reach an agreement. The only difference is that the process is not based on the free will of the parties. But, as the present study will show, the reality is more complex and offers a diversity of situations where mediation is non-voluntary.

Mediation without voluntariness of the parties is considered by some authors as an 'oxymoron' as it undermines the essential characteristic of mediation:

Mediation (...) is a process that emphasizes *voluntary* decision-making and focuses on self-determination as a controlling principle. Coercion into the mediation process therefore seems inconsistent with, and even antithetical to, the fundamental tenets of the consensual mediation process.⁴⁹

Others consider, in light of the work accomplished by Sander,⁵⁰ that mediation without a free engagement into the process is not an oxymoron as far as coercion to enter into mediation is kept distinct from coercion within the mediation process as 'an individual may be told to attempt the process of mediation, but that is not tantamount to forcing him to settle in the mediation'.⁵¹

A similar approach is used by Nolan-Haley who distinguishes the two necessary elements to achieve consent in mediation: 'front-end participation consent which should occur at the beginning of the mediation process and continue throughout the

⁴⁹ Dorcas Quek, 'Mandatory Mediation: an Oxymoron? Examining the Feasibility of Implementing a Court-mandated Program' (2010) 11.2 *Cardozo Journal of Conflict Resolution* 479, 484.

⁵⁰ Franck E Sander, H William Allen and Debra Hensler, 'Judicial (Mis)use of ADR? A Debate' (1996) 27 *The University of Toledo Law Review* 885, 886.

⁵¹ Quek (n 49) 486.

process and back-end outcome consent which should be present when parties reach an agreement in mediation' and concludes:

In the United States, we generally have no problem dispensing with front-end consent in mediation (...) [but we are still] requiring back-end consent in mediation, insisting that parties voluntarily consent to the outcome and that no coercion takes place during the mediation process.⁵²

This position is justified by the assumption that our legal systems are so much court-oriented that people do not think to use spontaneously mediation. Therefore, to compel them to enter into mediation is a way to show them the benefits of mediation. Coercion to enter into mediation should however be temporary with the only aim to promote mediation in our societies.⁵³

However, this argument cannot be entirely satisfactory for the purpose of this study. First of all, mediation is a global and structured process which cannot be divided in terms of consent without distorting the voluntary nature of the process. Moreover, to compel parties to enter into mediation will inevitably put pressure on them to reach a settlement. Secondly, if coercion is admitted within the process, we probably witness the appearance of a new dispute resolution process but which cannot be classified as mediation. Finally, this distinction made between mandatory participation in mediation and mandatory outcome of mediation is too limited as it only divides the issue of coercion in mediation into two main categories. In addition, the latter has not been so far implemented anywhere in Europe.

Another attempt to classify coercion in relation to mediation was conducted by Quek, who established what he called 'the continuum of mandatoriness in mediation', based on an Australian study, where he classified from 1 to 5 the levels of compulsion as follows:

- (i) Categorical or discretionary referral with no sanction;
- (ii) Requirement to attend mediation orientation session;

⁵² Jacqueline M Nolan-Haley, 'Consent in Mediation' (2008) 14 Dispute Resolution Magazine 4, 5.

⁵³ Sander, Allen and Hensler (n 50) 886.

- (iii) Soft sanctions making mediation as a prerequisite for filing a case or obtaining legal aid or imposing cost sanctions for unreasonable refusal to mediate;
- (iv) Compulsory discretionary or categorical mediation with provision to be exempted;
- (v) Categorical or discretionary referral with sanctions for non-compliance.⁵⁴

This classification is valuable in attempting to graduate the level of compulsion in mediation but it is confined to the distinction made between categorical and discretionary approaches, ie whether mediation is ordered by the law or by the judges.

Finally, if we refer to our countries of investigation, and particularly to England, another distinction made in the Jackson ADR Handbook might help define the concept of non-voluntary mediation more precisely and might be more in adequation with the situation in Europe. It is the distinction made between mandatory consideration of mediation and mandatory participation in mediation.⁵⁵

Mandatory consideration of mediation is the obligation for the parties in a court context to consider whether mediation could be the appropriate resolution method to resolve their dispute. It must not be confused with mandatory participation in mediation (frequently named mandatory mediation) where the parties are compelled to attempt a full mediation process prior to going for judicial resolution. England considers that there is a fundamental difference between these two obligations and, while it refuses mandatory participation in mediation, it promotes mandatory consideration of mediation.⁵⁶

This distinction is interesting from many points of view. Firstly, it excludes the consideration of coercion in relation to the outcome of the mediation process. Even if parties are compelled to participate in a mediation process, they are always free

⁵⁴ Quek (n 49) 488.

⁵⁵ Blake, Browne and Sime *The Jackson ADR Handbook* (n 35) para 13.17.

⁵⁶ *ibid.*

to withdraw from it and to reach or not an agreement. Secondly, the input of such distinction is also to introduce a new form of coercion at the very early stage which is mandatory consideration. A number of countries in Europe such as England in family matters or Italy have chosen this form of compulsion by imposing upon the parties to attend a pre-stage Mediation Information and Assessment Meeting (MIAM).⁵⁷ Finally, it enables to identify different levels of coercive actions that are used in the context of court litigation to boost the use of mediation, highlighting the possibility to adopt different approaches and to adapt the level of compulsion to the objective pursued.

(b) The different categories of non-voluntary mediation

The present study will start from this distinction between participation and consideration to build a classification of methods of non-voluntary mediation. It will add another level of action that has been used to increase the use of mediation which is information.

When reviewing the current framework of mediation in Europe in a court context, it appears that these three levels of action (information, consideration and participation) have been experimented primarily on a voluntary basis for litigants. Indeed, many Member States have adopted a variety of measures to inform citizens on the advantages of mediation and give them useful practical information on cost and procedure. For example, in most Member States, information on mediation is available on the website of relevant ministries (eg Italy, France, England) or courts (eg The Netherlands). In Poland, the Ministry of Justice conducted public promotion campaigns, television spots, radio broadcasts and published posters promoting mediation. In France, 2013 was declared the 'Mediation Year' with the organization of many events such as seminars and conferences, and published information on mediation.⁵⁸

⁵⁷ Children and Families Act 2014 s 10.

⁵⁸ Study for Evaluation and Implementation of the Mediation Directive para 3.7.

Another step to boost the use of mediation consisted in inviting potential litigants to consider mediation, ie to think carefully about mediation in order to be able to decide whether or not they want to attempt mediation. In this situation, the aim is not only to inform litigants on mediation but to offer them the possibility to assess whether mediation would be more suitable for the resolution of their dispute than judicial resolution. Consideration is more than just information. It is soliciting litigants to think about the option of mediation. For example, in France, judges in courts of first instance have a general obligation to invite the parties to consider mediation.⁵⁹

Lastly some countries went even further by encouraging potential litigants to directly participate in a full mediation procedure before going to trial like in England through the Small Claims Mediation Service.⁶⁰

All the situations mentioned above are based on the principle of voluntariness. Potential litigants are free to inform themselves on mediation, to consider using mediation or to choose to participate in a full mediation process. However, given the low impact of such actions on the use of mediation, many European countries have started to impose them on litigants:

➤ Mandatory mediation information

It can be defined as the obligation made to the parties in a court context to be informed about mediation. The more comprehensive the information, the easier the potential litigant will be able to make a decision (advantages, cost, process, length, etc). The scope of the requirement can vary. For example, claimants can be required to complete a questionnaire stating that they have received information on mediation prior to the filing of the claim or parties must attend an informative meeting on mediation before choosing judicial resolution.

⁵⁹ Code de Procédure Civile (CPC) art 21.

⁶⁰ CPR 26.4A.

The requirement to be informed tackles the lack of public awareness observed in all of Europe on the possibility of using mediation instead of going to court and the urgent need to educate and inform potential litigants. In this regard every party who intends to bring an action is required to be aware of the mediation option.

In the three countries of investigation, there is no express measure in place that solely imposes on potential litigants the duty to be informed about mediation prior to going to court. It is either implied by provisions on mandatory consideration or participation (eg Pre-action Protocols, Directions Questionnaires in England) or coupled with the obligation to consider mediation (eg pre-action meeting in Italy; family MIAM in England).

However, it is worth separating the obligation of information from the obligations to consider or to participate as they differ in content. Furthermore, such obligation of information on mediation has already been formalized for some extra-judicial providers such as lawyers or traders. For example, in England and in Italy, lawyers must inform their client about the possibility of using mediation and of its benefits. The Consumers ADR Directive equally relates to the issue of information by requiring traders to inform consumers about consumer ADR.⁶¹

➤ Mandatory consideration of mediation

It is the obligation for the parties in a court context to consider whether mediation could be the appropriate resolution method to resolve their dispute. It is formally implemented under diverse forms and with various degrees of intensity in each country of investigation.

For example, in England, through the judicial policy of encouragement, litigants are required at different stages of the proceedings to consider mediation (Pre-action Protocols, Directions Questionnaires). In Italy, in some areas of civil and commercial

⁶¹ The ADR Directive art 13.

disputes, the 2013 Decree imposes on litigants to attend a meeting with a mediator for mediation information and consideration as a precondition to court.⁶²

➤ Mandatory participation in mediation

Frequently named mandatory mediation, it is the situation where the parties in a court context are compelled to attempt a full mediation process. The decision to reach a settlement always stays voluntary.

Mandatory participation in mediation has been implemented quite extensively in family and employment law in Europe whereas, until very recently, there was no legislation allowing mandatory participation in mediation in civil and commercial matters (with the exception of Italy between 2010 and 2012).⁶³ France seems to have opened a door, very recently, with a new law requiring to attempt conciliation as a precondition to court for any small civil claim (under 4,000 euros)⁶⁴ and the project of Online court in England might also modify the scope of mandatory mediation in England.⁶⁵ In addition, Italy has recently given to judges discretionary power to order parties to attempt mediation at any stage of the proceedings.⁶⁶ Also in England, the practice of cost sanctions has conducted to the development of 'implied compulsory mediation'.⁶⁷

Overall, the classification proposed (information, consideration, participation) gives a continuum of levels of coercive action devised to increase the use of mediation in the context of court litigation. The gathering of these three categories constitutes from my point of view what I call in this study non-voluntary mediation which I

⁶² Decreto-Legge 21 giugno 2013 no 69: Disposizioni urgenti per il rilancio dell' economia convertito con modificazioni dalla L 9 agosto 2013, no 98 art 83 (Decreto 69/2013).

⁶³ Decreto Legislativo 4 marzo 2010, no 28: Attuazione dell'articolo 60 della legge 18 giugno 2009, no 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali (Decreto 28/2010).

⁶⁴ Loi no 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIème siècle (Loi 2016-1547).

⁶⁵ Briggs LJ, 'Civil Courts Structure Review: Interim Report' (Judiciary of England and Wales, December 2015) (Briggs IR); Briggs LJ, 'Civil Courts Structure Review: Final Report' (Judiciary of England and Wales, July 2016) (Briggs FR).

⁶⁶ New art 5 of Decreto 28/2010.

⁶⁷ Masood Ahmed, 'Implied Compulsory Mediation' (2012) 31/2 Civil Justice Quarterly 151.

define as 'the different levels of coercive action imposed on the parties in a court context to increase the use of mediation'. The second part of the study will address in detail each form of non-voluntary mediation in the selected countries. But it is necessary beforehand to compare non-voluntary mediation with other dispute resolution mechanisms in order to be able to highlight its specificity.

1.1.3. The comparison of non-voluntary mediation with other dispute resolution mechanisms

There is such a wide range of dispute resolution methods that are available today in our legal systems that it has become difficult at times to distinguish one from the other. For example, what is the difference between mediation, conciliation, arbitration, the ombudsman procedure or some hybrid processes such as 'med-arb'? How do these techniques coexist and interact with the development of coercive forms of dispute resolution among which non-voluntary mediation?

There is at first a problem of definition as there is no consensus on the terminology of dispute resolution methods across Europe. There is no agreed definition of the term 'Alternative Dispute Resolution' which is, like in England, sometimes interchanged with mediation.⁶⁸ Moreover, the same terminology has often a different meaning from one country to the next or even various meanings within one country. The most current definitional confusion that exists is the one between mediation and conciliation. Secondly, there is a problem of classification because of the multiplicity of techniques and the fact that most of them are still evolving or even are often combined to adjust the conflict resolution process to the needs of the dispute.

(a) Mediation and conciliation

Mediation and conciliation are two concepts which are frequently used interchangeably, both in practice and in academic study. In practice, when looking

⁶⁸ Nolan-Haley, 'Consent in Mediation' (n 52) 4.

at our countries of investigation, we can observe that there is no clarity or consistency in the distinction between both mechanisms, even though conciliators are often considered to play a stronger leadership role in the procedure than mediators and to have more influence on the resulting agreement.⁶⁹ In Italy for example, the term ‘conciliation’ can refer to the resolution of a dispute as well as to the settlement of a dispute following the mediation process.⁷⁰ In addition, ‘some scholars equate conciliation with an evaluative type of mediation, while others have taken the opposite view and label conciliation as a brand of facilitative mediation’.⁷¹

Nevertheless, there is a tendency across Europe to use the two mechanisms interchangeably. In England, the Jackson ADR Handbook considers that conciliation is ‘a facilitative dispute resolution process in which a neutral third party seeks to assist the parties to a dispute to reach a settlement. As such, it is virtually indistinguishable from mediation’⁷² and in France, conventional mediation and conciliation have the same definition in the *Code de Procédure Civile* as:

(...) any structured process by which two or more parties attempt to reach an agreement outside judicial proceedings for the amicable resolution of their dispute, with the help of an impartial, competent and diligent third party chosen by the parties.⁷³

Moreover, the definition of mediation in UNCITRAL Model Law on International Commercial Conciliation, explicitly equates conciliation ‘with mediation or an expression of similar import’.⁷⁴ Although the UNCITRAL Model is not mandatory, it has a big impact on the regulation of ADR.

⁶⁹ Brown and Marriott (n 11) 156.

⁷⁰ De Palo and Keller (n 15) 669.

⁷¹ Jacqueline M Nolan-Haley, ‘Is Europe Headed Down the Primrose Path with Mandatory Mediation?’ (2012) 37/4 North Carolina Journal of International Law and Commercial Regulation 981, 1010.

⁷² Brown and Marriott (n 11) 156.

⁷³ art 1530.

⁷⁴ UNCITRAL 2002 Model Law on International Commercial Conciliation, adopted by United Nations General Assembly Resolution 2003/A/57/18, with Guide to Enactment and Use, art 1.3 (UNCITRAL 2002 Model Law).

What about the non-voluntary processes? Are they some forms of coercive conciliation? Are they assimilated to non-voluntary mediation schemes? It appears that most European countries offer examples of non-voluntary schemes as previously observed in the case of mediation. In England, the most important conciliation domain, which is employment law, practices non-voluntary conciliation.⁷⁵ In France, a new law requires as a precondition to court for any small civil claim (under 4,000 euros) to attempt conciliation.⁷⁶

These schemes are similar to some non-voluntary mediation schemes, as they have in common their mandatory nature, either through consideration or participation of the parties in conciliation. As a result, the present work will consider equally any forms of non-voluntary mediation or conciliation, given the similarity of the processes and their assimilation often made in practice.

(b) Other dispute resolution mechanisms: ombudsman schemes, med-arb, arbitration

The wide spectrum of existing dispute resolution mechanisms goes from voluntary mediation, which offers a non-adjudicative, consensual and flexible process with maximum decision-making control of the parties, to litigation which is characterized by adjudication with rigid procedure and minimal party control. Between these two extremes there is a 'broad church of models'.⁷⁷

How does the flow of procedures coexist with original mediation or more importantly interact with schemes of non-voluntary mediation? There are different perspectives that can be used to compare dispute resolution processes. Some focus on the third party's role (advice, suggestions, facilitation), its power (adjudicatory or not), or its institutional membership (state, professional body, private). These criteria based on the role of the third party make easy the distinction between

⁷⁵ Enterprise and Regulatory Reform Act 2013 art 7.

⁷⁶ Loi 2016-1547 art 4.

⁷⁷ Brown and Marriott (n 11) 29.

mediation and arbitration as 'arbitrator possesses unilateral adjudicatory powers while a mediator does not'.⁷⁸

Dispute resolution processes can also be compared from the perspective of the parties. In 'Regulating Dispute Resolution' Steffek proposes a functional and comparative matrix which:

(...) is determined from the perspective of the parties, since they are normative starting point and focus of regulation. The features facilitate the distinction of whether or not the parties together control a certain aspect of the dispute resolution. Hence the matrix uses the following features to describe dispute resolution mechanisms, all to be understood from the viewpoint of the parties:

- initiation control: whether each party's consent is needed to initiate the dispute resolution mechanism;
- procedure control: whether the parties determine the procedure;
- result-content control: whether the parties determine the content of the result of the dispute resolution (...);
- result-effect control: whether the parties consent is needed for the result-content to be binding;
- neutral choice control: whether the parties choose the neutral;
- information control: whether the parties control the disclosure of information.⁷⁹

A first version of the matrix which includes only traditional dispute resolution mechanisms, namely negotiation, mediation, arbitration and adjudication, shows that mediation is the only mechanism that fulfils all the features of the matrix, allowing full control of the parties on the whole mediation process. But a second version of the matrix which adds other dispute resolution mechanisms reveals that most traditional ADR mechanisms exist under mandatory forms which exclude in those cases any initiation control of the process by the parties. The table mentions

⁷⁸ Hopt and Steffek (n 4) 16.

⁷⁹ Felix Steffek and Hannes Unberath, *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (Hart Publishing 2013) 37.

mandatory mediation and mandatory conciliation but also court conciliation or mandatory ombudsman.

Therefore, in addition to what has been mentioned above about conciliation, another type of dispute resolution should be explored in relation to the exclusion of initiation control of the process by the parties: the mandatory ombudsman procedure.

An ombudsman is:

An independent person who deals with complaints by the public against administrative and organizational injustice and maladministration in certain specified areas, with the power to investigate, criticize, make issues public and sometimes with limited powers to award compensation.⁸⁰

Although predominantly located in the public sector (eg in France, the Mediator of the Republic, or in England, the Local Government Ombudsman), the institution is also found in the private sector (eg in England, the Legal Ombudsman or the Financial Ombudsman Service). Procedures and policies vary between different ombudsmen. However, power is usually in the hands of the neutral. If we refer to the English Ombudsman Association, the following is explained about the process:

The complainant can go to the ombudsman scheme after he has already complained to the business and is dissatisfied with the response or has not received any response (...) The ombudsman scheme may assist the early resolution of cases through informal processes generally mediation (...) If the case is not resolved by mediation, the ombudsman will investigate (...) and will recommend an outcome. In a majority of cases, both parties accept the recommendation (...) If not, the case is reviewed by an ombudsman, who issues a decision. So, the ombudsman provides, in effect, an internal appeal stage (...) Typically, whether the ombudsman scheme is compulsory or voluntary, the ombudsman can award compensation and/or require the business to do something in relation to the complainant. If the complainant

⁸⁰ Brown and Marriott (n 11) 811.

accepts the ombudsman's decision, it is legally binding on the business and the complainant; if the complainant does not accept the ombudsman's decision, the complainant remains free to pursue the matter in court.⁸¹

The second version of the matrix mentioned above reveals that, in the case of an ombudsman process, parties, unlike mediation, lose the procedure control, result-content control, result-effect control and neutral choice control. Degree of party initiation control depends on whether the recourse to the Ombudsman is voluntary or not. In most cases it is voluntary, but in some schemes it can be made mandatory for the parties. For example, in England, all social housing providers are required by law to belong to the Housing Ombudsman Service (HOS). This is mandatory for all providers registered with the Tenant Services Authority such as landlords, managing agents or developers.⁸²

What needs to be pointed out is that mediation is part of ombudsman procedures. In most schemes, there is a two-stage process, the first being mediation and the second adjudication if mediation fails. For example, in the year 2012/13, 198,897 of the 223,229 cases resolved by the Financial Ombudsman Service in England were dealt with through informal process, generally mediation.⁸³

This hybrid process could be compared to what is usually called 'med-arb' in which the parties in conflict agree to start with a mediation process, and if no settlement is reached at this stage, they ask the mediator to act as an arbitrator to 'determine the dispute and make an award that will be binding or non-binding as agreed by the parties'.⁸⁴ In addition, mandatory ombudsman schemes could be seen as the most achieved form of non-voluntary mediation comprising within the same process absence of initiative control and absence of result control.

⁸¹ Ombudsman Association, 'About ombudsmen' <www.ombudsmanassociation.org/about-process> accessed 16/06/2014.

⁸² Housing Ombudsman Service, <www.housing-ombudsman.org.uk/> accessed 16 June 2014.

⁸³ Financial Ombudsman Service, 'Annual Review 2012/2013' <www.financial-ombudsman.org.uk/publications/ar13/index.html> accessed 16 June 2014.

⁸⁴ Susan H Blake, Julie Browne and Stuart Sime, *The Jackson ADR Handbook* (1st edn, Oxford University Press 2013) para 15.37.

The ombudsman scheme is widespread today in Europe. Originally seen as quite distinct from the civil justice system with very little cross-over between the two, public and private ombudsmen are dealing today with more and more cases that could be dealt with through the civil justice system. The ombudsman has become an important alternative to the court process in many European countries, especially in England.

Nevertheless, as our research is oriented on non-voluntary schemes of mediation implemented in the context of court litigation, the ombudsman will not be included in our study as it is an out-of-court dispute resolution process. The same remark would apply to any other out-of-court ADR coercive mechanism. Indeed, non-voluntary mediation has the singularity of taking place in a court context which makes it unique in the dispute resolution landscape.

1.2. A concept evolving in a judicial context

The previous section has shown the existence of many various types of dispute processes and the emergence of non-voluntary mediation as a particular concept of mediation based on different levels of coercion. The following section will explain how non-voluntary mediation has been implemented within the court system and has led to a shift in the concept of access to justice.

1.2.1. The expansion of non-voluntary mediation in the context of court litigation

(a) The rationale behind non-voluntary mediation

Mediation has permeated the court apparatus through non-voluntary mediation requiring litigants, either to be aware of, to consider or to participate in mediation as they contemplate the judicial resolution of their dispute. There have been lively debates on the issue, which are illustrated by two authors with an old English proverb used by opponents of non-voluntary mediation, 'You can lead a horse to the

water, but you cannot make it drink' to which advocates answer, 'But if you lead it to water, there is a greater chance that it will drink'.⁸⁵

In other words, in the early 2000's, although some people thought that mediation should only be voluntary, and that the courts may distort the mediation process in trying to promote mediation, 'others believed that ADR would never become part of the mainstream of our litigation/dispute resolution culture unless courts were more actively involved in promoting the use of ADR'.⁸⁶ Moreover, some authors argued that 'experience in numerous jurisdictions around the world suggests that court-referred ADR only begins to develop where it is subject to some degree of mandating'.⁸⁷ This idea was also supported by the urgent need to control civil justice expenditure, to reduce backlog in pending cases or/and unbearable costs in litigation.

In practice, non-voluntary mediation has been introduced in a number of European countries and as a result mediation is 'now seen as an essential part of the process by which the parties seek to resolve their disputes by way of litigation, as much as an alternative process in itself'.⁸⁸

Despite this apparent homogeneity, the level of non-voluntary mediation varies from one country to another as a result of domestic factors: the type of legal system (civil or common law), the length of court proceedings, the cost of litigation, the political climate, the attitude of the legal profession or the judiciary towards coercion into mediation. This diversity has to be taken into consideration. Indeed, it is mirrored in the models of regulation and in the methods of integration of non-voluntary mediation.

⁸⁵ Hopt and Steffek (n 4) 25.

⁸⁶ Genn, *Judging Civil Justice* (n 13) 107.

⁸⁷ Nadja M Alexander, *International and Comparative Mediation: Legal Perspectives* (Kluwer Law International 2009) 157.

⁸⁸ Blake, Browne and Sime, *The Jackson ADR Handbook* (n 84) vi.

(b) Models of regulation within the EU

Although the legal sources will be detailed in depth when looking individually at each country, an overview of the existing regulations shows the existence of two main groups of countries in relation to the type of regulation.

Some countries have chosen to give a comprehensive legal framework to mediation including non-voluntary mediation. The aim is to give clarity and protection to litigants and also a defined status for practitioners. It can also be used as an instrument to promote all types of mediation. It is for example the case of France and Italy. France has regulated early mediation through the *Code de Procédure Civile*. Its provisions cover a wide range of issues such as general principles, including the accreditation and the duties of mediators, voluntary mediation, court-referral to mediation, confidentiality, enforceability of mediation agreements.⁸⁹ In Italy as well, mediation is highly regulated although it is the result of a multistep process with legal provisions governing mediation organizations, mediators, mediator training and mediation costs.⁹⁰

Other countries have chosen to leave the area of mediation mainly unregulated. It is the case of England but also, for example, the case of the Netherlands for domestic disputes.⁹¹ The argument commonly raised against regulated mediation is its incompatibility with the intrinsic nature of mediation as a flexible out-of-court process. Too much regulation poses also another risk as mediation could become 'increasingly formalized and procedural (...) just one more part of the expensive process that all of us are trying to avoid'.⁹² In those countries, and particularly in

⁸⁹ Loi no 95-125 du 8 février 1995 relative à l'organisation des juridictions et à la procédure civile, pénale et administrative (Loi 95-125); Décret no 96-652 du 22 juillet 1996 relatif à la conciliation et à la médiation judiciaires (Décret 96-652).

⁹⁰ Legge 18 giugno 2009, no 69: Disposizioni per lo sviluppo economico, la semplificazione, la competitività nonché in materia di processo civile (Legge 69/2009); Decreto 69/2013; Decreto 28/2010.

⁹¹ The Cross-Border Mediation (EU Directive) Regulations 2011, SI 2011/1133.

⁹² Jens M Scherpe and Bevan Marten, 'Mediation in England and Wales: Regulation and Practice' in Klaus J Hopt and Felix Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford University Press 2012) 365, 446.

England, there is no primary legislation for mediation. The implementation of voluntary mediation is due to spontaneous growth, public and private initiatives as well as judicial acceptance and encouragement. The establishment of the mediation procedure and the training of mediators are handled by private organizations such as the Civil Mediation Council, a body that ensures minimum standards in the practice of mediation. However, there are numerous references to ADR in the Civil Procedure Rules (CPR),⁹³ in the Pre-action Protocols,⁹⁴ and in various laws⁹⁵ which give a legal framework to non-voluntary mediation.

Therefore, despite the compliance of all those countries, as members of the European Union, with the EU common regional legal framework, there is a real diversity of approaches to regulating mediation. There is also a real diversity across Europe in the choice of methods devised in each country to implement non-voluntary mediation.

(c) Methods of integration in the court process

Although non-voluntary mediation has been widely implemented in civil proceedings across Europe, it has taken many forms and reached some legal fields more than others. Very briefly, at this stage, it can be mentioned that England offers in Europe the widest range of mediation options in the context of court litigation, while Italy has been at the forefront of experimenting non-voluntary mediation schemes. For its part, France has stayed for a long time far behind these two countries in relation to non-voluntary mediation experimentations and/or implementations but is now trying to bridge the gap. The second part of the study will address in detail these different features in our countries of investigation.

More generally at this stage, it is observed that in some countries, non-voluntary mediation has been introduced in traditional legal areas such as civil, commercial, family or employment law. But sometimes, rather than a substantive area of law, the

⁹³ CPR 1.4, 26.4.

⁹⁴ PD Pre-Action Conduct and Protocols para 8.

⁹⁵ eg Children and Families Act 2014 s 10.

point of reference has been a group of persons such as consumers or the amount of the claim. As already mentioned in the introduction of the thesis, the study will consider non-voluntary mediation in relation to civil and commercial matters.

Despite those disparities, it appears, at a macro-level, that non-voluntary mediation is usually implemented into the court systems at two main different stages: either the process is used at a pre-action stage of the court proceedings, or it is introduced during the court litigation process.

At a pre-action stage, some countries show a tendency to require the parties to attend an information and assessment meeting with a mediator who informs them about the process in order to consider mediation. For example, this requirement is in place in family cases in England where any party is required prior to starting family law proceedings to attend a MIAM.⁹⁶ Another pre-action approach imposes to attempt directly mediation as a precondition for going to court. In this case, either the obligation is limited to a selected type of disputes like family disputes⁹⁷ or affects a wide range of areas of conflicts.⁹⁸

Once the case is in court, the most common way of interaction between mediation and the court system is called court-annexed or court-attached mediation. It is the situation where mediation is ordered by a judge during the litigation process. The judge refers the case on a voluntary or mandatory basis to an independent mediator. However, the mediation process is placed largely under the judge's control even though the process takes place outside the courtroom. In most jurisdictions, if the mediation is successful, litigation is terminated and the parties can ask the judge to declare the mediation agreement to be binding. If not, litigation continues and the dispute is decided by the judge. France has introduced court-mediation as a general provision in its legislation although it is submitted to the agreement of the parties.⁹⁹

⁹⁶ *ibid.*

⁹⁷ Loi no 2011-1862 du 13 décembre 2011 relative à la répartition des contentieux et à l'allègement de certaines procédures juridictionnelles (Loi 2011-1862).

⁹⁸ Decreto 28/2010.

⁹⁹ Loi 72-11; Loi 95-125.

In Italy, since 2013, for any civil claims, judges have the power to mandate the use of mediation (outside the courtroom with an accredited mediator) as a precondition of the admissibility of the claim.¹⁰⁰

Another form of integration which is used is where mediation is carried out by the judge himself or other court officials as an ordinary mediation process 'to cut through the full trial process in order to arrive at a speedy, informal outcome'.¹⁰¹ This process is usually called judicial mediation. While it is less frequently used than court-annexed mediation, it nevertheless exists in significant areas of practice such as, for example in England, throughout the Employment Tribunals Judicial Mediation Scheme.¹⁰² In Europe, the organization GEMME – the European Association of Judges for Mediation – is a body with national sections whose members are working to support the development and implementation of judicial mediation.

Finally, it is important to recall that some countries have chosen to promote mediation through financial sanctions which are ordered at the very end of the court process along with the judicial decision. As already mentioned, England and, very recently, Italy allow judges to order cost sanctions under specific circumstances. Indeed, English courts can impose financial sanctions for a failure by a party to enter into mediation in circumstances where it was considered reasonable to do so.

Guidelines to determine unreasonableness have been listed in *Halsey v Milton Keynes NHS Trust* according to the following criteria:

The nature of the dispute, the merits of the case, the extent to which other settlements methods have been attempted; whether the costs of the ADR would be disproportionately high; whether any delay in setting up and

¹⁰⁰ Decreto 69/2013.

¹⁰¹ Brown and Marriott (n 11) 82.

¹⁰² Blake, Browne and Sime, *The Jackson ADR Handbook* (n 35) para 16.23.

attending the ADR would be prejudicial; whether the ADR had a reasonable prospect of success.¹⁰³

Those are the main methods of integration of mediation into the court system. Each of them demonstrates that mediation when implemented in a context of litigation is mainly a non-voluntary process. According to Quek, mediation has become ‘an adjunct to civil proceedings’¹⁰⁴ which has been made possible through non-voluntary processes. The following section will address the issue of its implications on the fundamental right of access to justice.

1.2.2. A shift to a different notion of access to justice

The implementation of non-voluntary mediation has changed the outline of the principle of access to justice. One could argue that it has enlarged access to justice, and it could be answered that on the other hand, it has deferred access to court in some situations. Access to justice is the fundamental right that guarantees all citizens to have an equal access to the legal system regardless their legal knowledge or their financial capacity, but also ‘being treated fairly according to the law and if not being able to get appropriate redress’.¹⁰⁵ It does not only equate to legal aid nor is an indefinite right. It is also important to consider that due to the growing complexity of the law, citizens need access to the right information as much as legal assistance.

Although the concept of access to justice covers multiple meanings, they all converge on the idea that it is a fundamental principle. Nevertheless, a distinction must be made between the two major components of the concept of access to justice: the economic access to effective justice and the formal access to a fundamental right.

¹⁰³ [2004] EWCA Civ 576, [2004] 1 WLR 3002, para 16.

¹⁰⁴ Quek (n 49) 480.

¹⁰⁵ Wilson and others (n 30) 361.

(a) Mediation as a means to widen access to justice

In an article, Cappelletti, one of the leading scholar on the global law reform movement of the 1970's, identified in a perspective he called 'legal realism'¹⁰⁶ three main obstacles to access to justice: the economic obstacle which deprives poor people from having access, either to information or to adequate representation, the organizational obstacle, when 'the isolated individual lacks sufficient motivation, information and power to initiate and pursue litigation against the powerful producer or the mass polluter' and the procedural obstacle when, 'in certain areas the traditional and ordinary types of procedure are inadequate.'¹⁰⁷

Along with Garth, Cappelletti enumerated three 'waves' of reform which could overcome each of the three obstacles:¹⁰⁸

- the reform of institutions delivering legal services to the poor;
- the development of procedural devices for the representation of diffuse interests, such as those of consumers;
- A broader conception of access to justice through the reform of civil procedure and the encouragement to use ADR.

According to them, ADR are essential mechanisms to make access to justice available to a wider group of citizens. They describe ADR as a means that can provide high quality and cheaper dispute resolutions. ADR is seen as the solution to combine the fundamental right of access to justice with the economic access to effective justice.

A few decades later, the principle of access to justice, originally confined to access to court, has been transformed progressively to appear as 'multi-faceted with the promotion of privatized processes as mediation and arbitration and the inclusion within modern civil justice of an impressive portfolio of processes'.¹⁰⁹ Mediation is

¹⁰⁶ Mauro Cappelletti, 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement' (1993) 56 MLR 282.

¹⁰⁷ *ibid* 284.

¹⁰⁸ Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 Buffalo Law Review 181.

¹⁰⁹ Andrews (n 20) 694.

not only seen as a vehicle of access to justice but has become itself an instrument of access to justice systems, what EU Commissioner of Justice Reding calls an 'alternative and additional access to justice in everyday life'.¹¹⁰ The principle of access to justice has been widely enlarged by the expansion of ADR and especially the increasing use of mediation. It now includes not only the right of access to court but also the right to access ADR mechanisms.

There are nevertheless still today strong opponents to this transformation of the principle of access to justice and the assumption that mediation delivers 'justice'. About the implementation of ADR policy in England over the past two decades, Genn says:

Although this policy has been given an 'access to justice' label it is, in fact, a policy directed at diverting disputes away from justice. (...) [or] the promotion of ADR by governments could be interpreted as less about the positive qualities of mediation and more about diverting cases to mediation as an easier and cheaper option than attempting to fix or invest in dysfunctional systems of adjudication. It is, in effect, a throwing up of hands – an admission of defeat.¹¹¹

In addition, the right is often circumvented by high legal fees in litigation and a recent but firm tendency of European governments such as England to cut legal aid budget.¹¹² Indeed, due to budget shortages, most governments have limited legal aid, at least in civil matters, which *de facto* leads again to an unequal access to justice. The 'economic obstacle' identified by Cappelletti seems to have re-emerged despite the development of ADR processes.¹¹³

¹¹⁰ Vivian Reding, EU Justice Commissioner, 'European Commission calls for saving time and money in cross-border legal disputes through mediation' (20/08/2010) <http://europa.eu/rapid/press-release_IP-10-1060_en.htm> accessed 20 November 2014.

¹¹¹ Genn, *Judging Civil Justice* (n 13) 121, 116.

¹¹² Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO Act 2012).

¹¹³ Cappelletti (n 106) 282.

However, the 'obstacle' might look a little less striking when looking at non-voluntary mediation provisions. Indeed, most schemes are put in place with the aim of being free or at least accessible to a large group of citizens. The SCMS in England is free for all¹¹⁴ and court-annexed mediations in France and mandatory mediation in Italy are covered by legal aid if litigants are eligible to it.¹¹⁵

Nevertheless, there are still concerns in relation to access to justice. In June 2011, the organization JUSTICE in England issued a vigorous press release warning that the combined effect of major cuts to legal aid together with compulsory mediation for small claims would be the 'economic cleansing' of the civil courts. The statement concludes that in the future "There will be no equal justice for all – only those with money".¹¹⁶ In other words, there is a fear that a two-speed civil justice system emerges, the first one being reserved for people able to afford the cost of classic court litigation and the second one dedicated to people unable to access the courts and left only with cheap or free non-voluntary mediation. This would be a dramatic consequence for the principle of access to justice.

Despite this threat, there is still a continued interest on the part of policy makers in Europe to embrace non-voluntary mediation. This situation has raised another fundamental question over the compatibility between mandatory mediation measures recently put in place in a number of European countries and the fundamental right of access to the court which is guaranteed in the European Convention on Human Rights (ECHR).¹¹⁷

¹¹⁴ Blake, Browne and Sime, *The Jackson ADR Handbook* (n 35) para 16.07.

¹¹⁵ Hopt and Steffek (n 4) 42.

¹¹⁶ JUSTICE, 'Legal aid reform: Danger of "economic cleansing" of the civil courts' (Press Release 21/06/2011)

<<https://justice.org.uk/legal-aid-reform-danger-of-economic-cleansing-of-the-civil-courts/>> accessed 20 November 2014.

¹¹⁷ European Convention on Human Rights (ECHR) . Please note that the initials ECHR will be used throughout this study to refer to the European Convention on Human Rights.

(b) Non-voluntary mediation: a threat to the fundamental right of access to courts from the English perspective

There has been an ongoing debate over the compatibility between coercion into mediation and the provisions of article 6 of the ECHR which provides that: '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'.

Over the last ten years a policy debate has emerged on the merits of mandatory mediation, and more specifically on whether it obstructs the right of access to court. The debate was sparked in 2004 by the English Court of Appeal decision in *Halsey*. The case raised the issue of the cost consequences of a refusal by a successful party to agree to mediation and decided, as previously mentioned, to uphold a court's right to impose costs on a party who has unreasonably refused consent to mediate and offered a non-exhaustive list of six factors to determine the reasonableness of a party's refusal to participate in mediation.¹¹⁸

The Court of Appeal took the opportunity of this case to assert 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'.¹¹⁹ In relation to this statement, the Court of Appeal based its decision on a previous case in which the ECtHR¹²⁰ said 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'.¹²¹

¹¹⁸ *Halsey* (n 103).

¹¹⁹ *ibid* para 9.

¹²⁰ Note that the initials ECtHR will be used throughout this study to refer to the European Court of Human Rights.

¹²¹ *Halsey* (n 103) para 9.

The Court of Appeal conclusions in *Halsey* were: 'If that is the approach of the European Court of Human Rights to an agreement to arbitrate, it seems to us likely that compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court, and therefore, a violation of article 6....'¹²² After *Halsey*, other decisions in England, as for example *Hickman v Blake Laphorn*, confirmed that compulsory ADR was contrary to article 6 ECHR.¹²³

However, many observers at the highest judicial level in England considered that the understanding of article 6 ECHR was misguided. Sir Anthony Clark MR considered that *Halsey* was wrong:

Taken together, what could be described as the European and USA approach to ADR appears to demonstrate that compulsory ADR does not in and of itself give rise to a violation of article 6 or of the equivalent USA constitutional right of due process. This suggests (...) that the *Halsey* approach may have been overly cautious.¹²⁴

According to Lightman LJ:

In respect of article 6, the reasons are twofold. First, the Court of Appeal appears to have confused an order for mediation with an order for arbitration or some other order that places a permanent stay on proceedings (...) Secondly, the appeal court appears to have been unaware that ordering parties to proceed to mediation regardless of their wishes happens elsewhere.¹²⁵

Indeed, at that time, there were already attempts of mandatory mediation in other jurisdictions such as, for example, in Greece and in Germany where the compatibility

¹²² *ibid.*

¹²³ [2006] EWHC 12 (QB).

¹²⁴ Sir Anthony Clarke MR, 'The Future of Civil Mediation' (The Second Civil Mediation Council National Conference, Birmingham, May 2008) <www.judiciary.gov.uk/docs/speeches/mr_mediation_conference_may08_.pdf> accessed 14 June 2016, para 10.

¹²⁵ Lightman LJ, 'Breaking down the barriers' (Times Online 31/07/2007) <www.thetimes.co.uk/tto/law/article2209965.ece> accessed 15 February 2014.

of these initiatives with article 6 of the ECHR was not questioned.¹²⁶ Moreover article 5(2) of the Mediation Directive expressly acknowledges that use of mediation can be made compulsory by national legislation ‘before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system’.

Following the implementation of the Directive, the European Courts of Justice allowed the use of mandatory mediation provided it did not deny the parties access to the court after an unsuccessful mediation.¹²⁷ This position has been confirmed on 14 June 2017 by the Court of Justice of the European Union (CJEU) in the *Menini* case.¹²⁸ However, even this consensus carries some risks. The deferment can significantly postpone the time when the court determines the case and also compels the parties to bear additional costs. It could also reduce the efficiency of mediation if it is transformed into a rigid and technical process. In England, the issue was circumvented in the Jackson Review of Costs which clearly endorsed the view that participation in mediation should never be made compulsory.¹²⁹ The debate might be relaunched today with the Online Court project.¹³⁰

Access to justice has undoubtedly been reshaped over the last decades by the massive spreading of dispute resolution processes outside the courtrooms as well as their inclusion in many judicial systems with the aim of making justice accessible to a larger number of litigants at a more sustainable cost. Non-voluntary mediation has participated in this movement. If this trend continues, it will be necessary to ensure that all litigants obtain an equal treatment in court.

¹²⁶ Scherpe and Marten (n 92) 379.

¹²⁷ Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08 *Alassini v Telecom Italia SpA* [2010] 3 CMLR 17, [2010] ECR I-221, ECLI:EU:C:2010:146, EU:C:2010:146, [2010] EUECJ.

¹²⁸ Case C-75/16 *Menini and Rampanelli v Banco Popolare Societa Cooperativa* [2017] EUECJ, EU:C:2017:457, ECLI:EU:C:2017:457.

¹²⁹ Blake, Browne and Sime, *The Jackson ADR Handbook* (n 35) para 9.07.

¹³⁰ Briggs FR para 6.40.

Conclusion

The considerable expansion of ADR processes has given a new light to the practice of justice in most European countries. The spectrum of dispute resolution models has been enlarged for litigants and ADR processes have been applied to civil conflicts of all kinds. Therefore, the system around access to justice has evolved: the number of ADR organizations, groups and independent practitioners has grown, Bars associations and Law Societies have embraced the movement and in many law firms dispute resolution departments have been added.

Even some authors have started to endorse open access to courts for the widest range of disputes: 'It should be a fundamental aim of civil justice to open wide gates of the Halls of Justice and to provide adequate and effective methods and measures, practices and procedures, reliefs and remedies, to deal with all justiciable claim and complaints'.¹³¹ Others in Europe have promoted the concept of 'Multi-Door Courthouse' originated in 1976 by Sander in the USA where the court administration serves as the entry point to whatever kind of dispute resolution process may be appropriate – whether litigation through the courts or some alternative form of dispute resolution.¹³² None of these schemes have been adopted in Europe yet but they have inspired the exploration of new dispute resolution concepts such as the Online Court project.¹³³ What is certain is that mediation in Europe has become itself the major consensual ADR process and that at the same time most European countries have inserted coercive mediation processes in their civil justice system.

This first chapter has outlined the concept of non-voluntary mediation and the context in which it has emerged and demonstrated that non-voluntary mediation has today become a reality in European court litigation systems. The next

¹³¹ Sir Jack Jacob, 'Justice between Man and Man' (1985) 38 Current Legal Problems 211 cited in Hazel G Genn, 'Understanding Civil Justice' (1997) 50/1 Current Legal Problems 155, 185-6.

¹³² Brown and Marriott (n 11) 92.

¹³³ Briggs IR and Briggs FR; John Sorabji, 'The Online Solutions Court - a Multi-door Courthouse for the 21st Century' (2017) 36/1 Civil Justice Quarterly 86.

developments of the study will aim to answer the following question: To what extent should non-voluntary mediation be implemented in the civil justice system?

In other words, the question is, whether, as Senior Master Turner predicts, the twenty-first century English court litigation will become the ADR system.¹³⁴ But, before assessing this statement, the following chapter will place the emergence of non-voluntary mediation in a different perspective.

It will address the European Union legal framework and examine the decisions of the European Courts of Justice on the subject matter. The chapter will also include an exploration of the regulations and methods of non-voluntary mediation existing outside Europe and in particular in the USA, in Australia and in Canada, which offer very interesting points of comparison.

¹³⁴ Cited in Karl Mackie and others, *The ADR Practice Guide* (3rd edn, Tottel 2007) 5.

CHAPTER 2
THE IMPLEMENTATION OF NON-VOLUNTARY MEDIATION
ABROAD AND IN THE EU

Introduction

The first chapter has defined the concept of non-voluntary mediation as the different levels of coercive action imposed on potential litigants to increase the use of mediation in a judicial context. It has also identified three different categories of non-voluntary mediation in accordance with this concept, which have been implemented so far in Europe, namely mandatory information, mandatory consideration and mandatory participation, and explained why and how they expanded across Europe.

At this stage of the study, it is necessary to examine these changes in an international perspective for various reasons: firstly, an increasing number of disputes are globalized and go far beyond our European boundaries. There are initiatives at an international level to coordinate and harmonize the regulation of mediation around the world. Moreover, there seems to be a legal recognition of non-voluntary mediation illustrated by the UNCITRAL Model Law on International Commercial Conciliation. The Model Law takes into account the fact that, while conciliation/mediation is often set in motion by agreement of the parties after the dispute has arisen, there may exist various grounds pursuant to which the parties may be under a duty to make a good-faith attempt at conciliating their differences. One basis may be their own contractual commitment while other bases may be legal rules that some countries have adopted requiring the parties to conciliate in certain situations or allowing a judge or a court official to suggest, even direct, that parties conciliate before they continue with litigation.¹³⁵

Secondly, there are many non-voluntary mediation initiatives at a domestic level which have flourished around the world. Some countries have implemented

¹³⁵ UNCITRAL 2002 Model Law art 1.8.

mandatory process on information and consideration of mediation. In Romania or in Israel for example, attending a mediation information session can be compulsory. The obligation to participate in mediation has also become a compulsory process step in a significant number of jurisdictions around the world including Argentina, Croatia, Egypt, Japan, India or Lebanon.¹³⁶

The scope of the present study does not allow for an in-depth account of all initiatives of non-voluntary mediation around the world. Therefore, the present chapter will rather focus on its development in three common law countries: the USA, Australia and Canada. The history of non-voluntary mediation shows that it has been implemented in these countries for a much longer period than in Europe and this allows us to have access to a wide range of data and sources in the English language. It has also provided models and benchmarks that have inspired Europe, and particularly England, very much influenced by these common law jurisdictions.¹³⁷ In addition, the European Institutions have supported the trend in issuing consultation paper and reports, adopting resolutions and directives.¹³⁸

The following chapter will first look at the models and benchmarks of the three countries outside Europe mentioned above, which have influenced European domestic regulations of non-voluntary mediation, and then will present and analyze the current framework of non-voluntary mediation both at the level of the European Institutions and of the European Courts of Justice.

2.1. Non-voluntary mediation schemes and regulations implemented outside Europe – Examples of the USA, Australia and Canada

The success of mediation in the 1970's in the USA expanded very soon after into Australia and later into Canada. During that decade mediation was promoted as a means to resolve legal disputes outside the court system. But the same countries

¹³⁶ Manon Schonewille and Fred Schonewille, *The Variegated Landscape of Mediation* (Eleven International Publishing 2014) 16.

¹³⁷ Hopt and Steffek (n 4) 8.

¹³⁸ See para 2.2, 66ff.

also, very rapidly, started to incorporate coercive forms of mediation in the context of court litigation. In Australia, the USA and Canada, ADR, including non-voluntary mediation, exists in many, if not most courts. Europe took hold of the movement more slowly and started to implement non-voluntary forms of mediation in the early 1990's. The experiments and outcomes obtained outside Europe undoubtedly influenced the methods put in place across Europe although the legal context was different.

2.1.1. Comparison of the backgrounds

When looking at the different forms of non-voluntary mediation existing in the USA, Australia and Canada in comparison to Europe, we can see that, even when the legal backgrounds are different from one country to another, the objectives for their implementation are often similar. Most countries outside Europe which have implemented mediation and later non-voluntary mediation, such as the USA and Australia, are common law countries where ADR processes were seen as a response to the civil litigation context.

According to Brooker:

The confrontational aspects of litigation in many common law countries eventually led to experimentation with alternatives and the promotion of mediation, which has been tailored from a 'community based system' to a 'dispute resolution technique' used in a myriad of settings including family and commercial disputes.¹³⁹

In those countries of common law tradition, the litigation process had become unaffordable and highly unsatisfactory for most citizens and there was an urgent need to increase access to justice. England as a common law country faced the same

¹³⁹ Penny Brooker, *Mediation law: Journey through Institutionalism to Juridification* (Taylor and Francis Ltd 2013) 2.

crisis and started rapidly in the early 1990's to implement non-voluntary mediation schemes within the court system.¹⁴⁰

In contrast, the vast majority of legal systems in Europe based on civil law were more reluctant to impose mediation in the context of court litigation. For a long time, litigation in these countries was considered the best way of resolving disputes as it was easily accessible and affordable for citizens. But in the 1990's many European civil law countries also witnessed civil litigation problems. In Italy for example, although the litigation process was described as not too costly, it was also considered 'tortuously inefficient with the result that disputants, while they can afford to litigate, are dissatisfied with the excessive time required to obtain a judicial decision'.¹⁴¹ Many countries in continental Europe started to use non-voluntary mediation in response to their judicial civil problems.¹⁴²

Because of its heritage, Canada offers a unique situation between common law and civil law systems. It has its foundation in and is still governed by the English common law system. However, Quebec still retains a civil system for issues of private law as this domain falls within the exclusive jurisdiction of the provinces. In recent decades Canada has joined the trend of non-voluntary mediation, in particular in the provinces of Ontario and Quebec, where mediation is widely imposed within the litigation process.¹⁴³

Each country of investigation in this study presents a different historical and legal background, as well as divergent cultural attitudes to conflict and dispute resolution, which can impact on how mediation is perceived and applied in practice. The distinctions between common and civil law jurisdictions can emphasize those differences. But it seems that the civil justice crisis in western countries have

¹⁴⁰ eg Hazel G Genn, *Central London Pilot Mediation Scheme, Evaluation Report* (Department for Constitutional Affairs 1998).

¹⁴¹ Nadja M Alexander, *Global Trends in Mediation* (2nd edn, Kluwer Law International 2006) 20.

¹⁴² Study for Evaluation and Implementation of the Mediation Directive 48.

¹⁴³ Richard Ellger, 'Mediation in Canada: One Goal - Different Approaches to Mediation in a State with Federal and Provincial Jurisdictions' in Klaus J Hopt and Felix Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford University Press 2012) 909, 941.

brought nearer the needs of most legal systems. Voluntary and non-voluntary mediation have both been seen as a means to resolve the crisis of the western civil justice systems. Hopt considers that today 'the basic aims of the regulations and the reasons for implementing mediation are largely the same in the Member States of the European Union as in the wider world'.¹⁴⁴ From a quantitative point of view, the shared concerns are the relief of the judiciary's workload and cost savings for the parties and the government. From a qualitative perspective, the reasons are a broader and better access to justice, the strengthening of the parties through an integrative and constructive method of dispute resolution and a wider acceptance of the results.¹⁴⁵

It seems that ADR, in particular mediation, has gone today beyond the historical, legal and cultural traditional differences to become a universal process which can take place outside or within the court system with the 'ability to transcend differences in legal systems'.¹⁴⁶

2.1.2. Forms of non-voluntary mediation

The present chapter focuses on selective geographical areas which are the USA, Australia and Canada. In these three federal countries mediation regulation is partly federal, partly provincial/state, which leads to a real patchwork of rules. Nevertheless, it appears that what is in place in these countries is often very similar to what is experienced today in many European Member States. And if we refer to the three categories of non-voluntary forms of mediation identified in Chapter 1 (information, consideration, participation), it is obvious that each of them has been or is still being experimented in the selected countries outside Europe.

In the USA, mandatory consideration has been implemented as a general provision which allows any federal court to require the litigants in all civil cases to consider

¹⁴⁴ Hopt and Steffek (n 4) 9.

¹⁴⁵ *ibid.*

¹⁴⁶ Alexander, *Global Trends in Mediation* (n 141) 2.

the use of an ADR process at an appropriate stage of the litigation.¹⁴⁷ Based on this requirement, each federal district has established a system to ensure consideration: for example, for the East district of Pennsylvania, the model rules for districts courts include descriptions of a wide range of ADR processes, pre-process requirements and many details about the options available to litigants.¹⁴⁸

In other countries, mandatory information has been coupled with mandatory consideration under the requirement of attendance at an informational and assessment meeting about mediation. For example, in Québec (Canada), mandatory attendance at an information session for the parties to inform them of the alternative of mediation is required in family matters and the mediator must send a report on the case before going to court.¹⁴⁹

But the category of non-voluntary mediation that is the most widely and firmly rooted in the USA, Canada and Australia is undoubtedly mandatory participation in mediation.

Since 1999, the province of Ontario has implemented a very extensive scheme of mandatory participation, originally because of a large backlog of pending cases. Introduced in 2002 into the Ontario Rules of Civil Procedure on a permanent basis, rules 24 and 76 require the parties to complete a mandatory mediation procedure prior to the commencement of litigation proceedings for most civil and commercial matters. Mandatory mediation must take place within 180 days from the defendant's filing of the first defense with the court where the suit is pending. Here the mandatory mediation requires that the parties must have commenced litigation proceedings.

Since the 1980's Australia has been at the forefront of the implementation of mandatory participation in mediation, either through categorical legislative

¹⁴⁷ Alternative Dispute Resolution Act 1998 (USA) 28 para 652.

¹⁴⁸ Michael L Moffitt and Andrea Kupfer Schneider, *Dispute Resolution: Examples & Explanations* (2nd edn, Wolters Kluwer Law & Business 2011) 203.

¹⁴⁹ Code de Procédure Civile (Québec, CAN) arts 417-419.

schemes which impose mediation as a prerequisite to bringing a court action, or through a discretionary power given to the courts to refer the case to mediation. Examples of legislative schemes in New South Wales (NSW) include the Farm Debt Mediation Act 1994, the Retail Leases Act 1994, the Legal Profession Act 2004 and the Strata Schemes Management Act 1996. The state of Victoria has a similar legislative scheme in relation to retail tenancy disputes. In Queensland (Qld), the Motor Accident Insurance Act 1994 (amended in 2002) provides categorical referral to mediation of personal injury claims. Also in some states courts have discretionary power to order mediation without the parties' consent. For example, in New South Wales it was allowed by the Supreme Court.¹⁵⁰ This has been supported by the judiciary in judicial decisions.¹⁵¹ At a federal level, since 2007, s 601 of the Family Law Act 1975 imposes a mandatory pre-action procedure for parenting cases and for financial cases (maintenance, property).

More recently, the Civil Dispute Resolution Act 2011 introduced at a federal level a mandatory obligation to take 'genuine steps' to settle a dispute before proceeding to litigation in court.¹⁵² A similar duty already existed in some of the individual states such as Queensland. Today, mediation or an equivalent ADR procedure has become a mandatory precondition to litigation in all federal courts in Australia although there is no obligation to settle at this stage: each party has the constitutional right to be heard in court, but must have tried in a reasonable way to find a consented solution before resorting to litigation in court. This legislative provision allows the courts to consider the pre-litigation conduct of the parties when making cost orders.¹⁵³

The USA has also had a long history in prescribing mandatory mediation in the context of court litigation. In 1981, California was the first state to impose mediation

¹⁵⁰ Melissa Hanks, 'Perspectives on Mandatory Mediation' (2012) 35/3 University of New South Wales Law Journal 929, 945.

¹⁵¹ eg *Browning v Crowley* [2004] NSWSC 128 [5].

¹⁵² Civil Dispute Resolution Act 2011 (AUS) s 4 (CDR Act 2011).

¹⁵³ Ulrich Magnus, 'Mediation in Australia: Development and Problems' in Klaus J Hopt and Felix Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford University Press 2012) 869, 872.

for child custody and visitation disputes.¹⁵⁴ Although there is no federal statutory obligation for the parties to mediate, rule 16 of the Federal Rules of Civil Procedure explicitly anticipates the creation of local rules concerning ADR, stating that ‘courts may take appropriate action, with respect to (...) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule’. Once these local rules exist, rule 16 authorizes the court to order the parties to use ADR procedures.¹⁵⁵

Therefore, mandatory mediation in the USA is mainly taking place through court orders and its extent varies considerably from State to State. There have been concerns about this inherent power given to the district courts. The opinion in the case *Re Atlantic Pipe Corporation*¹⁵⁶ illustrates that courts are given substantial discretion in mandating mediation as long as they order a reasonable process. The other safeguard is that rule 16 of the Federal Procedure Rules mentioned above does not intend to push the parties or one of them into an involuntary compromise. The courts can order the parties to mediate but the court cannot require a settlement.¹⁵⁷

Many States have adopted one or more mandatory programs of mediation in association with their courts. California, Florida, Ohio and Texas seem to have taken the lead on coercion into mediation by mandatory referral systems. In California, the Rules of Court specify that an action may be submitted to mediation by court order when the amount in controversy does not exceed \$50,000 for each plaintiff.¹⁵⁸ In Ohio, rule 16¹⁵⁹ confers on the courts considerable discretion to manage pre-trial procedure. At a pre-trial conference, the court may submit the dispute to mediation *sua sponte*. If a party contests the referral mediation, it can ask to opt out if it demonstrates a good cause for its request. Texas allows its judges a discretion to

¹⁵⁴ *ibid* 1249.

¹⁵⁵ Moffitt and Kupfer Schneider (n 148) 202.

¹⁵⁶ *Re Atlantic Pipe Corporation (APC)*, Petitioner 304 Fed 135 N° 02-1339 (Decided September 18, 2002, 76, 77) (United States Court of Appeals, First Circuit).

¹⁵⁷ Moffitt and Kupfer Schneider (n 148) 205.

¹⁵⁸ r 3.891 (USA).

¹⁵⁹ Rules of Superintendence for the Courts of Ohio (USA).

order mediation in any civil cases.¹⁶⁰ In Florida, since 1987 judges can refer any civil cases to mediation or arbitration 'if the judge determines the action to be of such nature that mediation could be of benefit to the litigants or the court'.¹⁶¹ 'Parties are able to request that mediation be dispensed with by filing a motion within fifteen days of referral'.¹⁶²

Mandatory participation in mediation is widely implemented in the selected countries outside Europe, either as a prior step to litigation in court (Ontario, Australian federal courts), or, once the case is in court, through court-ordered mediation where mediation is discretionarily ordered by a judge (USA, some Australian state courts).

Mandatory mediation is also often implied by the power given to the judiciary to order cost sanctions in relation to the conduct of the parties during the mediation process. Indeed, this indirect form of mandatory mediation is also present in the three countries selected in the wider world for the present study. But it appears under different features. Some are quite straightforward, allowing the judge to order cost sanctions if one of the parties does not comply with the obligation to mediate prior to litigation. In Canada, as previously mentioned, in the province of Ontario where a very extensive scheme of mandatory participation is in place, the litigants have the obligation to participate at least in one mediation negotiation before going to litigation. If a party fails to attend, it may result in serious procedural disadvantages for this non-compliant party like, for example, the dismissal of the action or the possibility for the judge to order the party to pay costs.¹⁶³

Other countries are imposing cost sanctions through the power given to judges to assess the parties' conduct during the mediation process via a consideration of more subjective concepts than the simple attendance at a meeting such as 'genuine steps' or even 'good faith' which inevitably recalls the English notion of 'unreasonable

¹⁶⁰ Texas Civil Practice and Remedies Code (USA) s 154.022(a).

¹⁶¹ Florida Rules of Civil Procedure (USA) r 1.710(b).

¹⁶² Quek (n 49) 505.

¹⁶³ Rules of Civil Procedure, RRO 1990, Reg 194 (Ontario, CAN) r 24.1.13.

conduct'.¹⁶⁴ A good example of this indirect form of mandatory mediation can be found in Australia where the courts have the power to assess whether the parties have taken genuine steps to resolve their dispute during the compulsory pre-action mediation, and if not may impose cost sanctions and procedural burdens.¹⁶⁵ Another example to regulate the parties' conduct during the mediation and to allow judges to order cost sanctions exists in various North American jurisdictions under the concept of 'good faith'. Parties are required to participate to court-referred mediation in 'good faith'. At least, two dozen states have currently a good-faith statutory requirement and a similar number of federal district courts have adopted local rules with a 'good faith requirement'.¹⁶⁶

Kupfer Schneider identifies three items on which courts have focused in the USA to shape the legal boundaries of what constitutes good-faith participation in mediation: (i) the first 'attendance' at the mediation is, according to her, 'the easiest item to measure in terms of good faith, and courts have consistently found that failing to show up to an ordered mediation constitutes bad faith'; (ii) good-faith participation hinges on the 'preparation' each party has engaged in prior to the ADR process; (iii) ensuring that those who attend the mediation have sufficient 'settlement authority' to make resolution possible. For example, a mediation in which the Chief Executive Officer of each company is present is far more likely to reach an agreement. If the judge considers that a party has acted in bad faith, he has considerable discretion in deciding the appropriate sanction. Most of the time, judges order cost sanctions in order to return all of the adversely affected parties to their financial situations prior to the failed mediation.¹⁶⁷

The above-mentioned selected countries offer many examples of non-voluntary mediation schemes and techniques which have undoubtedly inspired Europe. However, it appears that the implementation of one category, ie mandatory participation in mediation, is much more robustly and widely disseminated in our

¹⁶⁴ *Halsey* (n 103) para 13.

¹⁶⁵ CDR Act 2011.

¹⁶⁶ *Hanks* (n 150) 950.

¹⁶⁷ *Moffitt and Kupfer Schneider* (n 148) 211- 212.

three common law countries than in Europe. In addition, they have been implemented over a longer period of time which enables to evaluate them with more perspective.

2.1.3. Evaluation of non-voluntary mediation schemes

Menkel-Meadow says, talking about ADR processes at large:

Thus, from the beginning, at least two different motivations for alternative or less formal processes were present – the ‘quantitative-efficiency’ concerns to make justice more accessible, cheaper, faster and efficient, and the more ‘qualitative-party empowering’ ideas that, with greater and more direct participation, and identification of underlying needs and interest, parties might identify more tailored solutions to their problems that would be less brittle and binary than the win/lose outcomes of formal court (...).¹⁶⁸

These motivations were in theory common to all ADR processes but in practice, did it work with non-voluntary mediation? In other words, did the various non-voluntary schemes put in place delivered a more efficient means of dispute resolution and/or a higher level of satisfaction for the litigants? or both?

Let us examine the situation in our selected countries outside Europe with regard to (i) the quantitative and (ii) the qualitative performance of the non-voluntary schemes put in place.

(i) In Canada, and especially in Ontario, the pre-action mandatory mediation procedure has achieved a resounding quantitative success. Ellger, referring to an 2001 evaluation commissioned by the Ontario Ministry of Justice two years after its introduction, reports:

In 85% of cases mandatory mediation proceedings have been terminated within 150 days after defences had been filed. A survey among lawyers representing parties in mandatory mediation procedures showed that

¹⁶⁸ Menkel-Meadow, ‘Regulation of Dispute Resolution’ (n 2) 423.

mandatory mediation results in a considerable reduction of costs for the clients where the mediation caused the termination of litigation at an early stage. The survey also showed that mandatory mediation settled the action within one mediation session in four out of ten cases. In two out of ten cases, neither a full nor a partial settlement could be reached.¹⁶⁹

Australia has also experienced a number of mandatory mediation schemes although there are not many available statistical data. The main reference is the Federal Court of Australia Annual Report which shows, in its latest version of 2013-14, that, within the Court's jurisdiction, the number of judicial mediation referrals in the Federal Court has more than doubled since 2000. These figures only represent Federal Court cases but they show a clear tendency that is likely to be valid for other courts. It is also evidenced in this report that although these figures are not impressive (433 cases in total), there are huge differences between fields of law and types of cases in terms of settlement. The highest success rate of mediation in the Federal Court was for taxation (100%) and appeals (100%), whereas the lowest rates were found in Administrative Law (50%) and Competition Law (33%). Overall, the same year, the success rate of mediation processes was 67% compared to 57% in 2009-10.¹⁷⁰

In the USA, since the 1990's with the modification of the Federal Rules of Civil Procedure, courts began to offer mandatory programmes of court-annexed mediation at both federal and state levels, but the considerable variations in practices and degree of compulsion make it difficult to have a comprehensive picture of the quantitative outcome of non-voluntary mediation in the USA. Moreover, the courts report on the rates of mediation in a non-uniform manner. Menkel-Meadow reports:

Statistical reports available from many of the most populous states (including New York, California, Texas and Michigan) demonstrate high usage of a variety of non-trial forms of dispute resolution, within the formal court, with

¹⁶⁹ Ellger (n 143) 941.

¹⁷⁰ Federal Court of Australia, 'Annual Report 2013-2014' (AUS) <www.fedcourt.gov.au/data/assets/pdf_file/0004/25726/Annual-Report-2013-14.pdf> accessed 7 January 2015, 27-31.

'settlement rates' ranging from 30 per cent to over 70 per cent in some courts.¹⁷¹

Lastly, studies conducted at a federal level give mixed and controversial conclusions in relation to the reduction in cost and delay in courts that used ADR.¹⁷² Nolan-Haley is even more critical about the efficiency of mandatory mediation in the USA, observing:

While mandatory mediation programs were adopted in large measure for efficiency reasons, experience has demonstrated that in some respects, these were false economies. Given the number of parties returning to court to challenge the validity of agreements they made in mediation, the efficiency rationale loses some of its luster.¹⁷³

(ii) However, some states like Florida offer examples of qualitative successful mandatory mediation policy. Since 1987, judges can refer any civil cases to mediation. According to the Uniform Data Reporting System, more than 100,000 are referred to mediation each year with a high rate of satisfaction.¹⁷⁴ Quek considers that the success of this judicial referral regime, although discretionary, is principally attributable to a few factors which tampered the compulsory feature of the scheme: a) the parties have the freedom to choose their mediator, b) dissatisfied parties have recourse to a mediator grievance system, and c) clear requirements are made in relation to the obligation to mediate. Quek concludes:

Florida's experience offers an apt illustration of how a court-mandated mediation program can be comprehensively institutionalized. (...) Hence, while the choice to mediate may be imposed on the parties, it is more than compensated for by the parties' freedom of choice over other aspects.¹⁷⁵

¹⁷¹ Menkel-Meadow, 'Regulation of Dispute Resolution' (n 2) 436.

¹⁷² *ibid* 437.

¹⁷³ Nolan-Haley, 'Is Europe Headed Down the Primrose Path' (n 71) 1008.

¹⁷⁴ Quek (n 49) 505.

¹⁷⁵ *ibid* 507.

In Ontario, the quantitative success of mandatory pre-action mediation procedure mentioned above is also seen as a satisfactory qualitative experiment. According to Quek referring to the Ministry of Justice 2001 evaluation, 80% of lawyers in Ottawa and 59% of lawyers in Toronto expressed satisfaction with the overall mandatory experience, while 82% and 65% respectively of the litigants expressed satisfaction.¹⁷⁶ However, as observed for Florida, this can be explained by the flexibility of the scheme:

(...) Ontario's program, while achieving the overarching goal of increasing the number of mediations 'tempered' the mandatory effect of the scheme by giving parties the option to either opt out for cause or to obtain more time to undergo mediation.¹⁷⁷

In Australia non-voluntary mediation has been widely used in the context of court litigation over the last twenty-five years and the increase in positive results of mediation in the Federal Court show that there is a growing public acceptance of this form of dispute resolution. In addition, mediation has been strongly supported not only by the judicial but also by the National Alternative Dispute Resolution Advisory Council (NADRAC), with a tendency to give more and more discretionary powers to the judiciary to order mediation.¹⁷⁸ Another factor which favours recourse to mediation is the qualification of mediators through a national accreditation system.

It has been therefore demonstrated that the selected countries in the wider world have been practising for several decades traditional voluntary private mediation alongside non-voluntary mediation and more particularly mandatory mediation on a wide scale. It has also been demonstrated that this practice has produced rather good results when the mandatory feature at the front-end of the program is balanced by the parties' freedom of choice over other aspects of the process. Overall, it is observed at this stage of the thesis that these countries did not hesitate to use

¹⁷⁶ *ibid* 501.

¹⁷⁷ *ibid*.

¹⁷⁸ Hanks (n 150) 946.

mandatory mediation to achieve the 'culture shift' for resolving disputes from a traditional trial process to settlement through ADR, advocated by European authors.¹⁷⁹

However, Nolan-Haley reports that, behind the apparent success of mandatory mediation in the USA,

(...) there is a substantial literature that is critical of mandatory mediation (...) critiques include claims that mediation had outlived its usefulness, was antidemocratic, had reduced the number of trials, lacked the substantive and procedural protections of court (...).¹⁸⁰

and concludes: 'before EU Member States consider adopting mandatory mediation approaches on a large scale (...) they should take note other countries' experiences with compulsory regimes' (...).¹⁸¹

Indeed, there are still many questions to be addressed: Are those methods likely to be imported in Europe? Are the common law 'ADR success stories' observed in the wider world able to work out in a different legal and cultural environment? What are the qualitative and quantitative performances of non-voluntary mediation in Europe so far? The second part of the thesis will attempt to give a comprehensive answer to these questions. But what needs to be addressed first is the strong signal that has been given in that field by the European Institutions which have issued consultation paper and reports, adopted resolutions and finally directives, compliance of which is being monitored by the European Courts of Justice.

¹⁷⁹ Barbara Billingsley and Masood Ahmed, 'Evolution, Revolution and Culture Shift: a Critical Analysis of Compulsory ADR in England and Canada' (2016) 45/2-3 *Common Law World Review* 186.

¹⁸⁰ Nolan-Haley, 'Is Europe Headed Down the Primrose Path' (n 71) 1008.

¹⁸¹ *ibid* 27.

2.2. The EU scheme on non-voluntary mediation

It must be highlighted that most of the following section was researched before the Brexit vote. It is too early to predict the outcome of the Brexit negotiations and whether or not the English legislation would remain in line with the EU framework. However, it seems reasonable to think that England, being a leading jurisdiction in the promotion of ADR, will not depart greatly from the current EU framework on civil and commercial mediation and from consumer ADR in its domestic legislation. Accordingly, this section presumes that the UK will retain the current European legal framework.

Over the last two decades, the European Institutions have promoted mediation and other forms of ADR outside the court system with a high degree of intensity. This promotion took shape in a series of projects beginning with the 1993 Green Paper.¹⁸² The 1998 Vienna Action Plan established mediation as a priority¹⁸³ and in 1999 the Tampere Meeting of the European Council¹⁸⁴ called for the development of alternative procedures in civil and commercial issues.

In 2002, the EU issued a Green Paper stating that:

ADRs offer a solution to the problem of access to justice faced by citizens in many countries due to three factors: the volume of disputes brought before courts is increasing, the proceedings are becoming more lengthy and the costs incurred by such proceedings are increasing.¹⁸⁵

¹⁸² Commission, 'Green Paper of 16 November 1993 on access of consumers to justice and the settlement of consumer disputes in the single market' COM (93) 576 final 40.

¹⁸³ Commission, 'Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice' OJ C 019, 23/01/1999, para 41(b).

¹⁸⁴ European Parliament, 'Tampere European Council 15 and 16 October 1999, Presidency Conclusions' (1999)
<www.europarl.europa.eu/summits/tam_en.htm> accessed 21 January 2015, para 30.

¹⁸⁵ COM (2002) 196 final 7.

It also suggested that such processes could be used to 'complement judicial processes'.¹⁸⁶

Following the Green Paper, the EU issued a Code of Conduct for Mediators in 2004 with the objective of ensuring a high quality of mediation services.¹⁸⁷ The same year, the EU Commission wrote the Proposal for a Directive on certain aspects of mediation in civil and commercial matters which was read for the first time in the European Parliament in 2007.¹⁸⁸ In April 2008, the European Parliament passed the Directive on certain aspects of Mediation in civil and commercial matters¹⁸⁹ in its second reading. Member States were required to transpose the Mediation Directive into their laws, regulations and administrative provisions no later than 20 May 2011. In 2013 the European Parliament adopted a sector-specific Directive on Consumer ADR¹⁹⁰ supported by the Consumer ODR Regulation.¹⁹¹

At the beginning of the process, the question of non-voluntary mediation did not capture much attention from the EU. The 2002 Green Paper even ignored the issue, observing only that mandatory mediation was 'likely to affect the right of access to the courts'.¹⁹² However, at the time of the enactment of the Mediation Directive in 2008, many European countries had already started to implement non-voluntary mediation in the context of court litigation in their domestic legal systems and although it was done in an uncoordinated manner, the trend was confirmed.

¹⁸⁶ *ibid* 8.

¹⁸⁷ at <http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf> accessed 7 May 2014.

¹⁸⁸ COM(2004)0718-C6-0154/2004 - 2004/0251(COD).

¹⁸⁹ The Mediation Directive.

¹⁹⁰ The ADR Directive.

¹⁹¹ The ODR Regulation.

¹⁹² COM(2002) 196 final 25.

2.2.1. The European Directives

(a) The Mediation Directive

The purpose of this Directive was primarily to promote the amicable settlement of disputes by encouraging mediation and by ensuring there is a balanced relationship between mediation and judicial proceedings in all EU jurisdictions. The scope of application of the Directive is limited to civil and commercial cross-border disputes with Member States, which are free to extend the scope of application of such provisions to domestic affairs. In other words, 'Each Member State has been left free to develop a culturally-shaped and nationally-biased view of what the word mediation means, without creating any bridges between these different interpretations and customs (...)'.¹⁹³

However, the Directive has sought to introduce certain common principles among which the guarantee of confidentiality (art 7) or the enforceability of agreements resulting from mediation (art 6). It also contains provisions that are directly related to the present study which are the requirement for Member States to encourage the availability to the general public of information on mediation (art 9) and the possibility for national legislation to use non-voluntary mediation (arts 3 and 5).

Indeed, article 3 states that the mediation process 'may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State' and article 5(1)(2) continues:

A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and easily available. This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation

¹⁹³ Schonewille and Lack (n 47) 20.

does not prevent the parties from exercising their right of access to the judicial system.

The Directive clearly gives the courts the power to encourage information and consideration, and also opens the door for Member States to introduce in their national legislation coercive elements in the mediation process, from the introduction of incentives and sanctions to the use of mandatory mediation. Moreover, it appears from article 5 that the European Union is recognizing the validity of mandatory mediation and implicitly accepts its conformity with the right of access to justice as long as the parties can still use the court system.

In addition, the Directive considers the question of information. Indeed, its article 9 entitled 'Information for the general public' states that: 'Member States shall encourage the availability to the general public, in particular on the Internet, of information on how to contact mediators and organisations providing mediation services'.

More recently, a study from the European Commission goes further in expressing the necessity for each Member States to consider 'the feasibility of introducing an obligation to inform potential parties to a dispute about mediation and its advantages'.¹⁹⁴ Therefore, the issue of coercion was already at the heart of the Mediation Directive.

A vast majority of Member States have used the enactment of the Directive to introduce or reinforce their regulation on conflict resolution. As a result, some have implemented non-voluntary mediation provisions in their domestic judicial system with the aim of increasing the use of mediation. If we exclude at this stage the situation in the three European countries of investigation, only a few Member States made participation in mediation compulsory. For example, in Austria, this is the rule in case of the anticipated termination of an apprenticeship contract. In Slovenia, even though the national transposing legislation states that mediation can be made

¹⁹⁴ Study for Evaluation and Implementation of the Mediation Directive 80.

mandatory by law, no legal provisions requiring parties to have recourse to mediation before accessing the judicial system were identified.¹⁹⁵ Other Member States have introduced mandatory mediation information and consideration instead of mandatory participation in mediation. For example, under the Irish legislation an information session on mediation can be ordered by the judge; under the Czech legislation, the court can order the parties to attend a three-hour meeting with a mediator.¹⁹⁶ Part II of the present study will show that the situation is also quite diverse in the European countries of investigation selected, ie England, France and Italy.

(b) The Directive on ADR for Consumer and the Consumer ODR Regulation

Although the Mediation Directive is directly affecting the issue of non-voluntary mediation, the ADR Directive and the ODR Regulation provide mainly an out-of-court and voluntary online dispute resolution framework for Consumer Disputes. However, it is worth considering their main features in the present study as they contain some procedural requirements to be followed by certified ADR entities available in each country and more importantly a new obligation for all businesses established in an EU Member State to inform consumers about the possibility to use a certified ADR entity which confirms the emphasis put by the European Institutions to increase awareness of the public on ADR in order to achieve a cultural change.

Article 1 stipulates that the ADR Directive is ‘to contribute to the proper functioning of the internal market by ensuring that consumers can (...) submit complaints against traders to entities offering independent, impartial, effective and fair alternative dispute resolution procedures’.

Commenting on the ADR Directive, Cortés points out that, among the procedural requirements to be followed:

¹⁹⁵ *ibid* 48.

¹⁹⁶ *ibid*.

(...) certified ADR entities must be able to process complaints online; be free of charge (or of low cost) for the consumer and comply with the principles of independence, effectiveness (eg resolving disputes within 90 days), transparency (eg publishing annual activity reports), fairness (eg giving consumers a cooling off period before they agree to settle a claim), legality (eg ensuring that mandatory law is respected) and liberty (eg guaranteeing that consumers can only agree to arbitration, or any other procedure that precludes them from going to court after the dispute arises - in other words, pre-dispute contractual agreements are only valid for consensual or non-binding ADR processes).¹⁹⁷

In addition, all traders must inform their consumers about the availability of these certified ADR entities. Information shall include the website address of the relevant ADR entity or ADR entities and shall be provided in a clear, comprehensible and easily accessible way on the trader's website, where one exists, and, if applicable, in the general terms and conditions of sales or service contracts between the trader and a consumer.¹⁹⁸ Member States will be able to issue proportionate penalties to traders and ADR entities that do not comply with the information requirements. However, there is no obligation imposed on the trader to participate in an ADR process with the consumer unless a national law requires it.

The ODR Regulation complements the Directive by requiring the European Commission to run an ODR platform, 'which is in essence a website that acts as a hub to channel all consumer complaints (both domestic and cross-border) arising from e-commerce to these certified ADR entities'.¹⁹⁹ Once EU consumers submit their dispute online, they are linked with national ADR providers who will help to resolve the dispute. The Regulation applies to consumer, to trader, domestic and cross-border disputes, and certain disputes brought against a consumer by a trader. Each Member State must propose an ODR point of contact to assist with disputes

¹⁹⁷ Pablo Cortés, 'The Online Court: Filling the Gaps of the Civil Justice System' (2017) 36/1 Civil Justice Quarterly 109, 111.

¹⁹⁸ The ADR Directive art 13 paras 1,2,3.

¹⁹⁹ Cortés, 'The Online Court: Filling the Gaps' (n 197) 111.

submitted through the ODR Platform.²⁰⁰ The ODR Regulation also insists on the requirement to indicate that the contact points will have the function of providing the parties with information about the submission of the complaint and the available ADR processes. They will also inform the parties about other means of redress in cases where the dispute cannot be resolved via the platform, ie litigation.

It is too early to assess how effective the new system is. Some authors have made reservations about the practicability of the new provisions²⁰¹ while others point out the risk of significant discrepancies between national regulations.²⁰² Cortés is calling to ensure its application 'by making the requirement of Consumer ADR mandatory in a number of sectors where there is a high demand for CADR and to set up an effective residual forum to ensure full coverage.'²⁰³ However, both texts aim at increasing awareness of ADR processes among consumers by placing information at the heart of the system and thus confirm the commitment of European Institutions to provide the general public with a clear, coherent and adequate information on ADR processes.

2.2.2. The supervision of the European Courts of Justice

(a) The co-existence of two courts

The European citizens of EU countries have access to two different regional courts: the Court of Justice of the European Union (CJEU) based in Luxembourg, and the European Court of Human Rights (ECtHR) based in Strasbourg. The former adjudicates questions of European law – essentially whether national governments

²⁰⁰ Available at <<https://ec.europa.eu/consumers/odr>> (accessed on 8 May 2017).

²⁰¹ Pablo Cortés, 'A New Regulatory Framework for Extra-judicial Consumer Redress: Where We Are and How to Move Forward' (2015) 35/1 Legal Studies 114-141 ; Pablo Cortés, 'Enforcing EU Consumer Policy through Different Layers: Combining the Judicial and the Out-of-court Mechanisms' University of Leicester School of Law Research Paper No 14-27 (November 7, 2014) <<http://ssrn.com/abstract=2520487>> accessed 26 February 2015,18.

²⁰² Ana Maria, 'Toward a Harmonious European Mediation System?' (Stanford Law School Blogs/Gould Center for Dispute Resolution, 24/04/2012) <<http://blogs.law.stanford.edu/gouldcenterblog/>> accessed 30 July 2015.

²⁰³ Pablo Cortés, *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 449.

are properly implementing EU law. The latter deals with violations of individual rights guaranteed by the ECHR that covers all the 47 members of the larger Council of Europe.

Since the Lisbon Treaty, the question of overlapping jurisdiction has been frequently raised as there are now two equally binding legal texts, the Charter of Fundamental Rights of the EU (CFR) and the ECHR corresponding to the two European courts mentioned above. As noted by Butti, while the CJEU 'can be seen as an integrative agent striving for further EU harmonization, the ECtHR's mandate is that of providing a minimum human rights standards protection'. From a practical point of view, the effects of adverse ruling by the CJEU are also different: 'When a national piece of legislation is found to be violating EU law or the Convention, national states should in principle repeal it or amend it'.²⁰⁴ But while the CJEU can refer to the EU principles of supremacy, direct effect and state liability, which ensure that, generally speaking, national legislation inconsistent with EU law is actually changed. These principles have no equivalent in the Convention of the ECtHR where their implementation is much more dependent on the discretion of national states and on their national constitutions.

However, a common determination of the Courts to contribute to create uniform human rights standards has been observed: 'The adoption of a similar approach to the ECtHR strengthens the ECJ's legitimacy and helps to avoid the embarrassment of its judgments possibly being overturned by the ECtHR'.²⁰⁵

(b) An embryonic case law on non-voluntary mediation

The few decisions that have been taken by the European Courts of Justice in the field of compulsory ADR illustrate this development by referring both to the provisions of the CFR and of the ECHR mainly on the principle of effective judicial protection.

²⁰⁴ Elena Butti, 'The Roles and Relationship Between the Two European Courts in Post-Lisbon EU Human Rights Protection' (JURIST 12/09/2013) <<http://jurist.org/datetime/2013/09/elena-butti-lisbon-treaty.php>> accessed 27 November 2014.

²⁰⁵ *ibid.*

This principle which constitutes a general principle of EU law stemming from the constitutional traditions common to the Member States, has been enshrined in article 6²⁰⁶ and article 13²⁰⁷ of the ECHR and has also been reaffirmed by article 47 of the CFR.²⁰⁸

The major issue that has been raised so far in front the CJEU was over the compatibility between coercion into mediation and the provisions of ECHR art 6. It was first addressed in the central case of *Alassini* previously mentioned in Chapter 1. In that case involving Italian consumer telecom disputes, the CJEU confirms, in line with the Mediation Directive, the possibility to use mandatory mediation, provided it does not deny the parties access to the court after an unsuccessful mediation. However, under the Court's decision, a procedural law requiring the participation in a mandatory mediation process prior to submitting a claim is subject to conditions. The Court says:

Nor do the principles of equivalence and effectiveness or the principle of effective judicial protection preclude national legislation which imposes, in respect of such disputes, prior implementation of an out-of-court settlement procedure, provided that that procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs — or gives rise to very low costs — for the parties, and only if electronic means is not the only means by which the settlement procedure may be accessed and interim

²⁰⁶ ECHR art 6 'Right to a fair trial', para 1: '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.'

²⁰⁷ ECHR art 13 'Right to an effective remedy': 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'.

²⁰⁸ CFR art 47 'Right to an effective remedy and to a fair trial': 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.'

measures are possible in exceptional cases where the urgency of the situation so requires.²⁰⁹

Firstly this decision was particularly significant because it showed the CJEU's support for mandatory out-of-court settlement procedures, and secondly it was relevant for the understanding of the right of access to civil justice with regard to ECHR art 6. Indeed, the case raises questions regarding what constitutes access to justice, including whether recourse to the court system must be immediately available or available in a reasonable time. As seen in Chapter 1, *Alassini* did have relevance in England where courts have taken the contrary view of article 6 in finding that they are unable to compel non-consenting parties to mediate.²¹⁰

The debate has been recently relaunched before the CJEU in the *Menini* case by an Italian court.²¹¹ Indeed, in a domestic case, the *Tribunale Ordinario di Verona* (District Court, Verona, Italy) was hearing an appeal brought by two consumers against an order for payment obtained against them by a credit institution. The court was unsure whether the Legislative Decree no 28/2010, aiming at transposing the Mediation Directive into Italian law, which required litigants to use a mediation procedure in order for the appeal to be admissible, was compatible with some of the provisions of the ADR Directive.²¹²

In that case, the court in Verona referred a preliminary question to the CJEU asking firstly about the respective scopes of these two directives, secondly whether the provisions of the ADR Directive preclude a rule requiring a consumer to use the mediation procedure provided by the Italian legislation before bringing legal proceedings against a trader in respect of a service contract. Thirdly the Italian court asked the CJEU whether the detailed rules of the Italian mediation procedure, in so far as they require the consumer to be assisted by a lawyer and impose penalties for

²⁰⁹ *Alassini* (n 127) para 67.

²¹⁰ *Halsey* (n 103).

²¹¹ *Menini* (n 128).

²¹² *ibid.*

withdrawal from that procedure without valid grounds, are in compliance with the ADR Directive.²¹³

The CJEU decision held on the 14th June 2017 has given the following answers:²¹⁴

(i) The CJEU states that a mandatory recourse to out-of-court mediation procedure before bringing a claim before a judicial body is compatible with EU law.²¹⁵ However, such national regulation must be in accordance with the principle of effective judicial protection, ie that such legislation does not prevent the parties from having access to court.²¹⁶ Thus, the CJEU establishes some procedural requirements for a national legislator with regard to the use of mediation in such disputes. These requirements are, in particular, that the procedure should not a) result in a decision which is binding on the parties, b) cause a substantial delay for the purposes of bringing legal proceedings, c) suspend the period for the time-barring of claims and d) give rise to high costs; in addition e) electronic means should not be the only means by which the settlement procedure may be accessed and f) urgent interim measures should be possible.²¹⁷

This decision is in line with the current Mediation Directive, which already allows Member States to establish mandatory mediation procedures. In addition, it replicates the principle and conditions set in the *Alassini* case, extending them to consumers' disputes.

(ii) The CJEU decision notes that national legislation shall not require that a consumer taking part in an ADR procedure be assisted by a lawyer.²¹⁸

This decision is coherent with the ADR Directive since article 8(b) establishes that the parties have access to the procedure without being obliged to retain a lawyer or

²¹³ *ibid.*

²¹⁴ *ibid.*

²¹⁵ *ibid* para 52.

²¹⁶ *ibid* para 53.

²¹⁷ *ibid* para 61.

²¹⁸ *ibid* para 65.

a legal advisor.²¹⁹ However, it is in opposition to the Italian legislation requiring parties to be assisted by a lawyer in the context of an ADR procedure such as a mediation procedure.²²⁰

(iii) The CJEU points out that protection of the right of access to the judicial system means that any withdrawal from an ADR procedure by a consumer, with or without a valid reason, shall not have unfavourable consequences for that consumer when the dispute is before the court.²²¹ However, national legislation may provide for penalties in the event of the failure of the parties to participate in a mediation procedure without a valid reason, provided that the consumer may withdraw following the initial meeting with a mediator.²²²

Although this position concerns the provisions of the ADR Directive, it could nevertheless question more generally the practice of judicial cost sanctions related to the behaviour of the parties during the pre-action ADR process as will be detailed in the second part of the study.

For its part, the ECtHR decided recently along the same line, that a Croatian law making access to a civil court dependent upon a prior attempt to settle the claim was compatible with ECHR art 6. The Court found, in particular, that the restriction on the applicant's access to court, namely the obligation to go through a friendly settlement procedure before bringing their claim for damages against the State, was provided by law and 'pursued a legitimate aim of securing judicial economy and opened the possibility for the parties to efficiently settle their claims without the involvement of courts'.²²³

²¹⁹ The ADR Directive art 8: 'Member States shall ensure that ADR procedures are effective and fulfil the following requirements (...): (b) the parties have access to the procedure without being obliged to retain a lawyer or a legal advisor, but the procedure shall not deprive the parties of their right to independent advice or to be represented or assisted by a third party at any stage of the procedure'.

²²⁰ New art 5 of the March 2010 Decree after modification by art 84 the June 2013 decree [Decreto 69/2013; Decreto 28/2010].

²²¹ *Menini* (n 128) para 66.

²²² *ibid* para 72.

²²³ *Momcilovic v Croatia* (2015) ECHR 334 para 46.

This judgment is interesting firstly because it refers to the desirability of encouraging ADR procedures to prevent and reduce excessive workloads in the courts. As such, it is in line with the Council of Europe Declaration made in Brussels in March 2015.²²⁴ Secondly, because it confirms the principle already developed in *Alassini*, that litigants in Europe may be forced to participate in an ADR process as a precondition to court.

It will probably take some time to have a more comprehensive case law from the European courts on the issue of non-voluntary mediation, and in particular on mandatory mediation, but it appears clearly that they will play an active role in that field through their supervision of the EU States compliance with the European Directives and human rights standards. So far, both jurisdictions have made a strict application of the European Directives.

2.2.3. The EU perspectives on non-voluntary mediation to promote mediation

While the Mediation Directive has been an important benchmark of ADR regulation in the EU – and a starting point of recognition of non-voluntary mediation – new challenges and future developments have become apparent since 2008. The Mediation Directive has been called the ‘preliminary end of a process’.²²⁵

In its article 11, the Mediation Directive stated that the EU Commission will prepare in 2016 a report on the ‘development of mediation throughout the European Union and the impact of the Directive in the Member States’. And ‘(...) if necessary, the report shall be accompanied by proposals to adapt the Directive’.

²²⁴ Council of Europe, 'Brussels Declaration' ('High-level Conference on the "Implementation of the European Convention on Human Rights: Our shared responsibility", Brussels, 27 March 2015) <http://vm.ee/sites/default/files/article-filefield/final_declaration_en.pdf> accessed 20 May 2016, 3(9).

²²⁵ Hopt and Steffek (n 4) 7.

This document was published on 26 August 2016²²⁶ after a few publications were issued since 2008 on the impact of the Mediation Directive by the European Institutions themselves or requested by them.²²⁷ They all converge on the idea that so far the Mediation Directive has failed in its objectives to increase the number of mediation (1% of the cases for civil and commercial matters)²²⁸ and some recommend to introduce a proportion of mandatory mediation in judicial systems to help increase the recourse to mediation in general.²²⁹

However, the position adopted by the European Commission in the 2016 report is more balanced: while expressing reservations about compulsory participation in mediation to be imposed on a large scale, the Commission calls preferably for the expansion of mandatory mediation information and consideration to be widely implemented in the context of court litigation.

(a) The reservations about implementing mandatory participation in mediation

Indeed, the EU 2016 report assesses the different issues addressed by the Directive, among which, in its para 3.6, 'legislation making the use of mediation compulsory or subject to incentives or sanctions'²³⁰ in reference to Mediation Directive art 5(2). Although the article, and more generally the Mediation Directive, coupled with the case law emanating from the European courts, clearly opened the door for Member States to introduce mandatory mediation in their legal systems, the 2016 report seems to step back from expanding mandatory mediation across Europe on a large scale.

²²⁶ Commission 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters' COM (2016) 542 final.

²²⁷ European Parliament, 'Report on the implementation of the directive on mediation in the Member States, its impact on mediation and its take-up by the courts' (July 2011, Committee on Legal Affairs, (2011/2026(INI)); Study for Evaluation and Implementation of the Mediation Directive; 'Rebooting' the Mediation Directive.

²²⁸ 'Rebooting' the Mediation Directive 1.

²²⁹ Study for Evaluation and Implementation of the Mediation Directive 40.

²³⁰ COM (2016) 542 final.

Indeed, after having recalled the controversial nature of compulsory mediation, acknowledging that ‘some stakeholders conclude that the lack of compulsory mediation impedes the promotion of mediation’ while others ‘consider that by its very nature mediation can only be voluntary in order to function properly and that it would lose its attractiveness compared to court proceedings if it was rendered compulsory’, the Commission declares: ‘It is important to remind that compulsory mediation affects the exercise of CFR art 47 of the European Union’.²³¹

Further in the report, the Commission narrows even more the scope of mandatory mediation in stating:

The imposition of mediation within the framework of a judicial procedure might be considered where the parties may - because of the nature of their relationship - have reasons for repeated disagreements or even court litigation, such as in certain family matters (eg rights of access to children) or in neighbour disputes. It should be stressed that also, in such cases, the right of access to the judicial system which is guaranteed by article 47 of the Charter of Fundamental Rights of the European Union must be respected.

And concludes: ‘In light of the above, article 5(2) of the Directive can be considered appropriate’.²³²

Therefore, the Commission reiterates the possibility for Member States to introduce mandatory mediation, provided that such legislation does not prevent the parties from exercising their right of effective judicial protection. More surprising is the recommendation made by the Commission to limit in practice the use of mandatory mediation to specific cases or matters, thus making a narrow interpretation of the Directive art 5(2) eight years after its enactment.

²³¹ *ibid* 8.

²³² *ibid* 9.

(b) The encouragement for increasing mandatory mediation information and consideration

In para 3.10 of the August 2016 report which assesses the impact of the Mediation Directive art 9 ‘Information for the general public’, it is observed that awareness of mediation remains low and that information remains lacking for potential parties, affecting the efficiency of mediation. The Commission indicates that it should be explored how knowledge of the available information on mediation could be further disseminated. In its conclusion, the Commission considers that ‘there is no need at this time to revise the Directive but that its application can be further improved’²³³ and recommends that Member States increase their effort to promote and encourage the use of mediation through the various means and mechanisms foreseen in the Directive. The report then enumerates examples of best practices in this regard, among which:

(...) requirements for parties to state in their applications to courts whether mediation has been attempted, in particular in family law matters, obligatory information sessions within the framework of a judicial procedure and an obligation on courts to consider mediation at every stage of judicial proceedings.²³⁴

Clearly the Commission points out the need to explore and implement both information on and consideration of mediation, if necessary on a compulsory basis. Prior to the report, the Commission carried out a study in 2013 on the implementation of the Directive which was updated in 2016 and certainly inspired it.²³⁵ This study recommended that:

Member States should consider:

- targeting information measures about mediation at legal professionals;
- the feasibility of introducing an obligation to inform potential parties to a dispute about mediation and its advantages;

²³³ *ibid* 11.

²³⁴ *ibid* 12.

²³⁵ Study for Evaluation and Implementation of the Mediation Directive 80.

- the feasibility of introducing an obligatory preliminary procedure in court where it would be assessed whether the dispute could be better dealt with in the context of mediation rather than judicial proceedings and refer the parties to it.

Another study showed that the most consensual measure among practitioners to be taken would be the compulsory attendance of litigants at information session on mediation.²³⁶

It seems that the Commission, rather than revising the Directive, is willing to maintain its original version and leave to Member States the flexibility given by article 5(2) towards mandatory mediation. However, there are also in the report clear signals given to Member States to use it with caution, and only for specific cases, and conversely to increase mandatory information and consideration by using the different methods proposed.

A research paper edited by the European Parliament in December 2016 on the European Implementation of the Mediation Directive is even more straightforward when it concludes:

Further promotion of the use of mediation in the EU and facilitation of access to alternative dispute resolution in each Member State, should in any case maintain their essential character, which is that their success relies on a voluntary engagement of parties and their will to accept the compromise agreement reached with the assistance of a third party.²³⁷

²³⁶ 'Rebooting' the Mediation Directive 163.

²³⁷ European Parliament, 'The Mediation Directive: European Implementation Assessment' (European Parliamentary Research Service, Study PE 593.789, December 2016) 28.

Conclusion

This second chapter has shown that in the selected countries outside Europe (USA, Australia and Canada), non-voluntary mediation has been implemented widely and for a longer period than in Europe, particularly mandatory mediation. Indeed, although mandatory consideration of mediation is present in most states in the USA for example, mandatory participation in mediation is widely implemented in the selected countries, either as a prior step before litigation (Ontario, Australian federal courts) or, once the case is in court, through court-ordered mediation where mediation is discretionarily ordered by a judge (USA, some Australian state courts). Also, in the three countries of investigation, cost orders can be imposed by the judiciary for the parties' conduct during the mediation process. Therefore, these countries have provided models and benchmarks offering some very interesting points of comparison that have inspired common law but also civil law countries in Europe in the field of non-voluntary mediation.

The research also indicates that most experiments of non-voluntary mediation in these countries have been an overall qualitative and quantitative success. However, behind this apparent success, there is a substantial literature²³⁸ critical of non-voluntary mediation claiming that it has made the disputing landscape more and more complex and inadequate 'for a democratic society to produce legal precedent and fair process'.²³⁹ Others suggest that mandatory mediation should only be recognized as a temporary expedient, 'to be carefully implemented in any jurisdiction with the penultimate aim of increasing the awareness of mediation in a society'.²⁴⁰

Along with these experiments abroad which have influenced Europe, the second part of the chapter described how mediation in all its forms has been continuously supported since the 1990's by the European Institutions which has issued consultation papers and reports, adopted resolutions and finally enacted the

²³⁸ Nolan-Haley, 'Is Europe Headed Down the Primrose Path' (n 71) 1008.

²³⁹ Menkel-Meadow, 'Regulation of Dispute Resolution' (n 2) 446.

²⁴⁰ Quek (n 49) 509.

Mediation Directive in 2008, followed by the ADR Directive in 2013, supported by the Consumer ODR Regulation.

Although the scope of application of the Mediation Directive is limited to civil and commercial cross-border disputes, its purpose was also to promote mediation as an out-of-court alternative means, and even to allow Member States to enact national legislation making mediation compulsory, provided it would not deny the parties access to the court after an unsuccessful mediation.²⁴¹ The compliance to EU law, and more specifically to the provisions of the Mediation Directive, by national legislation is being monitored today by the European Courts of Justice. They have provided so far an embryonic case law highlighted by the *Alassini* jurisprudence which gives the possibility to use mandatory mediation provided it does not deny afterwards the parties' access to the court.²⁴² This has been confirmed by the recent CJEU decision of *Menini*.²⁴³ As a result, many Member States have taken the opportunity of the Directive either to reinforce (eg the Netherlands) or to introduce (eg Romania) mandatory elements in the mediation process in their domestic legal system.

So far, the studies on the impact of the Directive all converge to the conclusion that the text has generally failed in its objectives to increase the use of mediation in Europe (1% of the cases relating to civil and commercial matters) and more interestingly most of them recommend to introduce more mandatory elements of mediation in European judicial systems in order to develop the use of mediation. However, the 2016 European Commission report evaluating the application of the Mediation Directive²⁴⁴ considers that there is no need at this time to revise the Directive and adopts a more nuanced position towards coercion. While expressing reservations about imposing compulsory participation in mediation on a large scale, the Commission calls for the expansion of mandatory mediation information and

²⁴¹ The Mediation Directive art 5.

²⁴² *Alassini* (n 127).

²⁴³ *Menini* (n 128).

²⁴⁴ COM (2016) 542 final 11.

mandatory mediation consideration in court processes. This view is endorsed by the present study and will be developed in the next chapters.

CONCLUSION TO PART I

Part I of the thesis 'Non-voluntary mediation in context' (Chapters 1 and 2) has outlined the concept of non-voluntary mediation based on the different levels of coercive action used on potential litigants to increase the recourse to mediation in the context of court litigation and has classified them in three categories namely, mandatory information on mediation, mandatory consideration of mediation and mandatory participation in mediation.

Although Part I has explained how these three categories have been progressively introduced in Europe and in the wider world to represent today a permanent feature of our dispute resolution landscape, it has also foreshadowed their differences and a potential fracture between them when considering to what extent should non-voluntary mediation be implemented in our civil justice systems to increase the use of mediation.

The following part of the study, Part II, will present the facts and assess the efficiency of the various forms of non-voluntary mediation already in place in England and compare them to the situation in France and in Italy.

To conclude, the pragmatic solution on mandatory mediation recommended by Hanks seems appropriate to follow throughout the present research on non-voluntary mediation: 'the different perspectives (...) indicate that there is no right or wrong approach and that the legislature and courts must react to the specific needs of the domestic legal environment'.²⁴⁵

²⁴⁵ Hanks (n 150) 952.

PART II

NON-VOLUNTARY MEDIATION IN PRACTICE

INTRODUCTION

Part I has introduced the operating concept of non-voluntary mediation and subdivided it into three categories in order to allow a clear and comprehensive overview of the situation between coercion and the use of mediation within the court context.

Mandatory mediation information can be defined as the obligation made to the parties in a court context to be informed about mediation. The more comprehensive the information, the easier the potential litigant will be able to make a decision (advantages, cost, process, length, etc).

Mandatory consideration of mediation is the obligation for the parties in a court context to consider whether mediation could be the appropriate resolution method to resolve their dispute. It is formally implemented under diverse forms and with various degrees of intensity in each country of investigation.

Mandatory participation in mediation (frequently named mandatory mediation) is the situation where the parties in a court context are compelled to attempt a full mediation process. The decision to reach a settlement always stays voluntary.

Overall, the classification proposed (information, consideration, participation) gives a continuum of levels of coercive action devised to increase the use of mediation in the context of court litigation. The gathering of these three categories constitutes from my point of view what I call in this study non-voluntary mediation, which I define as 'the different levels of coercive action imposed on the parties in a court context to increase the use of mediation'.

This Part II aims at giving a critical overview of the various forms of non-voluntary mediation in England, using this classification, and to compare it with France and Italy in a European context. The comparison is valuable as despite different approaches and levels of development towards ADR, the three countries are trying to increase the use of mediation through the expansion of non-voluntary mediation.

The following chapters will also show that each level of coercive action to increase the use of mediation are distinct from each other and used separately. However we will also see that it is sometimes difficult to draw a formal and definite frontier between the different levels of actions because of the variety of solutions and the highly evolving nature of the subject.

Although mandatory mediation information is often coupled or implied by the requirement of consideration while mandatory participation in mediation is the only form of non-voluntary mediation in which the parties lose control over their entry into the resolution process. The logic would have been to consider each category separately.

However, Part II will consider mandatory mediation information separately from the two other forms of non-voluntary mediation to have a better understanding of the situation of mediation in England in the context of court litigation. Indeed, England, while officially rejecting mandatory mediation, has transformed mandatory consideration of mediation into an implied requirement to participate in mediation through the policy of cost sanctions. Very interestingly, the same trend is observed in Italy and emerging in France.

Therefore, Chapter 3 focuses on the first category of non-voluntary mediation identified in the study which is mandatory mediation information. It defines it, analyzes its stage of development in England and compares it with France and Italy. Chapter 4 focuses on the two other forms of non-voluntary mediation, namely mandatory consideration of mediation and mandatory participation in mediation with also comparisons with France and Italy.

CHAPTER 3

MANDATORY MEDIATION INFORMATION

Introduction

Many Member States have adopted a variety of measures to inform citizens on the advantages of mediation with useful practical information on cost and procedure (eg online information on the website of relevant ministries, public conferences, public promotion campaigns, television spots, etc). However, viewing the low impact on the use of mediation of these measures,¹ some countries have started to require litigants to be informed about mediation before embarking on a judicial procedure (eg completion by litigants of a questionnaire stating that they have received information on mediation, attendance to a pre-action informative meeting on mediation).

The aim is to tackle more robustly the lack of awareness of the public on the possibility to use mediation instead of going to court, observed in all of Europe, and the urgent need to educate and inform potential litigants.² In this way, every party who intends to bring a court action is required to be aware of the mediation option.

Mandatory mediation information can be defined as the obligation made to the parties in a court context to be informed about mediation. None of the countries of investigation has a scheme in place that solely imposes on potential litigants to be informed about mediation. The study here will show that it is either implied by provisions on mandatory consideration or mandatory participation (eg Pre-action

¹ European Parliament, "Rebooting' the Mediation Directive: assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU', (Directorate General for Internal Policies Legal Affairs, Study PE 493.042, January 2014) ('Rebooting' the Mediation Directive); Commission, 'Study for an evaluation and implementation of Directive 2008/52/EC – the 'Mediation Directive', Final Report, October 2013, updated March 2016 (Publications Office of the European Union 2016) 40 (Study for Evaluation and Implementation of the Mediation Directive).

² Commission, 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters' COM (2016) 542 final 10.

protocols or Directions Questionnaires in England) or coupled with the obligation to consider mediation (eg Informative pre-action mediation meeting in Italy).

Nevertheless, the question of information on mediation has become crucial, especially at a time where mediation is more and more often incorporated within our judicial systems as an alternative to traditional courtroom litigation and is a central issue in the more comprehensive current reflection about judicial systems in general that is taking place today at domestic and European levels.

What has been put in place so far in England, France and Italy that requires parties to be informed on mediation? Has it increased the use of mediation and, more importantly in relation to the present study, does it need to be extended to all civil and commercial cases on a mandatory basis and how? The present chapter aims at answering these questions by assessing first what is happening in England and then making a comparison with what is in place in France and Italy.

3.1. The absence of a general regulation on mandatory mediation information in civil and commercial matters in England

England does not provide a comprehensive regulated framework for mediation or other forms of ADR. However, ADR, including mediation, has been integrated into court proceedings through the Civil Procedure Rules (CPR) in civil matters, and the Admiralty and Commercial Courts Guide in commercial matters.³ Under these rules there is no formal obligation for judges to inform the parties on ADR but the courts have the general duty to encourage the parties at all stages of the action to use ADR. Alongside these provisions, there are many other providers of information on mediation and an existing climate of opinion in England calling for a cultural change, ie to spread more widely and robustly information and benefits of ADR, including mediation.

³ Admiralty and Commercial Courts Guide (HMCTS, 2014, updated March 2016) para D 8.3(e), s G and app 6.

3.1.1. The courts' general duty of encouragement to use ADR: an implicit obligation of information

The purpose of this section is to demonstrate that the policy of encouragement to use ADR imposed on the judiciary in civil and commercial matters is leading to an implicit duty of information on ADR imposed on litigants at all stages of the judicial process.

(a) The policy of encouragement in civil matters

Over the years, judges have been required by the CPR to further the overriding objective. Expressed in the rule 1.1, the overriding objective is to deal with cases justly, and following the changes to the rules in 2013 as part of the Jackson reforms,⁴ at proportionate cost. This governing purpose includes, among other obligations, that judges will encourage the parties to use ADR.⁵ To fulfil this duty, the CPR contains a variety of provisions to ensure this policy of encouragement.

First of all, the preliminary stage of court proceedings is mostly regulated by the pre-action protocols. These are defined as 'statements of best practice about pre-action conduct which have been approved by the Head of Civil Justice.'⁶ There are currently thirteen specific protocols in areas such as housing disrepair or defamation.⁷

There is also an overarching Practice Direction (PD)– Pre-Action Conduct and Protocols that applies in all cases, including those that have no specific protocol. Its main objectives are to enable parties to settle the issue between them without the

⁴ Jackson LJ, *Review of Civil Litigation Costs: Final Report* (TSO 2010) (Jackson Report on Civil Litigation Costs).

⁵ CPR 1.4(2)(e).

⁶ Jens M Scherpe and Bevan Marten, 'Mediation in England and Wales: Regulation and Practice' in Klaus J Hopt and Felix Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford University Press 2012) 365, 376.

⁷ PD Pre-Action Conduct and Protocols para 18.

need to start proceedings and support the efficient management by the court and the parties of proceedings that cannot be avoided.⁸

It follows from the above that one of the primary aim of the pre-action protocols is to ensure that litigation is truly a last resort, requiring parties to state their cases and exchange relevant documents clearly prior to commencement of proceedings, and to indicate whether or not they have considered the use of ADR.⁹ Further, during the early stages of proceedings, when parties apply for directions for the conduct of the case, they will have to answer the same question. If proceedings take place, both parties may be required to provide evidence that alternative means of resolving the dispute were considered.¹⁰

There is no formal information meeting at this stage for all cases but some specific pre-action protocols, for example the Pre-Action Protocol for Construction and Engineering Disputes, includes the requirement for the parties to attend a pre-action meeting to consider if litigation is unavoidable.¹¹ In its updated version of February 2017, it is even provided that the meeting can directly take the form of an ADR process such as mediation.¹²

In addition to the pre-action protocols, there are a number of specialist court guides, each of which contains guidance relating to the use of ADR to solve the dispute: for example, the Chancery Guide,¹³ the Queen's Bench Guide,¹⁴ the Technology and Construction Court Guide.¹⁵ They all recall the obligation of the courts to encourage the use of ADR.

⁸ *ibid* para 3.

⁹ *ibid* para 8.

¹⁰ *ibid* para 11.

¹¹ Susan H Blake, Julie Browne and Stuart Sime, *A Practical Approach to Alternative Dispute Resolution* (3rd edn, Oxford University Press 2014) para 7.24.

¹² Para 9.3.

¹³ The Chancery Guide (HMCTS, February 2016, last amended May 2017) ch 18.

¹⁴ The Queen's Bench Guide (Judiciary of England and Wales 2017) para 8.4.

¹⁵ Technology and Construction Court Guide (HMCTS, 2nd edn, latest revision March 2014) s 7.

Furthermore, during the judicial process at the time of allocation of the case to the small claim track, the fast track or the multitrack, the court will serve a party a notice of proposed allocation. The notice requires the parties to complete a Directions Questionnaire (replacing the Allocation Questionnaire since 1 April 2013) and to serve copies on all other parties. Parties are asked in the Questionnaire to confirm if they have complied with the relevant pre-action protocol and if so why they refused to settle the action or consider ADR at this stage.¹⁶ If the court considers these reasons to be weak or inadequate, it will direct the parties to attend an allocation hearing or case conference management to consider whether ADR should be attempted. The court may also, at any stage of the proceedings, grant a stay¹⁷ and direct the parties to consider ADR through eventually an Ungley Order or a Jordan ADR Order.¹⁸

The policy of encouragement in civil matters has led to mixed reviews, especially in relation to the application of the pre-action protocols. Ahmed reports that, although the Ministry of Justice recognizes the general effectiveness of such protocols, they rarely lead to sanctions by the courts if they are not followed. The author also observes the increase in costs caused by the pre-action protocols and suggests that a balance should be found between

(...) two competing factors: on the one hand, the need to minimize the frontloading of costs and on the other, the need to provide litigants with a basic procedural framework within which they are able to discharge their pre-action obligations.¹⁹

However, at all stages of the judicial action, judges in civil courts are under a duty to encourage litigants to use ADR to resolve their dispute. There is no formal obligation to inform them, but a set of rules which exists and implies that the parties

¹⁶ CPR Forms N180/N181.

¹⁷ CPR 26.4.

¹⁸ PD 29 para 4.10(9).

¹⁹ Masood Ahmed, 'An Alternative Approach to Repealing the General Pre-action Protocol' (2013) 32/2 Civil Justice Quarterly 256, 271.

are inevitably made aware by the judiciary of the possibility to use an ADR process. The duty of encouragement of the judge is even stronger in Commercial Courts.

(b) The policy of encouragement in commercial matters

The commercial courts started early to promote the use of ADR and to have concerns about the information provided to the parties on this topic. From the mid 1990's, they required lawyers to consider with their clients the possibility of resolving the dispute by mediation, conciliation or otherwise to ensure that parties were fully informed about the most cost-effective means of resolving their dispute.²⁰

In addition, Part 58 of the CPR mentioned above which enables a court to stay a proceeding in order to allow the parties to consider ADR is not allowed before commercial courts.²¹ Instead, there are special provisions for ADR in section G of the Admiralty and Commercial Courts Guide. These provisions do not only recall the importance for judges to encourage the use of ADR at any stage or to stay proceedings if it appears appropriate, but also gives them the power to order the parties to consider ADR. This option given to the judge has been described by Dyson LJ as the "strongest form of encouragement" to attempt ADR,²² although rarely used.²³ In addition, and more importantly in the context of this chapter, appendix 6 of the above-mentioned guide sets out that all parties attending a case management conference must complete and file a detailed case management information sheet and therefore answer specific questions about their consideration of ADR.²⁴

A research from 2002 concluded that 'ADR orders were said to have had a significant impact on commercial practice and the advice given by the legal profession to clients

²⁰ Commercial Court Practice Note: Alternative dispute resolution [1994] 1 All ER 34.

²¹ CPR 58.13(1).

²² Scherpe and Marten (n 6) 382.

²³ Hazel G Genn, *Court-Based ADR Initiatives for Non-Family Civil Disputes: The Commercial Court and the Court of Appeal* (Lord Chancellor's Department Research Series 1/02, 2002) i.

²⁴ Case Management Information Sheet paras 18, 19.

about commercial dispute resolution.²⁵ In 2012, Jackson LJ also cited research indicating that through judicial encouragement the number of commercial disputes referred to mediation in England and Wales had increased by 141%.²⁶

In summary, civil and commercial courts in England are under a general duty to encourage the parties to attempt to resolve their dispute by ADR if appropriate and the strongest form of encouragement lies in the ADR order which can be made by the Commercial Courts. This duty of encouragement which takes place at the very early stage of the proceedings and continues at all stages of the action implies that the Courts either inform the parties on ADR or check whether the information they possess enable them to take the appropriate decision in relation to the choice of their dispute resolution process.

This implied obligation of information is facilitated in practice by the obligation made to the parties to fill in a Directions Questionnaire in civil matters and a Case Management Information Sheet in commercial matters before starting court proceedings. It implies that in both types of matters the parties will have to acknowledge that they have been made aware of the existence of ADR processes, including mediation, to resolve their dispute before proceeding to litigation in court. It might be seen only as a bureaucratic requirement.²⁷ However, it is an existing step that requires litigants to be aware of the mediation option.

The policy of encouragement by the courts to use ADR has also been reinforced by the 2013 Jackson reform which requires judges to actively engage in both case management and cost management at all stages of the judicial process so as to

²⁵ Genn, *Court-Based ADR Initiatives for Non-Family Civil Disputes* (n 23) iii.

²⁶ Jackson LJ, 'The Role of Alternative Dispute Resolution in Furthering the Aims of the Civil Litigation Costs Review' (RICS Expert Witness Conference, 8 March 2012, 11th Lecture in the implementation of the programme) <www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/lj-jackson-speech-eleventh-lecture-implementation-programme.pdf> accessed 12 May 2015 para 3.6.

²⁷ Karl Mackie, 'The Future of Civil Justice in England and Wales - Costs, Funding and New Court Structures' (Westminster Legal Policy Forum, London, 23rd May 2016) <<http://thebooksout.com/downloads/westminster-legal-policy-forum-keynote-seminar-innovation.pdf>> accessed 4 October 2016, 25.

comply with the overriding objective.²⁸ All these provisions render more crucial than ever the issue of the parties' information on ADR. Additionally, information on mediation can be conveyed via different routes and by different providers inside and outside the judicial system, among which legal advisers are playing a major role.

3.1.2. The extrajudicial providers of information on mediation

(a) Legal advisers

Although the presence of a legal adviser is not mandatory in England, parties are represented when using ADR or even for court proceedings in a majority of civil and commercial cases of any size.²⁹ As such, they are the first point of contact for many disputes. It gives them a fundamental role in the diffusion of information and advice in relation to the parties' choice of their dispute resolution process, even though this situation could change as a result of the government's spending cuts on civil legal aid.³⁰

For many years, legal advisers have been placed under a positive duty to consider with their clients whether the dispute is suitable for ADR, implying also at this stage an obligation to inform the parties. This obligation results implicitly from the CPR provisions which states that parties are required to help the court to further the overriding objective, to co-operate with each other and to facilitate the use of ADR if that would be appropriate.³¹

This approach is supported by judicial statements including the one by Dyson LJ: 'All members of the legal profession who conduct litigation should now routinely

²⁸ Blake, Browne and Sime, *A practical approach* (n 11) para 7.09.

²⁹ Manon Schonewille and Fred Schonewille, *The Variegated Landscape of Mediation* (Eleven International Publishing 2014) 380.

³⁰ Ministry of Justice, Statistics Bulletin, 'Legal Aid Statistics in England and Wales: January to March 2015' (25 June 2015)
<www.gov.uk/government/uploads/system/uploads/attachment_data/file/438013/legal-aid-statistics-bulletin-jan-to-mar-2015.pdf> accessed 7 November 2016.

³¹ CPR 1.3 and 1.4.

consider with their clients whether their disputes are suitable for ADR³² or by Ward LJ: 'The court has given its stamp of approval to mediation and it is now the legal profession which must become fully aware of and acknowledge its value'.³³

The duty of information is also reinforced by the professional codes of conduct under the concept of 'the client's best interests'.³⁴ In the solicitor's code of conduct, an obligation to inform a client of their dispute resolution options (including mediation) can be implied as part of the duty to act in a client's best interest.³⁵ Barristers have a similar obligation to 'strive to achieve the most cost effective resolution of the client's dispute' including advice on ADR options where appropriate.³⁶ It is then suggested that it is normally in the client's interest to be made aware of the relevant ADR options. It is also to be noted that ADR has become a compulsory part of the Bar Professional Training Course³⁷ as well as a core practice area listed in the Legal Practice Course Outcomes of the Solicitors Regulation Authority.³⁸

Another requirement strengthening the legal adviser's obligation to inform the parties on ADR including mediation is the Directions Questionnaire mentioned above. Each questionnaire contains the following statement that must be attested to by legal representatives: 'I confirm that I have explained to my clients the need to try to settle, the options available and the possibility of costs sanctions if they refuse

³² *Halsey v Milton Keynes General NHS Trust and Steel, Joy & Halliday* [2004] EWCA Civ 576, [2004] 1 WLR 3002 para 11.

³³ *Burchell v Bullard* [2005] EWCA Civ 358, [2005] BLR 330 para 43.

³⁴ Blake, Browne and Sime, *A practical approach* (n 11) para 3.07.

³⁵ Solicitors Regulation Authority, 'SRA Code of Conduct 2011' <www.sra.org.uk/solicitors/handbook/code/content.page> accessed 2 February 2017, Principle 4.

³⁶ Bar Standards Board, 'Code of Conduct of the Bar of England and Wales and Written Standards for the Conduct of Professional Work' (8th edn) r 3.7.1.

³⁷ Bar Standards Board, 'BPTC syllabus and curriculum' (2016/17) <www.barstandardsboard.org.uk/media/1820691/2016-17_bptc_syllabus_-_including_civil_and_criminal_full_syllabus_feb_2017_pdf.pdf> accessed 5 March 2017, 74.

³⁸ Solicitors Regulation Authority, 'Legal Practice Course Outcomes' (2011) <www.sra.org.uk/documents/students/lpc/lpc-outcomes-sept2011.pdf> accessed 15 March 2017, 17.

to try to settle'.³⁹ Indeed, if lawyers fail to give appropriate advice about ADR, they may expose their client to costs penalty and could also be personally liable and a professional negligence action could be brought against them.

There is no doubt that legal advisers are seen in England as an essential link to inform on mediation, although it has been observed that:

Here and elsewhere, lawyers were blamed for hindering the development of mediation because they either held negative attitudes about mediating, fearing that it showed a weakness in a case or might reveal litigation strategies - or more resentfully, that they apprehended an 'alarming drop in revenue'.⁴⁰

In addition, it is worth mentioning that, unlike continental lawyers, English lawyers are used to reach out-of-court settlements through negotiations and as a result they may not perceive as much the added value of mediation. However, it is also reported that lawyers have started to position mediation within the sphere of their professional practice and to train as mediators. Legal professions are placed in an ideal position to influence developments as many mediation policies take place in 'the shadow of the courts'.⁴¹ The 2016 Centre for Effective Dispute Resolution (CEDR)'s Mediator Audit reported that lawyers occupy nearly half of the mediators' market with 43% of the respondents from the legal profession.⁴²

(b) Legal Aid

For many years, legal aid in England has encouraged the use of ADR and therefore has been a valuable tool to spread information on mediation. Indeed, the government's determination to promote mediation was demonstrated in 1999 in the Access to Justice Act 1999, which included the cost of mediation within the legal

³⁹ CPR Forms N180/N181.

⁴⁰ Penny Brooker, *Mediation law: Journey through Institutionalism to Juridification* (Taylor and Francis Ltd 2013) 247.

⁴¹ *ibid* 248.

⁴² Centre for Effective Dispute Resolution (CEDR), 'The Seventh Mediation Audit: a survey of commercial mediator attitudes and experience' (11 May 2016) (CEDR Seventh Mediation Audit) <[www.cedr.com/docslib/The_Seventh_Mediation_Audit_\(2016\).pdf](http://www.cedr.com/docslib/The_Seventh_Mediation_Audit_(2016).pdf)> accessed 12 September 2016.

aid system. The emphasis on mediation was reinforced in the Legal Aid Funding Code in 2005 which indicates that ‘an application for funding may be refused if there are complaint systems, ombudsman schemes or forms of ADR which should be tried before litigation is pursued’, ie legal aid for taking a claim to court can be refused if ADR should have been attempted. The Legal Aid Funding Code also allowed the possibility of legal aid being given for a legal representative to assist with mediation provided other relevant criteria are met.⁴³

Nevertheless, since 1 April 2013, legal aid has been removed from most types of civil cases under The Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012. In some areas of law such as family law, legal aid is no longer available in court proceedings (except in cases of domestic violence and child protection issues) and only covers family mediation. According to Scherpe and Marten, ‘these changes will largely affect formal legal proceedings, and will not affect legal aid funding relating to mediation *per se*. Mediation is singled out in the description of ‘legal services’ under the new Act’.⁴⁴ Under the legislation, parties can be required by the Legal Aid Agency to attempt mediation before engaging into litigation and public funding might be withdrawn if a party unreasonably refuses to mediate. Legal aid funding will normally cover reasonable costs of mediation, provided it is the most effective way of proceeding and the fees of the mediator are reasonable.⁴⁵ However, as it will be observed below, the LASPO Act 2012 has indirectly affected the use of mediation.

It is worth also mentioning that the Legal Aid Agency provides an example of mandatory legal information process through the Legal Aid Agency’s Civil Legal Advice Telephone Gateway (‘the Gateway’) which is at present the only publicly funded source of telephone help in England. The service is available only to those who qualify on means. The service is mandatory (ie an enquirer is obliged to obtain their initial assistance by this method) but only in three categories of case (debt,

⁴³ Hazel G Genn, Shiva Riahi and Katherine Fleming, ‘Regulation of Dispute Resolution in England and Wales: A Sceptical Analysis of Government and Judicial Promotion of Private Mediation’ in Felix Steffek and Hannes Unberath (eds), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (Hart Publishing 2013) 145.

⁴⁴ Scherpe and Marten, ‘Mediation in England and Wales: Regulation and Practice’ (n 6) 395.

⁴⁵ Blake, Browne and Sime, *A practical approach* (n 11) para 14.47.

special education and discrimination). In other categories, an enquirer may choose to call the Gateway rather than go directly to a solicitor or advice agency. It is however reported that the Gateway has been criticized for being poorly publicized, confusing and bureaucratic.⁴⁶

(c) Various governmental and non-governmental initiatives

England offers a vast range of organizations which promote mediation across the country and participate in the information of the public on ADR; but there is no overall system that supervises the access to information. The present thesis cannot attempt to cover all the current organizations that offer information on mediation but this section will outline that there are however a few bodies of reference which are giving some coherence to the network of information such as the Civil Mediation Council (CMC) or the CEDR referred to above.

The CMC was established in 2003 to be the neutral and independent body that represents and promotes civil and commercial mediation across England. The CMC mission is 'to inspire all sectors of society to use mediation when managing and resolving disputes (...) to be a trusted and authoritative source of information about mediation' and 'to act as a link between all who are interested in mediation, in particular our members, the public, businesses, the professions and the government'.⁴⁷ It has currently about 400 individual members and about 100 member organizations. The CMC is not a regulatory body but has a 'quasi-regulation function'⁴⁸ in the sense that it accredits most civil, commercial and workplace mediation providers.

The CMC is also the body of reference which provides accredited mediators for any mediation which is to take place through the Civil Mediation Online Directory operated by the Ministry of Justice, which was set up in 2011 to replace the National

⁴⁶ JUSTICE, 'Delivering Justice in an Age of Austerity' (April 2015) 32 (The JUSTICE Report).

⁴⁷ Civil Mediation Council (CMC), 'About CMC' <www.civilmediation.org/about-cmc> accessed 3 October 2015.

⁴⁸ Genn, Riahi and Fleming (n 43) 171.

Mediation Helpline, considered too costly by the Ministry of Justice,⁴⁹ and can be used by anyone to find an ADR provider organization operating locally that can carry out a time-limited, low-cost, fixed-fee mediation. The CMC website and the websites of the CMC provider organizations, along with the CMC Directory, constitute in England a central pole of information about mediation and mediation services for the public.

Another body that plays a very active part in the diffusion of information about mediation is the CEDR, which has a national and international presence. Its objectives are the promotion and facilitation of ADR, especially in commercial cases. It is one of the largest providers in the field of mediation services, as well as in training and consultancy services. It is also a body of reference that conducts regular audits on civil and commercial mediation.⁵⁰

This section has shown that, despite the absence of a general legal obligation of information for civil and commercial matters, the policy of encouragement assigned to the courts by the CPR and the Admiralty & Commercial Courts Guide has led to the implementation of an implicit but real policy of information of the public on ADR, including mediation, at all stages of the judicial process, especially with the practice of the questionnaires on ADR in civil and commercial proceedings. In addition, information on mediation is carried out by other providers such as lawyers and mediation bodies which all contribute to promote the spreading of information among the public.

Is this enough to fill in the lack of knowledge about mediation that has been observed?⁵¹ Recent figures indicate that the rate of civil and commercial mediation in England remains low and even that 'the pace of progress has slowed in recent

⁴⁹ Herbert Smith Freehills ADR Notes, 'Closure of the National Helpline telephone service' (17 January 2012) <<http://hsfnotes.com/adr/2012/01/17/closure-of-the-national-mediation-helpline-telephone-service/>> accessed 27/04/2014; Ministry of Justice, 'Civil Mediation- Find a civil mediation provider', <civilmediation.justice.gov.uk> accessed 2 December 2016.

⁵⁰ CEDR Seventh Mediation audit.

⁵¹ Jackson Report on Civil Litigation Costs 355ff.

years';⁵² and some observers have been calling for a more robust approach on information for civil and commercial matters citing the policy applied in England to family and employment issues.⁵³

3.1.3. The option of mandatory mediation information

For many years, the fields of family and employment disputes have been at the forefront of the policy of information in relation to mediation. In both areas of law, the general approach has been that the courts should be used as a last resort. Since 1996, mediation has been offered in employment law under the Employment Tribunals Act 1996 and in family law under the Family Law Act 1996. In both fields, the government, very recently, has put an emphasis on the use of mediation, and particularly on the issue of information, although coupled with an advice/assessment component, by introducing mandatory attendance to ADR meetings before presenting a claim in court.

(a) The current implementations: employment law and family law

(i) Most employment disputes in England fall within the jurisdiction of the Employment Tribunal, which practices a form of judicial mediation alongside its traditional formal hearings. In both procedures, the parties' attention is drawn to mediation or conciliation.

In judicial mediation, the possibility of such procedure will be discussed with the parties at a case management conference where information will be given to them on the process. If the parties express an interest, the employment judge will assess the file and decide whether the Tribunal is able to offer judicial mediation for the

⁵² Centre for Effective Dispute Resolution (CEDR), 'The Sixth Mediation Audit: a survey of commercial mediator attitudes and experiences' (22 May 2014) 3 (CEDR Sixth Mediation Audit) <www.cedr.com/docslib/TheMediatorAudit2014.pdf> accessed 7 March 2015.

⁵³ Lord Faulks, 'Keynote speech, Mediation and government' (The Civil Mediation Conference, London, 22 May 2014) <www.gov.uk/government/speeches/mediation-and-government> accessed 11 August 2016; Lord Neuberger, 'A View From On High' (Civil Mediation Conference, London, 12 May 2015) <www.supremecourt.uk/docs/speech-150512-civil-meditation-conference-2015.pdf> accessed 11 August 2016.

case. If it is suitable, an employment judge will be assigned to the case to act as mediator but is precluded from having further involvement in the matter if the mediation is unsuccessful. The scheme began as a pilot project in 2006 but has since been made available on a permanent basis with approximately 65% of cases settling on the day of mediation.⁵⁴

For all other employment proceedings before 2013, a conciliation process could be ordered by the court with the consent of the parties or initiated by the parties themselves to 'promote a settlement of the proceedings without their being determined by an employment tribunal'.⁵⁵ In both cases, the conciliation was monitored by the Advisory, Conciliation and Arbitration Service (ACAS), an independent body that deals with employment relations in accordance with a range of statutory powers and duties. ACAS offered conciliation and mediation services but differentiated the two processes as follows: the term conciliation is used in the context where an employee is making or could make a specific complaint against his/her employer to an employment tribunal, whereas mediation is used to resolve workplace disputes with the aim of restoring and maintaining the employment relationship between the parties.

Under the Enterprise and Regulatory Reform Act 2013, and as a result of the success of the pre-existing ACAS conciliation process, contacting the ACAS has become a pre-requirement before going to the Employment Tribunal. Indeed, it has become mandatory for parties to contact the ACAS Early Conciliation Service before they can bring a claim to the Employment Tribunal. Claimants have the obligation to make a request for Early Conciliation by completing the Early Conciliation Notification form. An ACAS conciliator will then contact the parties and inform them about the conciliation process. However, neither party is obliged to take part in the conciliation process and can stop whenever they wish.⁵⁶ If a settlement can be reached, it will be legally binding on the parties and ACAS will inform the tribunal.

⁵⁴ Scherpe and Marten (n 6) 417.

⁵⁵ *ibid* 418.

⁵⁶ ACAS Conciliation explained, 'Conciliation explained' (May 2015) <www.acas.org.uk/media/pdf/o/g/Conciliation-Explained-Acas.pdf> accessed 30 January 2017, 4.

If not, the claimant can issue a claim in the Employment Tribunal.⁵⁷ In addition to this new statutory provision, fees have recently been introduced of up to £950 if the claim is listed for a hearing.⁵⁸ The latest ACAS statistics show that 71% of Early Conciliation notifications did not proceed to a tribunal claim.⁵⁹ The legal requirement to contact ACAS before making a tribunal claim implies systematic information of the parties about the ADR conciliation process, which is monitored under the new regime by the ACAS conciliator officer.

Family law is another field where mediation has been implemented early and which contains today a mandatory requirement in relation to information.

(ii) Since the Family Law Act 1996, information on family mediation has been directly promoted by the government through legal aid to help divert cases from court. From 1997, litigants who have sought legal aid to finance a family law dispute have had to attend a Mediation Information and Assessment Meeting (MIAM). The objective of such meeting was to ensure that the parties 'understand mediation and are aware that it is available to them locally, and to receive advice as to whether it is an appropriate avenue for them to use to resolve their dispute'.⁶⁰

It may explain why family mediation is more structured today than most other areas of mediation. Family mediation is mainly provided by the Family Mediation Council (FMC) which is not a regulated body itself but rather 'an umbrella organisation covering the main providers of family mediation in England and Wales'.⁶¹ It publishes a code of practice, provides initial training and continuing professional development. Parties can obtain information about mediation, be provided with

⁵⁷ Enterprise and Regulatory Reform Act 2013 ch 24 pt 2, 7.

⁵⁸ Blake Browne and Sime, *A practical approach* (n 11) para 18.71.

⁵⁹ 'ACAS Annual report and accounts 2015-2016' (July 2016)
<www.acas.org.uk/media/pdf/f/m/2015-16-acas-annual-report-accounts-accessible.pdf>
accessed 30 January 2017.

⁶⁰ Anna Bloch, Rosie McLeod and Ben Toombs, *Mediation Information and Assessment Meetings (MIAMs) and Mediation in Private Family Law Disputes - Qualitative Research Findings* (Ministry of Justice Analytical Series 2014) 5.

⁶¹ Genn, Riahi and Pleming (n 43) 171.

details of mediation providers, and be given information about funding. An FMC registered mediator can be found by using the 'Find your local mediator'.⁶²

More recently, new steps have been taken to increase the use of MIAMs in family matters. 'In April 2011, a Pre-action Protocol was introduced (...). This set out "an expectation" that all parties in relevant private family law cases (...) would attend a MIAM to learn about mediation as a potential alternative to court proceedings'.⁶³ Relevant cases included most children and financial remedy cases.

In April 2014, the Government legislated to change the 'expectation' to a 'requirement'.⁶⁴ The Children and Families Act 2014 introduced, for the first time, mandatory mediation information in England. The statute provides that, before making a relevant family application to the Family Court, 'a person must attend a family mediation information and assessment meeting'. In section 10, a MIAM is defined as:

(...) a meeting held for the purposes of enabling information to be provided about mediation, the ways in which family disputes can be resolved otherwise than by the court, and the suitability of mediation or any other such way of resolving disputes.

The parties pay a fee for this meeting which varies from one mediator to another. The requirement applies to any application to initiate private law proceedings relating to children or proceedings for a financial remedy. There is a limited number of circumstances in which a MIAM is not required such as cases of domestic violence and child protection, urgency cases where there is a risk to life, liberty or safety of the applicant or a child or a family member, or a MIAM has already been held within the previous four months in relation to the issues in dispute.⁶⁵

⁶² Family Mediation Council (FMC), <www.familymediationcouncil.org.uk/find-local-mediator> accessed 18 March 2017.

⁶³ Becky Hamlyn, Emma Coleman and Mark Sefton, *Mediation Information and Assessment Meetings (MIAMs) and Mediation in Private Family Law Disputes - Quantitative Research Findings* (Ministry of Justice Analytical Series 2015) 6.

⁶⁴ *ibid.*

⁶⁵ s 10 of the Children and Families Act 2014.

If court proceedings are issued, the applicant must submit to the court an FM1 form which must be completed and signed by the mediator and countersigned by the applicant, disclosing whether the parties attended or not a MIAM. The defendant has no formal obligation to take part, but the court has the power, if parties have not complied with the protocol, to adjourn proceedings until a MIAM has been attended by one or both parties.⁶⁶

In addition, the Family Procedure Rules 2010 (in particular pt 3) have been replaced by the Family Procedure Rules 2014 which assert the court's power to encourage the parties to use ADR. It is supplemented by a new PD 3A, the Pre-Application Protocol for Mediation Information and Assessment, which reflects the introduction of the statutory requirement. Under these provisions the court must consider, at every stage of the proceedings, whether non-court dispute resolution is appropriate.

In 2013, the Ministry of Justice commissioned a broad program of research on the use of MIAMs in family law disputes in order to assess the extent to which these meetings are encouraging publicly and privately funded clients to attend mediation. Findings from a small sample of qualitative interviews with 20 mediators, 36 MIAM clients and 24 court parties were published in 2014.⁶⁷ Findings from quantitative data involving mediation practitioners with Legal Aid Agency contracts prepared to provide information about their privately funded clients were published in 2015, along with a court file review of 300 cases.⁶⁸ Investigations of both reports were conducted between 2012 and 2014, before the enactment of the 2014 Act.⁶⁹

⁶⁶ *ibid.*

⁶⁷ Bloch, McLeod and Toombs (n 60) 1.

⁶⁸ Hamlyn, Coleman and Sefton (n 63) 1.

⁶⁹ Data are available for publicly funded MIAMs and mediations but there are no comparable data for privately funded ones.

Their key conclusions are:

- The two main functions of the MIAM are outlined:

During the information element of the MIAM, clients needed to learn about the role of the mediator, the role of the parties in the mediation process and the mediator's approach to resolution, and to be able to use this information to decide whether they felt mediation was appropriate for them. The assessment component of the MIAM involved the mediator considering the financial evidence and personal information that clients disclosed about their case, and using this evidence to determine if the client was entitled to legal aid and whether one/both parties were suitable for mediation. MIAMs therefore needed to be a two-way process, with information and assessment taking place on both sides.⁷⁰

- Both studies report a significant number of publicly funded MIAMs in 2012-13 followed by a sharp decrease in 2013-14.⁷¹

In 2012-13 31,000 couples where one or both parties were publicly funded attended MIAMs with 44% progressing to mediation.⁷² In 2013-14, the number of publicly funded MIAMs fell to 13,354. However, the rate of conversion from MIAMs to mediation increased to 63%, showing their impact on parties' decision to use mediation.⁷³

- Both reports establish that this decrease in MIAMs attendance is due to the implementation of the LASPO Act 2012 in April 2013.

Indeed, the 2012 Act largely removed most private family law cases from the scope of legal aid for legal advice and representation in court proceedings, except in cases of domestic violence and child protection issues, and kept legal aid available to clients who are eligible for mediation. These changes provoked in practice a shift in the referral route to MIAM which has led to a decrease in

⁷⁰ Bloch, McLeod and Toombs (n 60) 25.

⁷¹ Hamlyn, Coleman and Sefton (n 63) 7.

⁷² Bloch, McLeod and Toombs (n 60) 5.

⁷³ Hamlyn, Coleman and Sefton (n 63) 7.

MIAMs attendance. Before the Act, both studies show that mediators, for privately as well as publicly funded clients, were mainly relying for MIAMs on solicitors. Post LASPO Act 2012, mediators observed a substantial fall in the number of solicitor referrals to MIAMs and an increase of self-referrals; mediators attributed this drop to what they perceived as the loss of an incentive for solicitors to refer publicly funded clients to MIAMs, given they would no longer (for most cases) receive legal aid for representing them in court proceedings.⁷⁴ As a result, fewer clients were presenting at MIAMs and those who did were more diverse, often less aware of mediation than those who were previously 'filtered' by solicitors. Therefore, mediators were seeing clients with a greater variety of knowledge and therefore had to adopt a greater variety of approaches in response.⁷⁵

- In addition, one report points out that in four out of the five courts visited, the overall approach had been one of not 'policing' compliance with the protocol on MIAMs very strictly, although the study took place before the 2014 Act, and each court practice at the time of the research were under review in anticipation of the new provisions.⁷⁶

In conclusion, the shift from MIAM solicitor referrals to self-referrals is due to the LASPO Act 2012. Such shift made the meetings more important for mediators to inform clients adequately, and given the greater variety of client experiences, to adopt a greater variety of responses. In order to increase routes to MIAMs, the reports also recommend public-facing communications so as to reach their audience early in the process of deciding how to resolve a dispute, as well as communications targeted to professional organizations that could signpost clients to MIAMs.⁷⁷

Despite the recommendations made in these two reports, the recent legal aid statistics show that the number of MIAMs fell sharply after the introduction of the

⁷⁴ Bloch, McLeod and Toomb, (n 60) 13.

⁷⁵ *ibid* 2-3.

⁷⁶ Hamlyn, Coleman and Sefton (n 63) 38.

⁷⁷ Bloch, McLeod and Toombs (n 60) 4.

LASPO Act 2012 in April 2013, and numbers have fluctuated since. They were down by 7% in the last quarter compared to the previous year and are currently only stabilising at around half pre-LASPO levels.⁷⁸ It seems that the new legal aid policy has had a negative impact on the introduction of mandatory family MIAMs.

In addition, a study conducted by the National Family Mediation (NFM) charity organisation after 2014, through a freedom of information request, suggests that the problem of low attendance at MIAMs cannot only be explained by financial considerations or the lack of information. Indeed, surprisingly, it reveals that in 2014/15, out of 112,000 family law applications to the court, only 1 in 20 had followed the statutory rule for the applicant to have attended a MIAM first, despite its compulsory nature. It suggests that, in the early period of the change of rules, it is most likely that the court administration staff did not check the applications thoroughly and therefore that the provision is not being enforced despite its compulsory nature.⁷⁹

Although some of these results are disappointing employment conciliation and family mediation have paved the way to institutionalized mandatory information on ADR in the context of court litigation.

(b) Expanding mandatory mediation information to civil and commercial matters?

As a result of the above experiments, the government and the judiciary have put a real emphasis on testing MIAMs outside the field of family mediation over the last decade in England.

⁷⁸ Ministry of Justice, Statistics Bulletin 'Legal Aid Statistics in England and Wales October to December 2016' (30 March 2017)
<www.gov.uk/government/uploads/system/uploads/attachment_data/file/604003/legal-aid-statistics-bulletin-oct-to-dec-2016.pdf> accessed 12 June 2017, 26.

⁷⁹ Emsley Solicitors, 'Family Mediation and MIAMS - Statistics Revealed'
<www.emsleys.co.uk/blog/family-mediation-and-miams-statistics-revealed> accessed 11 November 2016.

Indeed, a compulsory Mediation Information Pilot scheme based on the MIAMs used in family cases has taken place in the Central London, Birmingham and Manchester County Courts since 2011.⁸⁰ These pilot schemes involved mediators being present at court to hold short meetings with parties for the purpose of informing them of the benefits of mediation with a view to persuading them to mediate. They have not been evaluated yet.⁸¹

The government has also consulted on requiring a MIAM to take place in civil cases with a value of up to £100,000. Overall respondents of the enquiry generally agreed that it would be useful for parties to have information enabling them to engage in mediation or other forms of ADR, but raised some concerns about the introduction of an additional compulsory information stage which might result in unnecessary further costs and delays being incurred as part of the civil process.⁸² This was never implemented.

Nevertheless, there have been other positions on the issue. Commenting on the government consultation, Lord Faulks declared at the Civil Mediation Conference on 22 May 2014: 'We have no plans at this stage for further legislation, but it is right that we look again at the case for MIAMs in civil claims'.⁸³ In May 2015, again at the Civil Mediation Conference, Lord Neuberger, then President of the Supreme Court of the United Kingdom, added 'While, as I say, it would be wrong for me to go so far as to say that it ought to happen, I think there plainly must be a lot to be said for extending the MIAM scheme to smaller civil cases'.⁸⁴

In his report on costs in civil litigation Jackson LJ recommended a culture change rather than a rule change. Considering that the pre-action protocols draw attention

⁸⁰ Susan H Blake, Julie Browne and Stuart Sime, *The Jackson ADR Handbook* (2nd edn, Oxford University Press 2016) para 1.16.

⁸¹ Blake, Browne and Sime, *A Practical Approach* (n 11) para 18.29.

⁸² Ministry of Justice, *Solving disputes in the county courts: creating a simpler, quicker and more proportionate system. A consultation on reforming civil justice in England and Wales. The Government Response* (Cm 8274, February 2012) 42.

⁸³ Faulks (n 53) 3.

⁸⁴ Neuberger (n 53) para 21.

appropriately to ADR, he suggested two main directions to achieve the change of culture: first to ensure that all litigation lawyers and judges are properly informed about the benefits which ADR can bring and secondly to alert the public and small businesses to the benefits of ADR.⁸⁵

Steps have already been taken in both directions although it appears that information about ADR is still fragmented:⁸⁶

- A Jackson's reform official manual commissioned for use by judges, lawyers and the public – the Jackson ADR Handbook - has been published in 2013 to answer the need for a single authoritative handbook to become the standard training manual.⁸⁷ The aim was to provide a practical and concise guidance on all aspects of ADR, including mediation, and in particular the use of ADR in relation to civil claims in England. A new updated edition was published in September 2016.⁸⁸
- The 2016 Enterprise Bill introduced a small business commissioner to provide information and recommend independent mediation to small businesses that have a complaint over late payments.⁸⁹ This service is currently being set up.
- The transposition of the ADR Directive and the ODR Regulation in English law has introduced an information requirement for traders. Under these new provisions, all businesses selling goods, services, or digital content to consumers (except for health professionals, public sector providers and contracts for the sale of land/tenancy agreements) are under a statutory obligation to provide information to consumers regarding the availability of

⁸⁵ Jackson Report on Civil Litigation Costs 362.

⁸⁶ Jackson LJ, 'Civil Justice Reform and Alternative Dispute Resolution' (Chartered Institute of Arbitrators, 20 September 2016) <www.judiciary.gov.uk/wp-content/uploads/2013/03/lj-jackson-cjreform-adr.pdf> accessed 23 March 2107, 4.

⁸⁷ Susan H Blake, Julie Browne and Stuart Sime, *The Jackson ADR Handbook* (1st edn, Oxford University Press 2013).

⁸⁸ Blake, Browne and Sime, *The Jackson ADR Handbook*, 2nd edn (n 80).

⁸⁹ Ch 12 pt 1.

certified ADR schemes.⁹⁰ Since October 2015 a business that uses an ADR provider must provide information on their website and in their contractual terms. If a dispute is unresolved, all businesses must provide information about an appropriate certified ADR provider and whether the business is prepared to use ADR. From January 2016, all businesses that sell goods or services online must provide on their website a link to the new cross-EU online dispute resolution platform.⁹¹ At the time of writing, it is not possible to assess how Brexit will affect the application of these new provisions.

In addition, the Online Court project based on the Briggs reports⁹² is today underway. Beforehand, two reports proposed solutions to reshape the justice system: the Civil Justice Council report and the JUSTICE report.⁹³ Their proposals address the question of legal information of the public, including information on ADR processes, by creating integrated online and/or telephone platforms to be ‘the first port of call for individuals with potential legal problems and offering information, advice and assistance as their cases proceed’.⁹⁴

The Online Court project in the Interim Report first indicated that it would be worth considering some adaptation of the MIAM to be added to civil procedure but dismisses the idea in the Final Report.⁹⁵ It proposes instead a full and direct integration into stage 1 of an informative step with a rather large scope that would include information on ADR processes, including mediation, but also information on

⁹⁰ The ADR for Consumer Disputes (Competent Authorities and Information) Regulations 2015, SI 2015/542 (Consumer ADR Reg 2015/542); The ADR for Consumer Disputes (Amendment) Regulations 2015, SI 2015/1392 (Consumer ADR Reg 2015/1392).

⁹¹ Ministry of Justice, ‘Find your local trading standards office’ <www.gov.uk/find-local-tradingstandards-office> accessed 11 September 2016.

⁹² Briggs LJ, ‘Civil Courts Structure Review: Interim Report’ (Judiciary of England and Wales, December 2015) (Briggs IR); Briggs LJ, ‘Civil Courts Structure Review: Final Report’ (Judiciary of England and Wales, July 2016) (Briggs FR).

⁹³ Civil Justice Council (Online Dispute Resolution Advisory Group), ‘Online Dispute Resolution for Low Value Civil Claims’ (February 2015) (The ODR Report); The JUSTICE Report.

⁹⁴ The JUSTICE Report 16.

⁹⁵ Briggs IR para 11.21.

sources of affordable or free advice, and perhaps some commoditized summaries of the essential legal principles.⁹⁶

All of the above-mentioned reports confirm the need to take urgent action in relation to the information of the public. However, there has not yet been a move towards a comprehensive online service of information and advice, and it is uncertain if the Briggs project, in its current drafting, will fulfil this function.

The present thesis proposes to create a small claims' online MIAM service, which would be an internet platform for individuals with potential legal problems, at no cost (or very low cost) to them. It would deliver the same elements as in the current family MIAMs in civil and commercial matters.⁹⁷ To optimize the results of such scheme it could be imposed on litigants as a precondition before going to court. It will ensure that all of them have had information (and advice) on mediation and that they have chosen knowingly and freely their dispute resolution process. On the other hand, it could provide the Ministry of Justice a centralized system to achieve the 'change of culture' advocated by Jackson LJ.⁹⁸

This solution will be explored in the last part of the thesis, along with the possibility of combining it with the current Online Court project. It can be said at this stage that mandatory mediation information, coupled with the assessment component, would become part of the more comprehensive rethink of the English civil and commercial judicial system.

Public information is at the heart of the question of the use of mediation. It is argued in the present study that mandatory mediation information is an essential tool to help increase public awareness of mediation and it has the immense benefit of not altering the voluntary nature of mediation, unlike mandatory consideration of mediation or mandatory participation in mediation.

⁹⁶ Briggs FR para 6.108.

⁹⁷ See para 6.2.1, 210ff.

⁹⁸ Jackson Report on Civil Litigation Costs 362.

But before investigating these other forms of non-voluntary mediation in the context of court litigation in the following chapter, the present study will analyze the level of mandatory mediation information in France and in Italy.

3.2. Mandatory mediation information in civil and commercial matters in France and in Italy: towards a change

3.2.1. France: an embryonic policy in mandatory mediation information

In France, there is no official statistical data available on mediation. The annual *Annuaire Statistique de la Justice* does not mention the number of cases referred to mediation.⁹⁹ In 2008, a report found that a mediator was appointed in 1.5% of the cases by an appellate court and 1.1% by a first instance court, which reveals the very low level of mediation in the context of court litigation.¹⁰⁰

However, mediation and conciliation have been practised in France in civil and commercial matters for many years and the distinction between the two processes is fairly unclear outside the judicial context. However, within the judicial context, the two processes are more identifiable:

- Mediation is available in the form of court-annexed mediation, which means that during pending court proceedings the judge may refer the case to mediation with the consent of the parties. The judge chooses the mediator in consultation with the parties and determines the duration of the mediator's assignment. If the mediation is successful, litigation is terminated and the parties can ask the judge to declare the mediation agreement to be binding. If not, litigation continues and the dispute is decided by the judge. Also, the judge determines the payment of the mediator which is not part of the court costs.¹⁰¹

⁹⁹ Ministère de la Justice, 'Tableaux de l'annuaire statistique, Les chiffres-clés de la Justice - Édition 2014' <www.justice.gouv.fr/statistiques-10054/annuaires-statistiques-de-la-justice-10304/tableaux-de-lannuaire-statistique-27054.html> accessed 25 February 2015.

¹⁰⁰ Serge Guinchard, *L'ambition Raisonnée d'une Justice Apaisée* (La Documentation française 2008) 161.

¹⁰¹ Code de Procédure Civile (CPC) arts 131-1 to 15.

Court-annexed mediation is accessible in all civil, commercial, employment and family courts at all instances. The process takes place outside the courtroom and the mediator is not a court employee.

- Conciliation is regulated mainly as a general duty of the judge who may, at any stage of the proceedings before the courts of first instance for small civil and commercial matters, try to conciliate the parties.¹⁰² He may also, before these jurisdictions, delegate this task to a *conciliateur de justice* who will attempt to find solutions to the dispute.¹⁰³ The *conciliateur de justice* is someone appointed by the President of the Court of Appeal (usually retired judges, lawyers or civil servants) who works on a voluntary, unpaid basis. Only less than 1% of the cases before first instance courts are estimated to be settled by conciliation.¹⁰⁴ This may actually change for at least small civil claims as a new law adopted on 18 November 2016 provides that, for any civil claim under 4,000 euros to be admissible in court, the parties must have attempted before a free-of-charge conventional conciliation with a *conciliateur de justice*.¹⁰⁵

(a) The absence of a general duty of information on mediation in civil and commercial matters

Unlike England, there is no specific regulation in France imposing on judges to encourage the use of ADR at the earliest possible stage of the court proceedings. Therefore, if we exclude the recent conciliation provisions for small civil claims, mediation in the context of court litigation relies solely on the judge's power to propose court-annexed mediation as described above, thus implicitly informing litigants about mediation.

¹⁰² *ibid* arts 21, 127, 128.

¹⁰³ *ibid* arts 129-1 to 129-5.

¹⁰⁴ Ministère de la Justice, 'Références Statistiques Justice - Année 2015' <http://www.justice.gouv.fr/art_pix/Stat_Annuaire_ministere-justice_2015_interactif.pdf> accessed 3 June 2016, 98.

¹⁰⁵ Loi no 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIème siècle art 4 (Loi 2016-1547).

There is no obligation either for lawyers to inform and advise their clients about ADR processes before going to court. Studies on the use of ADR report that lawyers are not even themselves always aware of the possibility to use ADR. Some steps have been recently taken in the professional law schools to introduce ADR modules in the curriculum but it was noted that they are still often hesitant about recommending mediation.¹⁰⁶ Furthermore, legal aid cannot be considered as an information tool as it only covers the cost of court-annexed mediation, ie once the case is already before the judge.¹⁰⁷

Finally, there is no umbrella body at a national level to bring together providers of mediation and centralize information on mediation. There are a number of organisations providing mediation services: *L'Association Nationale des Médiateurs*, *la Fédération Nationale des Centres de Médiation*, *l'Institut d'Expertise, d'Arbitrage et de Médiation*, etc. Each of them gathers a number of associations and individual mediators, has its own Code of Conduct and its own system of accreditation. At the moment, there are no provisions requiring specific training in mediation except for family matters where a specific diploma is required since 2003.

Overall, very little emphasis is put in France on the question of information on mediation which mainly relies on each judge's initiative once the claim is brought in court. In practice, some will be more inclined than others to promote mediation, thereby to diffuse information. There is no real coordination at a national level, no public or private initiative to improve information on ADR. There is no general regulation encouraging the use of ADR at the earliest stage of court proceedings, which could boost the policy of information, except in family and employment law where concrete provisions have been enacted.

¹⁰⁶ Rapport Magendie, 'Célérité et qualité de la justice. La médiation : une autre voie' (Publication Cour d'Appel de Paris 2008) 51 (Rapport Magendie).

¹⁰⁷ Loi no 95-125 du 8 février 1995 relative à l'organisation des juridictions et à la procédure civile, pénale et administrative art 22(2) (Loi 95-125).

(b) The exceptions in family and employment disputes

In these two areas of disputes France has been using mediation and conciliation for many years. A mandatory 'conciliation' procedure at a pre-trial stage applies for all employment disputes and there are some specific provisions in family law imposing on litigants to consider or to use mediation. Therefore, it implies that information on these processes is much more widely accessible by the public.

In French labour disputes a conciliation attempt is mandatory before going to court even though it is reported that a very low number of cases are settled at this stage (less than 10%).¹⁰⁸ Conversely, at the appellate level, a few Social Chambers (Grenoble, Paris, Lyon) have initiated a special procedure to inform litigants about mediation. The judge selects a number of relevant disputes for an information session on mediation. During these sessions, the judge, with the help of mediators, informs the parties about mediation in general. If the parties subsequently decide to go to mediation, the judge orders the mediation and appoints a mediator. Those initiatives have had a real success. For the period between 2000 and 2005, 70% of the 800 mediations in labour disputes at the Court of Appeal of Grenoble reached an agreement.¹⁰⁹

There are also specific provisions in family mediation. For repeated disputes over the exercise of parental responsibilities or over maintenance towards children in which the court has already given a judgment, a 2011 legislation¹¹⁰ has created an obligation for the parents to first make an attempt at a family mediation before ceasing the court again. In this case, mediation is not ordered by the judge but prescribed by the law. If the procedure is not followed by the litigants the claim will not be admissible in court. The legislation stipulated that the measure would be

¹⁰⁸ Ministère de la Justice, 'Rapport Lacabarats, L'avenir des juridictions du travail: Vers un tribunal prud'homal du XXIème siècle' (16 juillet 2014) <http://www.justice.gouv.fr/publication/rap_lacabarats_2014.pdf> accessed 20 July 2015, 8.

¹⁰⁹ Béatrice Blohorn-Brenneur, 'La Médiation Judiciaire en France : Bilan de Dix Ans de Pratique (1995-2005)' La Gazette du Palais (11 mai 2005) 2, 4.

¹¹⁰ Loi no 2011-1862 du 13 décembre 2011 relative à la répartition des contentieux et à l'allègement de certaines procédures juridictionnelles art 15 (Loi 2011-1862).

experimented for 3 years (ie until December 2014) before selected Appeal Courts. Although the results are mixed,¹¹¹ a proposed law is seeking to extend the scheme on a permanent basis.¹¹²

Regarding information, since 2002, the *Code Civil* provides that the parties may be forced by the judge to attend an information meeting on mediation with a mediator in cases involving the exercise of parental authority or interim measures in divorce cases.¹¹³ The meeting informs the parties of the mediation procedure and its objectives; it is free of charge and cannot result in any judicial type of sanctions.

(c) Any future for mandatory mediation information?

France does not have any general act that promotes information on mediation or its encouragement by judges or legal practitioners. Moreover, all of the commissions working on ADR insist on the need to inform and educate judges and lawyers on these processes.¹¹⁴ As a result, mediation in civil and commercial court litigation is generally not very developed in France. With the system of court-annexed mediation, recourse to mediation, and implicitly information on same mostly relies on the judges' initiative once the claim is brought to court.

However, some very good results have been observed when judges in local courts have taken the initiative to inform on mediation in order to promote its use. As previously mentioned, when the Social Chamber of the Grenoble Court of Appeal offered the parties systematic information meetings on mediation, mediation processes increased to 8% of all disputes with about 70% reaching agreements. In 2008, after the team that had set up this practice had left the court, mediation only represented 0.8% of disputes.¹¹⁵ There are also some encouraging statistics for

¹¹¹ Natalie Fricero, 'L'état du Droit Positif de la Médiation Judiciaire' (Juin 2015) 21 Les Annonces de la Seine 5.

¹¹² Proposition de loi no 1856 relative à l'autorité parentale et à l'intérêt de l'enfant (1er avril 2014).

¹¹³ Arts 255 et 373-2-10.

¹¹⁴ Guinchard (n 100) 161.

¹¹⁵ Rapport Magendie 40.

cases submitted to the *conciliateurs de justice* with 118,294 cases in 2014 and 58.1% of settlements, representing a significant activity.¹¹⁶ Additionally, it has been reported that the legal provisions in family matters allowing the judge to order the parties to attend a mediation information session are of great practical importance¹¹⁷ and have increased the number of mediations, although there are no statistics confirming the perception.¹¹⁸ The Floch Report was the first to recommend the extension of this provision to all court-annexed mediations in civil and commercial matters.¹¹⁹

Other signs indicate that shifts are taking place in the field of information on mediation. For example, an agreement has been put in place between the Paris Court of Appeal and the Paris Bar Association to increase the litigants' awareness of mediation through the legal profession.¹²⁰ Recently, a report commissioned by the Ministry of Justice on the organisation of the public service of justice in the 21st century¹²¹ announces the imminent creation of a promotional body, the National Council of Mediation and Conciliation, recommends the development of ADR such as mediation and provides many proposals on mediation, among which the necessity to improve education on mediation. Also, the latest regulation on ADR provides for the establishment of a list of mediators in each court of appeal.¹²²

More significantly, a governmental decree encourages parties to civil and commercial disputes to seek an amicable settlement before they refer the matter to

¹¹⁶ Ministère de la Justice, *Les Chiffres-clés de la Justice 2015* (Sous-Direction de la Statistique et des Etudes 2015) 35.

¹¹⁷ Commission, Rapport d'information sur la médiation en Europe déposé le 13 février 2007 et présenté par Jacques Floch' (Délégation de l'Assemblée Nationale pour l'Union Européenne) COM [2004] 718 final/no E 2844, 19.

¹¹⁸ Frédérique Ferrand, 'Regulation of Dispute Resolution in France: Evolutions and Challenges' in Felix Steffek and Hannes Unberath (eds), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (Hart Publishing 2013) 175.

¹¹⁹ COM [2004] 718 final/no E 2844, 24.

¹²⁰ Fabrice Vert, 'La Médiation dans le Domaine Judiciaire en France' (2014) 21 *Annonces de la Seine* 14.

¹²¹ Ministère de la Justice, 'La justice du XXIème siècle: 15 actions pour la justice du quotidien - 2014' <www.justice.gouv.fr/publication/j21-actions.pdf> accessed 17 May 2015.

¹²² Loi 2016-1547 art 4.

court as of 1 April 2015.¹²³ Indeed, the new article 56 of the *Code de Procédure Civile* provides now that:

Unless a legitimate reason is provided with respect to urgency or to the matter at issue, in particular when it concerns public policy, the claim form shall also specify the steps taken in view of reaching an amicable resolution of the dispute.

It implies that any claim form must now mention that the parties have attempted an amicable settlement. However, there is no sanction attached to the non-compliance of this obligation but, in such case, the judge is entitled to propose to the parties a mediation or a conciliation measure.¹²⁴ This new requirement clearly represents a significant signal in favour of the use of ADR processes in France and the ambition of the legislator to sensitize not only litigants but also judges and lawyers to ADR. This initiative also implies to find new solutions upstream to reinforce information on mediation for litigants in order to help them fulfil this new requirement.

In addition, France has transposed the ADR Directive and the ODR Regulation into national provisions that came into force on January 2016.¹²⁵ Consequently, traders must give information to consumers, in a 'clear and accessible way', about the relevant *Médiateur(s)* with contact details and website address, and their right to file a claim with the *Médiateur(s)*. In addition, traders engaging in online sales and service contracts must provide on their websites an electronic link to and information about the European ODR platform. We will see in the next chapter that France has even gone beyond the obligation of information for traders.

Therefore, some significant initiatives have been taken recently in France to improve information about mediation inside and outside the court system. It seems that France, which is far behind England and Italy in that field, is trying to catch up.

¹²³ Décret no 2015-282 du 11 Mars 2015 relatif à la simplification de la procédure civile, à la communication électronique et à la résolution amiable des différends (Décret 2015-282).

¹²⁴ Code de Procédure Civile (CPC) arts 58 and 127.

¹²⁵ Ordonnance no 2015-1033 du 20 août 2015 relative au règlement extrajudiciaire des litiges de consommation (Ord 2015-1033); Décret no 2015-1382 du 30 octobre 2015 relatif à la médiation des litiges de la consommation (Décret 2015-1382).

3.2.2. Italy: an active policy in mandatory mediation information

Unlike France, Italy has been at the forefront of mandatory mediation in the context of court litigation. Indeed, the 2010 legislative decree¹²⁶ implementing the European Mediation Directive¹²⁷ went far beyond the Directive's recommendations in introducing a mandatory pre-action mediation in some civil and commercial disputes.

The 2010 Decree provided that the parties were required to engage in a mediation process as a precondition to accessing the courts in some types of disputes including any litigation in relation to insurance, banking and financial agreements, joint ownership, property rights, division of assets, hereditary and family law, leases in general, gratuitous loans, medical malpractice, defamation, compensation for damages due to car accidents.¹²⁸ Under this legislation, the party initiating the action was required to file a request to mediate with a mediation organization, which would appoint a mediator and arrange a meeting with the mediator and the parties. If an agreement was reached the text of the agreement was entered into an official record called the *verbale* by the Mediator. Access to judicial courts for disputes subject to the compulsory mediation procedure was only available if the mediation had failed.

On 6 December 2012, the program was frozen when the Italian Constitutional Court ruled that the 2010 Decree did not comply with the Constitution. The reason of the decision was not, as requested by lawyers' associations, over the breach of the citizens' right of defence (art 24 of the Constitution) but 'over delegation', because the Government had not been expressly delegated by the Parliament to introduce the compulsory pre-action mediation system.¹²⁹ A new 2013 Decree reintroduces

¹²⁶ Decreto Legislativo 4 marzo 2010, no 28: Attuazione dell'articolo 60 della legge 18 giugno 2009, no 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali (Decreto 28/2010).

¹²⁷ Directive 2008/52/EC of the European Parliament of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L136/3 (the Mediation Directive).

¹²⁸ art 5-1.

¹²⁹ Corte costituzionale: Sentenza no 272/2012 published in Gazzetta Ufficiale, 12/12/2012.

some of the provisions declared unconstitutional, along with significant amendments to the previous regulation which came into force on 20 September 2013 for a testing period of four years.¹³⁰

(a) The mandatory mediation participation scheme converted into a mandatory informational meeting

Under the new Decree 69/2013, the compulsory pre-action mediation was reintroduced for all the matters listed in article 5-1 of the 2010 Decree as described above except for car accident disputes. However, the parties' obligation to mediate has been substantially altered. Attendance at an informational meeting before the mediator within 30 days from the filing of the mediation request is now sufficient. The meeting is free of charge but the party who decides not to continue beyond that first meeting must pay a nominal fee (from 40 to 80 euros) for the mediator's time.

During this meeting, the mediator clarifies the role and the modalities of the mediation process. The mediator will then invite the parties and their lawyers to comment on the opportunity to begin the process. If the parties agree, they then start the mediation process. If the parties choose not to engage in mediation, they have access to the court. If one party does not attend the meeting and the case goes to court, the judge will ask the defaulting party to justify the absence and may order the party to pay legal costs and a fine.¹³¹ In other words, litigants are now allowed in the matters listed above to withdraw from the mediation process at the initial stage if they deem settlement unlikely.

Therefore, the new decree has substantially changed the mandatory nature of mediation and the condition of admissibility to courts as it has converted an obligation to engage in a full mediation procedure into an obligation of mediation information and consideration in the context of court litigation for some specific

¹³⁰ Decreto-Legge 21 giugno 2013 no 69: Disposizioni urgenti per il rilancio dell' economia convertito con modificazioni dalla L 9 agosto 2013, no 98, edited in the Gazzetta Ufficiale no 194 of 20/8/2013), specifically throughout art 184 bringing amendments and integrations to Legislative Decree 28/2010 (Decreto 69/2013).

¹³¹ Decreto 28/2010 art 8 para 1.

disputes. The next paragraph will show that the 2013 Decree has also reinforced the role of the lawyers who are now a central source of information on mediation in Italy.

(b) Lawyers' mandatory duty to inform and assist their clients on mediation

Under the Decree 28/10, article 4(3), lawyers must inform their clients of the possibility or the requirement to use mediation. The lawyer must also provide information about tax breaks available to parties who choose to participate in mediation to resolve their dispute. This information must be provided clearly, in writing, and be signed by the client. If the lawyer fails to do so, the client may avoid the lawyer-client contract.

In addition, the 2013 regulation provides that the compulsory information mediation session shall take place with a lawyer's assistance.¹³² Furthermore, the presence of the parties' lawyers is mandatory for all the phases of the mediation procedure; the lawyers must sign the agreement to make it enforceable and to assess its conformity to public order. Although the presence of lawyers might be useful if the parties decide to go through a full mediation procedure, the mandatory nature of their presence at the stage of the informative meeting is more questionable. This appears to result from an intense lobbying by the Italian bar to ensure that lawyers would not be left out of the mediation market.¹³³ As mentioned in Chapter 2, the CJEU, in its recent decision, has provided that this requirement breaches the ADR directive.¹³⁴

To conclude, unlike England and France, Italy has formally taken the step of mandatory mediation information in some categories of civil and commercial matters, imposing it as a precondition to court. In doing so, it has outdistanced the

¹³² *ibid* ss 5 and 8.

¹³³ Giuseppe De Palo, 'The Italian ADR saga: a Machiavellian plot, or just lawyers without a plan' (Mediate 10/2014) <www.mediate.com/articles/PaloG1.cfm> accessed 28 July 2015.

¹³⁴ Case C-75/16 *Menini and Rampanelli v Banco Popolare Societa Cooperativa* [2017] EUECJ, EU:C:2017:457, ECLI:EU:C:2017:457.

other European countries and plays today the role of 'mediation policy experimentation lab'.¹³⁵

In addition, Italy has enacted a new decree¹³⁶ which took effect on 3 September 2015, thus transposing the ADR Directive and the ODR Regulation and therefore the obligation for businesses to provide information to their customers on ADR and the contact details of ADR providers. This transposition is another positive step taken towards information on mediation. Like in France and England, these measures will hopefully contribute to increase awareness and understanding of ADR in Italy.

Conclusion

The present chapter has shown a great diversity among our three countries of investigation when addressing the question of information of the public on mediation in civil and commercial matters, and more specifically the issue of mandatory mediation information. While France is taking more and more initiatives to increase public information on mediation, England has already made real improvements in that field and is addressing at the moment the question of mandatory mediation information through a more comprehensive review of its civil courts structure.¹³⁷ For its part, Italy has formally taken the step of compulsory mediation information, accompanied by mandatory consideration, by requiring, since 2013, attendance by the parties at an informational mediation meeting as a precondition to court in some categories of civil and commercial matters.

¹³⁵ 'Rebooting' the Mediation Directive 43.

¹³⁶ Decreto Legislativo 6 agosto 2015, no 130: Attuazione della direttiva 2013/11/UE sulla risoluzione alternativa delle controversie dei consumatori, che modifica il regolamento (CE) no 2006/2004 e la direttiva 2009/22/CE (direttiva sull'ADR per i consumatori) (15G00147) (GU no191 del 19-8-2015) [The Decree no 130/2015 also modifies the 2010 Decree and the manner in which the mediation centres that are currently registered with the Italian Ministry of Justice should carry out mediations between professionals/companies and consumers] (Decreto 130/2015).

¹³⁷ Ministry of Justice and HM Court & Tribunals Service, 'Transforming our justice system - joint statement' (Settembre 2016) <www.gov.uk/government/publications/transforming-our-justice-system-joint-statement> accessed 19 November 2016.

The very low rates of mediation observed in Europe show that improving public awareness on a voluntary basis by all possible means (public campaign, brochures, etc) is certainly a way to increase the use of mediation and to encourage potential litigants to think differently about litigation, but is insufficient to achieve the necessary change of culture towards ADR. This is why a strong focus should be placed on mandatory mediation information.¹³⁸

Indeed, mandatory mediation information is a flexible instrument that can be put in place under different forms (questionnaire, meeting), through different routes (in person or through an internet platform), by different agents (lawyers, mediators, judges, court staff, other providers), at different levels (in each court, at each level of jurisdiction, at a national level, outside the court). It is also adaptable to the different legal cultures and to each country's choice through a policy to either restrict it to general information on the mediation process or to include in it some sort of advice or assessment. This great adaptability of mandatory mediation information is also reflected in its cost which can vary depending on the scheme chosen to implement it. In other words, mandatory mediation information is a requirement that every country can modulate according to its own situation and policy.

Secondly, mandatory mediation information, unlike mandatory consideration of or participation in mediation, is the only form of non-voluntary mediation that does not distort the original concept of mediation, nor does it alter the traditional process of court litigation. The obligation is situated on the fringes of the mediation process itself and none of the essential components of mediation (eg confidentiality) is thus affected. The recourse to traditional court litigation and its outcomes are also left intact. Once the requirement of information has been fulfilled, the parties regain their full freedom of choice in terms of dispute resolution process.

¹³⁸ 'Rebooting' the Mediation Directive 1.

For all these reasons, mandatory mediation information appears to be an unavoidable measure to be put in place in all European Member States. The present study in its last chapter will explore the possibility of expanding it through the possible implementation of online mandatory MIAM to a large number of civil and commercial cases in England and the compatibility of such proposal with the Online Court project.

CHAPTER 4
MANDATORY CONSIDERATION OF MEDIATION
AND MANDATORY PARTICIPATION IN MEDIATION

Introduction

The previous chapter has defined mandatory mediation information as the obligation made to the parties in a court context to be informed about mediation. It has analysed the overall unsatisfactory, although improving, level of development of mandatory mediation information in England, France and Italy. It has concluded in favour of the generalization of this category of non-voluntary mediation.

The present chapter will consider together the two other types of non-voluntary mediation identified in the study which are mandatory consideration of mediation and mandatory participation in mediation.

Mandatory consideration of mediation is the obligation for the parties in a court context to consider whether mediation could be the appropriate resolution method to resolve their dispute. It is formally implemented under diverse forms and with various degrees of intensity in each country of investigation (eg MIAM with an opt-in or an opt-out option).

It must not be confused with mandatory participation in mediation (frequently named mandatory mediation) which is the situation where the parties in a court context are compelled to attempt a full mediation process. The decision to reach a settlement always stays voluntary. This form of non-voluntary mediation, although largely implemented as previously examined in Chapter 2 of the thesis in some western common law countries outside Europe, is used on a very limited basis in civil and commercial matters in our countries of investigation at it will be shown in this chapter.

Although the fact that the parties lose control over part of the resolution process in mandatory consideration and mandatory participation, the logic would have been

to consider the two categories of non-voluntary mediation separately, as each of them contains a different degree of coercion. But the situation of mediation in England in the context of court litigation does not allow the separation of the two categories.

Indeed, while formally rejecting mandatory participation in mediation and promoting instead mandatory consideration of mediation, the present chapter will demonstrate how England has transformed the latter in an implied obligation to participate in mediation through the power given to judges to impose cost sanctions on litigants for refusing to engage in ADR processes. And, very interestingly, on a comparative perspective, a policy of cost sanctions is emerging in France and it is observed in Italy. Therefore, we will consider below firstly the situation in England and its consequences, then we will compare it with France and Italy.

4.1. England: from a general duty to consider mediation to an obligation to justify a refusal to mediate

4.1.1. The official rejection of mandatory participation in mediation

The English position has always been the rejection of the introduction of mandatory participation in mediation. The Woolf's Interim Report, while acknowledging the benefits that ADR processes offer and placing a responsibility on the courts to encourage its use, did not recommend compulsory ADR for two main reasons.¹³⁹ Firstly, Lord Woolf argued that judicial resources in England were sufficient for the enforcement of civil rights, and secondly that there was a need to preserve the citizen's constitutional right to access the courts.¹⁴⁰ The same view was endorsed more recently by Jackson LJ who, in the Jackson Review of Costs, 'supported the view

¹³⁹ Genn, Riahi and Fleming (n 43) 141.

¹⁴⁰ Barbara Billingsley and Masood Ahmed, 'Evolution, Revolution and Culture Shift: a Critical Analysis of Compulsory ADR in England and Canada' (2016) 45/2-3 *Common Law World Review* 186, 190.

that mediation should not be compulsory, though a court will make its own objective judgment as to whether the use of ADR is reasonable in a particular case'.¹⁴¹

In addition, the 2010 PD Pre-Action conduct expressed, at paragraph 8.1, that ADR was not compulsory – although such statement has disappeared from the 2017 version referred to above. A number of pre-action protocols include a sentence to the effect that: "It is expressly recognized that no party can or should be forced to mediate or enter into any form of ADR".¹⁴² The Tribunals, Courts and Enforcement Act 2007 similarly states 'mediation of matters in dispute between parties to proceedings is to take place only by agreement between those parties'.¹⁴³

The principle that English courts do not have the jurisdiction to compel a party to participate in a mediation process has also been expressed by two Courts of Appeal judgments on the issue (already cited in Chapter 1), namely *Halsey v Milton Keynes General NHS Trust* and *Steel v Joy and Halliday*¹⁴⁴ and more recently in *PGF II SA v OMFS Company 1 Limited*.¹⁴⁵

In *Halsey*, as previously mentioned, the court accepted that, to require unwilling parties to mediate would infringe article 6 of the ECHR by which 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. A court can encourage the parties to engage in ADR but cannot compel them to do so. Dyson LJ stated:

It is one thing to encourage the parties to agree to mediation (...). 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.¹⁴⁶

¹⁴¹ Blake, Browne and Sime, *The Jackson ADR Handbook* (n 80) para 1.20.

¹⁴² Scherpe and Marten (n 6) 378.

¹⁴³ s 24(1)(a).

¹⁴⁴ *Halsey* (n 32).

¹⁴⁵ [2013] EWCA Civ 1288, [2014] 1 WLR 1386 para 22.

¹⁴⁶ *Halsey* (n 32) para 9.

Recently, in *PGF II*, Briggs LJ, in his leading judgment on appeal, endorsed Dyson LJ's point that the court should not compel parties to mediate because doing so would breach article 6 of the ECHR, even though the court can robustly encourage it.¹⁴⁷ Other decisions confirmed this position, holding for example that: 'Since the court cannot order the parties to participate in mediation, neither can the court make orders stipulating the details of how the parties should conduct a mediation. The most the court can do is to encourage'.¹⁴⁸

In *Halsey*, Dyson LJ also justified his position observing 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 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.¹⁴⁹

In relation to the principle that English courts do not have the jurisdiction to compel a party to participate in a mediation process, the *Halsey* case provoked many reactions. It contradicted the robust approach that had emerged in some lower courts about mandatory participation in mediation. For example, in *Shirayama Shokusan Company Ltd v Danovo Ltd*, Blackburn J argued that courts maintain jurisdiction to compel parties, even unwilling parties, to engage in mediation and that this approach is consistent with the overriding objective.¹⁵⁰ In *Cable & Wireless v IBM*, Colman J, commenting on the use of ADR orders in the Commercial Court, observed that the courts maintain the power to order even unwilling parties to engage in ADR.¹⁵¹

¹⁴⁷ *PGF II* (n 145) para 22.

¹⁴⁸ *Aird v Prime Meridian Ltd* [2006] EWCA Civ 1866, [2007] BLR 105 para 6.

¹⁴⁹ *Halsey* (n 32) para 10.

¹⁵⁰ [2003] EWHC 3006 (Ch) para 19.

¹⁵¹ [2002] EWHC 2059 (Comm).

The *Halsey* case was also widely criticized by some commentators who consider that the decision was wrong in holding that the court could not compel the parties to engage with an ADR process on the basis that it would infringe article 6. Indeed, Lightman LJ pointed out that a number of other nations who are signatories to the ECHR have compulsory mediation process.¹⁵² Furthermore, the view that compulsory participation in mediation would not infringe the article 6 rights was supported by the Mediation Directive (art 5) and the CJEU¹⁵³ in the *Alassini v Telecom Italia SpA* case.¹⁵⁴

In England, more recently, concerns have been expressed about the position taken by *Halsey* towards mandatory participation in mediation. In *Wright v Michael Wright Supplies Ltd*, Sir Alan Ward noted that, despite robust encouragement from the court, it was not possible 'to shift intransigent parties off the trial track and onto the parallel track of mediation' and that it be time to review *Halsey* in light of the developments of the past ten years in the field of ADR.¹⁵⁵ Lord Dyson has also acknowledged since that there might be circumstances in which it would be acceptable to impose a requirement to mediate on parties.¹⁵⁶

However, the position in England is still today that the courts cannot compel parties to engage in an ADR process if they are unwilling to do so. Recently, Briggs LJ confirmed this position:

(...) the civil courts have declined (...) to make any form of ADR compulsory. This is, in many ways, both understandable and as it should be (...) the civil courts exist primarily, and fundamentally, to provide a justice service rather than merely a dispute resolution service.¹⁵⁷

¹⁵² Lightman LJ, 'Mediation: An Approximation to Justice' (2007) 73/4 Arbitration 400, 402.

¹⁵³ The CJEU was called then the European Court of Justice (ECJ).

¹⁵⁴ Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08 [2010] 3 CMLR 17, [2010] ECR I-221, ECLI:EU:C:2010:146, EU:C:2010:146, [2010] EUECJ para 67.

¹⁵⁵ [2013] EWCA Civ 234 para 3.

¹⁵⁶ Lord Dyson MR, 'A Word on *Halsey v Milton Keynes*' (2011) 77/3 Arbitration 337.

¹⁵⁷ Briggs IR para 28.

But, in reality, with the practice of cost sanctions applied by the courts, it will be shown below that England has implicitly implemented mandatory participation in mediation for all civil and commercial matters.¹⁵⁸ Before coming to this point, the next section will address the question of consideration of mediation and will show how it has been timidly promoted in England despite the existence of the general duty to consider mediation in all civil and commercial cases.

4.1.2. The timorous expansion of mandatory mediation schemes

Since the 1990's, England explored mediation in the context of court litigation through various court-based mediation pilot schemes. Overall, very few of them were made mandatory but rather invited freely the parties to consider mediation or another ADR process.

Between 1996 and 2002 various county courts in England established mediation schemes on a voluntary basis. Such schemes were set up in Central London, Leeds, Exeter, Bristol and later in Birmingham, Manchester, Guilford, Reading and elsewhere. Despite high rates of settlement and satisfaction, there was a low uptake which led the government to attempt in 2004 an experimental compulsory mediation scheme. The Central London County Court Compulsory Mediation Scheme ran from 1 April 2004 to 31 March 2005. It provided for cases to be automatically and compulsorily referred to mediation unless one or both parties gave good reasons for objecting to do so.¹⁵⁹

Both the voluntary and the compulsory mediation schemes in Central London county courts were reviewed by Genn and others in a 2007 report which concluded the following: for both schemes it was apparent that the motivation and willingness of the parties to negotiate and compromise was critical to the success of mediation. Facilitation and encouragement, with appropriate pressure, was felt to be more effective than coercing the parties to mediate. Judicial pressure and fear of cost

¹⁵⁸ Masood Ahmed, 'Implied Compulsory Mediation' (2012) 31/2 Civil Justice Quarterly 151.

¹⁵⁹ Hazel G Genn, *Judging Civil Justice*, vol The Hamlyn Lectures 2008 (Cambridge University Press 2010) 97, 98.

penalties had resulted in more cases being mediated but had perhaps brought unwilling parties into the mediation process, which may have accounted for the declining settlement rates since 1999.¹⁶⁰

Given the discouraging results of the London compulsory mediation scheme, the government chose to implement a nationwide automatic system of referral to mediation subject to the consent of the parties. The Small Claims Mediation Service (SCMS) was established in 2007-08 by Her Majesty's Courts Service in every county court now known as Her Majesty's Courts and Tribunals Services (HMCTS). It implemented a system of automatic referral in the small-claims track which is widely used today across England. It is a free service for defended small claims cases up to a value of £10,000 (initially set in 2007 at £5,000) which operates by telephone or by meeting in all county courts, with mediators employed by the HMCTS. Claims are automatically referred to the SCMS if the parties indicate in their Directions Questionnaire that they agree to mediation.¹⁶¹ Therefore, both parties need to consent to using the service. Referral to mediation is proposed and not imposed. Overall the SCMS offers litigants voluntary participation in mediation but involves an implicit obligation to consider mediation in the Directions Questionnaires.

According to the figures the SCMS appears to have had a consistent history of success: the scheme receives over 10,000 referrals a year, saving 9,400 hours of judicial hearing time in English courts. The data shows that, although only 10% of cases opt for the mediation process, 64% of referred cases settle with 95% of users satisfied.¹⁶² In his Interim Report in 2016, Briggs LJ even reports about 70% of success rate in settlement¹⁶³ and recommends it as a model for the conciliation stage of the Online Court.¹⁶⁴

¹⁶⁰ Hazel G Genn and others, *Twisting Arms: Court Referred and Court Linked Mediation under Judicial Pressure*, (Ministry of Justice Research Series 1/07, May 2007) 151.

¹⁶¹ CPR 26.4A; Blake, Browne and Sime, *The Jackson ADR Handbook* (n 80) para 16.07.

¹⁶² Pablo Cortés, 'Legal Developments in the Field of Civil and Commercial Mediation in the UK' EMEDEU Project: JUST/2013/JCIV/AG/4689, 9.

¹⁶³ Briggs IR para 7.24.

¹⁶⁴ *ibid* para 7.26.

However, some voices are more mitigated on the outcome of the scheme. Steffek reports, very interestingly, that:

A recent study comparing litigants' experience of small claims mediation with small claims hearings found that overall satisfaction with the mediation process was high – though no higher, it seems, than with small claims hearings; levels of satisfaction with specific aspects of the mediation process were more varied (and with regard to convenience of arrangements, were low); most respondents for whom mediation produced a settlement reported that the outcome was fair, but strong belief in the fairness of mediated outcomes appeared lower than for outcomes of small claims hearings.¹⁶⁵

In the same line as that of the SCMS, an automatic referral to a mediation pilot scheme was introduced in the County Court Money Claims Centre from April 2013 to test the operation of automatic referrals to mediation of specified designated money claims that do not exceed £10,000.¹⁶⁶ The key point is that there is no referral unless all parties have agreed to mediate. The scheme has been made permanent since April 2014.¹⁶⁷

A new pilot scheme was also launched in the Court of Appeal in April 2012 applying to all personal injury, clinical negligence, and contract claims where judgment was given for no more than £250,000, inheritance disputes where the value of the estate is £500,000 or less and boundary disputes.¹⁶⁸ It expressly compels litigants to consider mediation. Indeed, such cases are automatically and without the agreement of the parties, referred to the Court of Appeal Mediation Pilot Scheme for consideration of mediation unless the judge granting permission to appeal considers mediation inappropriate in the particular circumstances of the case. The automatic referral to mediation in these cases means that parties are mandated to

¹⁶⁵ Genn, Riahi and Fleming (n 43) 159.

¹⁶⁶ Blake, Browne and Sime, *The Jackson ADR Handbook* (n 87) para 16.12.

¹⁶⁷ CPR 26.2A.

¹⁶⁸ Blake, Browne and Sime, *The Jackson ADR Handbook* (n 80) para 16.13.

consider mediation, not to participate in mediation, although a refusal to consider mediation runs the risk of costs penalty. The pilot scheme is still in operation.

Overall, the vast majority of court-based schemes implemented requires the agreement of the parties to engage with a mediator even though they oblige litigants to consider if mediation would be appropriate prior to going to court.

Alongside all these experiments, always stands the general duty for any litigant in civil and commercial cases to consider mediation as described in the previous chapter.¹⁶⁹ Indeed, civil and commercial courts in England are under a general duty to encourage the parties to attempt, if appropriate, to resolve their dispute through ADR. However the situation is more complex when considering the question of the sanction of this obligation since the parties do not only have the obligation to provide evidence that they have complied with it, but also have to justify the reasonableness of their refusal if they want to avoid the payment of legal costs.

4.1.3. The cost sanctions imposed by the courts on the use of mediation

English courts have implemented tools to penalize litigants who not only fail to consider mediation but also unreasonably refuse to attempt to mediate. The main penalty is the payment of legal costs. To the obligation to consider mediation has been therefore added an obligation to participate in mediation unless litigants can demonstrate the reasonableness of their refusal.

(a) The power of the courts to impose cost sanctions on litigants

(aa) Legal rules

The general rule in England is that the losing party will usually have to cover the costs of the winning party, also known as ‘costs follow the event’, ie the court orders the unsuccessful party to pay the successful party’s costs.¹⁷⁰

¹⁶⁹ See para 3.1.1, 90ff.

¹⁷⁰ CPR 44.2 (2)(a).

However, the court is given the power to depart from this indemnity principle and make a different order. Indeed, CPR 44.3(4) stipulates that the court must, inter alia, have regard to the conduct of the parties. In CPR 44.3(5)(a), conduct is held to include conduct before as well as during the proceedings, and in particular the extent to which the parties followed the PD Pre-Action Conduct or any relevant Pre-action Protocol. The conduct of the parties refers notably to the efforts made, if any, before and during the proceedings in order to try to resolve the dispute.¹⁷¹ Therefore, the conduct to be considered by the court expressly covers not only actions during the actual court proceedings but also everything that happened before, particularly whether the relevant pre-action protocols have been followed.

Regarding the compliance of the parties with the pre-action protocol, the court can assess it when making case management and cost orders. The court can ask the parties to explain what steps they took in relation to ADR and to provide evidence that they considered the use of ADR. The Court can also impose sanctions for non-compliance with the protocols.¹⁷²

These sanctions can include:

- (i) Staying the proceedings until the steps which ought to have been taken have been taken;
- (ii) Order that the party at fault pay the costs, all or part of the costs, or part of the costs of the other party;
- (iii) Order that these costs are paid on an indemnity basis;
- (iv) Order that the claimant at fault is deprived of interest on all or part of any damages or sums awarded by the court, or interest is awarded at a lower rate or that the defendant at fault pays interest on all or part of any sum awarded to the claimant at a higher rate, not exceeding 10% above base rate, than would otherwise have been awarded.¹⁷³

¹⁷¹ CPR 44.4(3)(ii).

¹⁷² PD on Pre-Action Conduct para 13.

¹⁷³ *ibid* para 16.

In addition, courts have a general power to make adverse cost orders when it 'appears to the court that the conduct of a party or that party's legal representative, before or during the proceedings or in the assessment proceedings, was unreasonable or improper'.¹⁷⁴ The adverse cost order that can be made by a court include an order that a party must pay:

- (i) a proportion of another party's costs;
- (ii) a stated amount in respect of another party's costs;
- (iii) costs from or until a certain date;
- (iv) costs incurred before proceedings have begun;
- (v) costs relating to a particular step in the proceedings or costs relating to a distinct part of the proceedings;
- (vi) interest on costs from or until a certain date, including a date before judgment.¹⁷⁵

The courts have regularly applied these provisions. As such, they have played a decisive role in the expansion of ADR, and in particular of non-voluntary mediation in the context of court litigation.

(ab) Case law

The courts have taken these rules into consideration and there has been a line of decisions that have emphasized the significance of ADR in resolving disputes. Although the courts often refer to ADR, the legal rules and guidelines in case law most frequently relate to mediation.¹⁷⁶ The body of decisions has created, as it will be demonstrated in the following section, not only sanctions to penalize parties for failing to consider ADR but more significantly sanctions to punish parties for failing to engage in it.

¹⁷⁴ CPR 44.11(b).

¹⁷⁵ CPR 44.2(6).

¹⁷⁶ Brooker (n 40) 118.

➤ Sanctions against a party who fails to consider ADR

In a series of cases, the courts started to robustly recall the general obligation to consider ADR, in particular mediation, ie to assess whether mediation could be the appropriate resolution method to resolve the dispute. The first significant case was *Cowl v Plymouth City Council* in which Lord Woolf held that, as a matter of law, parties are required to consider ADR before starting legal proceedings, and the courts can ask the parties to explain what steps they took in relation to ADR to settle the matter and to provide evidence that they considered the use of ADR.¹⁷⁷

The courts also made use of the above-mentioned provisions contained in the PD on Pre-Action Conduct, which allow them to take into account the extent of the parties' compliance with the pre-action protocols. Case law examples of this include:

- *Daejan Investments Ltd v The Park West Club Ltd*, in which the court stayed proceedings because the claimant had not complied with the Pre-Action Protocol and settlement could have been possible if the parties had complied with the protocol.¹⁷⁸

- *Webb Resolutions Ltd v Waller Needham & Green*, in which the claimant was ordered to pay the defendant's costs after a particular date because it had failed to disclose relevant documents.¹⁷⁹

- *Nelson's Yard Management Co v Eziefula*, in which the court, in making a cost order, took into account the defendant's unreasonable pre-action behaviour in failing to respond to pre-action correspondence and his unwillingness to set out his position, narrow the issues or discuss mediation or settlement.¹⁸⁰

All these decisions penalize various forms of non-consideration of ADR and are made under the policy of encouragement. They also suggest that costs sanctions are not justified if the relevant party can demonstrate that it has properly considered the mediation option, ie assessed whether or not mediation could be the appropriate

¹⁷⁷ [2001] EWCA Civ 1935 para 3.

¹⁷⁸ [2003] EWHC 2872 (TCC).

¹⁷⁹ [2012] EWHC 3529 (Ch).

¹⁸⁰ (2013) EWCA Civ 235.

resolution method of the dispute. However, the courts did not stop there and started to impose cost sanctions on a party for failing to engage in mediation, ie to participate in mediation, on the ground of the unreasonable nature of the refusal to do so.

➤ Sanctions against a party who unreasonably refuses to engage in ADR

With regard to CPR Part 44, the first decision to impose cost penalties to a party that refused to engage in mediation was *Dunnett v Railtrack Plc*. For the first time, it was held that a successful party could be deprived of costs that it would otherwise be entitled to because of a refusal to mediate. Indeed, after having dismissed Mrs Dunnett's appeal against Railtrack, the court refused to order that Mrs Dunnett pay Railtrack's cost in the appeal on the ground that its refusal to attempt ADR prior to the appeal (after it had been suggested by the court) was sufficient, in the court's view, to deny the company its legal costs. In this case, Brooke LJ observed that Railtrack Plc had been wrong to 'turn down out of hand the chance of ADR' and that, in his opinion, 'this appears to be a misunderstanding of the purpose of ADR'.¹⁸¹

The *Dunnett* principle was unevenly applied.¹⁸² However, in light of this decision, the courts made a series of cost-related judgments which took into account whether the parties had attempted or avoided mediation. For example, in two Court of Appeal decisions, successful parties were denied part of their costs, one for a blank refusal to mediate,¹⁸³ the other for withdrawing from planned mediation at the last minute at the insistence of its insurers.¹⁸⁴ In another case, *Royal Bank of Canada Trust Corporation v Secretary of State for Defence*,¹⁸⁵ the High Court penalized a government department with costs, although the department had been successful in the litigation, because of its failure to accept an earlier mediation proposal.

¹⁸¹ [2002] EWCA Civ 303 paras 14 and 15.

¹⁸² eg *Hurst v Leeming* [2002] EWHC 1051 (Ch).

¹⁸³ *Neal v Jones Motors* [2002] EWCA Civ 1731.

¹⁸⁴ *Leicester Circuits Limited v Coates Brothers Plc* [2003] EWCA Civ 333.

¹⁸⁵ [2003] EWHC 1841 (Ch).

In summary, all cases were questioning the same issue of mandatory participation in mediation in relation to cost orders and its criteria. The question was finally answered in the conjoined aforementioned cases of *Halsey* and *Steel*. The Court of Appeal held that the court was entitled to impose cost sanctions on a party who has unreasonably refused to mediate and offered a non-exhaustive list of six factors to determine the reasonableness of a party's refusal to participate in mediation, namely: (a) the nature of the dispute, (b) the merits of the case, (c) the extent to which other settlement methods have been attempted, (d) whether the costs of the ADR would be disproportionately high, (e) whether any delay in setting up and attending the ADR would have been prejudicial, and (f) whether the ADR had a reasonable prospect of success.¹⁸⁶

Although *Halsey* clarified the notion of unreasonableness, the case was extensively criticised.¹⁸⁷ But the main controversy was about the misguidance made in the decision between encouragement and compulsion. Indeed, the decision held on the one hand that:

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. (...) If the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing (...)¹⁸⁸

But, on the other hand, it acknowledged the possibility for the courts to decide 'to deprive a successful party of some or all of his costs on the grounds that he has refused to agree to ADR'.¹⁸⁹

It clearly shows the ambiguity expressed in the decision between encouragement and compulsion pointed out by some authors:

¹⁸⁶ Paras 17 to 23.

¹⁸⁷ See para 1.2.2(b), 46ff.

¹⁸⁸ *Halsey* (n 32) paras 9 and 10.

¹⁸⁹ *ibid* para 13.

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.¹⁹⁰

What *Halsey* legitimated in the end was the possibility for the courts to impose costs on a party who has unreasonably refused to mediate in offering a list of non-exhaustive factors to help the courts determine the reasonableness of a party's refusal to participate in mediation.

With *Halsey*, England has added into the debate the concept of reasonableness. Indeed, subsequent to *Halsey*, courts have been confronted with situations outside the scope of the case. *Halsey's* costs scheme that penalizes parties who unreasonably refused to mediate has been extended for example to refusals to negotiate,¹⁹¹ delays in agreeing to mediate,¹⁹² or taking unreasonable positions in mediation.¹⁹³

Also, Courts have imposed costs for unreasonable refusals to mediate in a number of cases¹⁹⁴ but it has not been the norm. With a great deal of frequency, courts have found that parties' behaviour in refusing to mediate was not unreasonable.¹⁹⁵ It is difficult to draw clear and definitive conclusions on these cases but a common rationale has been reliance on the sixth *Halsey* factor, namely whether mediation would have a reasonable prospect of success.¹⁹⁶

Not only the notion of reasonableness defined in *Halsey* was extended to new situations but the scope of the rule itself was widened. In *PGF II*, the Court held that silence in response to an invitation to participate in mediation was itself

¹⁹⁰ Ahmed, 'Implied Compulsory Mediation' (n 158), 161.

¹⁹¹ eg *Hickman v Blake Laphorn* [2006] EWHC 12 (QB).

¹⁹² eg *Nigel Witham Ltd v Smith* [2008] EWHC 12 (TCC).

¹⁹³ eg *Earl of Malmesbury v Strutt & Parker* [2008] EWHC 424 (QB).

¹⁹⁴ eg *P4 Ltd v Unite Integrated Solutions Plc* [2006] EWHC 2924 (TCC).

¹⁹⁵ eg *Reed Executive Plc v Reed Business Information Ltd* [2004] EWCA Civ 887 (46).

¹⁹⁶ Jacqueline M Nolan-Haley, 'Mediation Exceptionality' (2009) 78/3 *Fordham Law Review* 1247, 1263.

unreasonable regardless of whether there were reasonable grounds to refuse.¹⁹⁷ In *Burchell v Bullard*, the court ruled that the parties could be penalized for unreasonable refusal to engage in ADR, and in particular mediation, even at the pre-action stage of the action before issue of proceedings.¹⁹⁸ *Rolf v De Guerin* demonstrated that parties can be penalized for failure to mediate even when the court has not ordered it.¹⁹⁹ The judgment also 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.²⁰⁰

It seems today that, whatever the reason, the refusal of a party to participate in ADR, and in particular in mediation, is to be considered by the judge when making a cost order. To the robust obligation for the parties to consider mediation has been therefore added an obligation to participate in mediation unless litigants can demonstrate the reasonableness of their refusal.

Indeed,

English case law (...) makes clear that there is a requirement under the common law for parties to attempt to resolve civil disputes by ADR at the earliest opportunity and that unreasonable refusal to agree to engage in ADR when suggested by an opponent may lead to the party being penalised by the court through the award of costs.²⁰¹

Therefore, the formal rejection of compulsory mediation and the robust encouragement by the courts not only to consider it, but more significantly to engage in it, appears to be contradictory.

¹⁹⁷ *PGF II* (n 145).

¹⁹⁸ *Burchell* (n 33).

¹⁹⁹ [2011] EWCA Civ 78.

²⁰⁰ *ibid* para 48 (Rix LJ).

²⁰¹ Genn, Riahi and Fleming (n 43) 166.

(b) The mixed endorsement of the policy of cost sanctions

Many authors have rightly qualified the practice of cost sanctions as ‘implied compulsory mediation’²⁰² or ‘quasi-compulsory mediation’,²⁰³ considering that, if England has not yet formally implemented mandatory participation in mediation, the practice of adverse cost orders has implicitly introduced compulsion. And even if it is argued by some observers that ‘cost penalties are, overall, a rarity’,²⁰⁴ their mere existence has inevitably at least a deterrent effect on the parties. In addition, it is reported that, since the 2013 Jackson reform, courts have more frequently made cost orders against parties who unreasonably refused to mediate.²⁰⁵

However, there seems to be a clear consensus among academics and practitioners to recognize that the policy of cost sanctions is not satisfactory. Firstly, many observers consider that this policy has produced ‘inconsistent’ jurisprudence which has led to ‘uncertainty’ for litigants,²⁰⁶ as they are:

(...) expected to know when they must participate in mediation if they are to avoid the denial or reduction of a cost award at the end of their trial even if they are successful in the action (...) This ad hoc approach of the rules of court and judicial decisions makes it difficult for litigants to understand the demands they must meet during the conduct of their litigation and it leaves mediation in a no-man’s land as to its place within civil justice (...).²⁰⁷

Other observers go even further by arguing that:

As there is no evidence to suggest that there is a social demand for compulsory mediation, let alone a collective petition against the use of litigation, such pragmatism can only be seen as an inappropriate manner of both persuading

²⁰² Ahmed, ‘Implied Compulsory Mediation’ (n 158) 151.

²⁰³ Melissa Hanks, ‘Perspectives on Mandatory Mediation’ (2012) 35/3 University of New South Wales Law Journal 929, 931.

²⁰⁴ Cortés, ‘Legal Developments in the Field of Civil and Commercial Mediation in the UK’ (n 162) 14.

²⁰⁵ Jackson, ‘Civil Justice Reform’ (n 86) p 5.

²⁰⁶ Billingsley and Ahmed (n 140) 187, 212.

²⁰⁷ Debbie De Girolamo, ‘Rhetoric and Civil Justice: A Commentary on the Promotion of Mediation without Conviction in England and Wales’ (2016) 35/2 Civil Justice Quarterly 162, 166, 181.

the parties to participate in mediation proceedings and dissuading them from resolving their conflicts out-of-court. As a result, it can be concluded that the imposition of costs sanctions on parties who are not willing to mediate is a paradigmatic example of the illegitimate exercise of the judicial function, (...).²⁰⁸

But opinions differ when considering if the power of the courts to make adverse cost orders against parties who do not engage in mediation must be reinforced or not. Some argue that there is a 'discrepancy between strong and enthusiastic judicial endorsement of ADR but a failure on behalf of the senior judiciary to reflect this by making appropriate adverse cost orders' and advocate for a 'formal acknowledgment by the judiciary that it has the power to compel parties to engage in ADR' which means to give the courts the power to 'order the parties to explore settlement through an appropriate ADR process'.²⁰⁹

On the contrary, some authors point out the danger of this judicial supervision of the award of costs as 'it may encourage expensive satellite litigation to examine appropriateness of mediation in the circumstances and the exact allocation of costs'.²¹⁰ This position echoes Dyson LJ's in *Halsey*.²¹¹

In addition, experiments of court-attached mediation schemes in England have shown that 'cases are more likely to settle at mediation if the parties enter the process voluntarily rather than being pressured into the process and increased pressure to mediate depresses settlement rates'.²¹² Steffek confirms these assumptions when reporting that interviews with mediating parties and observations of mediations have revealed that 'the principal motivation for agreeing

²⁰⁸ Mansur Salanke, 'Voluntariness of Mediation and Cost Sanctions for Parties Refusal to Consider Mediation: an Oxymoron?' (academia.edu) <www.academia.edu/5169933> accessed 10 November 2015, 29.

²⁰⁹ Masood Ahmed, 'Bridging the Gap between Alternative Dispute Resolution and Robust Adverse Costs Orders' (2015) 66 (1) Northern Ireland Legal Quarterly 71, 92, 86.

²¹⁰ Schonewille, *The variegated landscape of mediation* (n 29) 380.

²¹¹ *Halsey* (n 32) paras 9 and 10.

²¹² Genn, Riahi and Fleming (n 43) 148.

to mediate was to avoid the anticipated cost, delay and uncertainties of trial, and, more recently, to avoid the risk of adverse cost penalties'.²¹³

In any case, it coerces the parties into what should be a voluntary process and prevents them from considering freely their dispute resolution process. Given these reservations, would it not be more relevant to find a way to preserve the voluntary nature of the mediation process in the context of court litigation while continuing to promote it?

If it is considered that the significance of the interrelationship between ADR and litigation relies on two main factors which are the economic advantages associated with ADR and the benefit of narrowing the legal and factual issues between the parties,²¹⁴ it is argued in the present study that such concerns could be addressed with a less coercive approach than to force litigants to participate in mediation under the threat of robust adverse costs orders.

In effect, the present research will make a proposal in the last part of the thesis (as already suggested in the previous chapter on mandatory mediation information) that an obligation similar to the mandatory family MIAM described in the previous chapter be transposed to most civil and commercial matters. Such a scheme, which involves mediation information and consideration, would preserve the free choice of the parties to engage or not into a mediation process instead of going to court. It would also introduce a new set of automatic and proportional financial sanctions in case of non-compliance, distinct from the practice of cost sanctions.

In order to increase the number of mediation settlements in the context of court litigation, this solution would be a compromise between the need to compel the parties to be aware of and to consider mediation before going to court and the preservation of the voluntariness of the mediation process itself when it comes to participation. It differs from the paradoxical and uncomfortable situation that

²¹³ *ibid* 147.

²¹⁴ Ahmed, 'Bridging the Gap' (n 209) 76.

England offers today with the practice of adverse cost orders coupled with the complex criteria of unreasonable refusal to participate in mediation.

What is the situation in France and in Italy? Despite their different legal systems, do they have the same approach as England towards mandatory consideration of mediation and mandatory participation in mediation and the practice of cost sanctions?

4.2. Italy and France in the footsteps of England for cost sanctions

While the development of mediation in the context of court litigation in England is mainly driven by the need to make access to justice more affordable for litigants, the rationale behind the promotion of mediation within the judicial systems in France and in Italy is to be found in the court backlogs and the slowness of the proceedings.

However, both common law and civil law models are willing to promote mediation within their judicial system and Italy, followed today by France, is tempted by the practice of court-ordered cost sanctions usually practiced in common law countries in order to ensure the use of mediation. Indeed, while adverse cost sanctions are part of the English traditional litigation model, they were absent from the legal framework of most civil law countries until very recently. This has recently changed. Indeed, since the Mediation Directive, similar provisions can be found in a number of EU countries.

4.2.1. Italy: mandatory participation and mandatory consideration embedded in the legal framework

(a) The various provisions

After a chaotic episode in trying to install pre-action mandatory participation in mediation,²¹⁵ Italy has introduced in September 2013 a new legislation which has

²¹⁵ See para 3.2.2, 121.

implemented a 'softer' mandatory scheme.²¹⁶ Indeed, the previous attempt of a mandatory mediation scheme has been replaced by a mandatory mediation information and assessment scheme.

As previously mentioned, under the 2013 decree, in a number of civil and commercial matters,²¹⁷ the parties' obligation to mediate is now satisfied by attending a first informational meeting before the mediator where the latter clarifies the role and the modalities of the mediation process, which has to be held within 30 days of the filing of the mediation request. The meeting is free of charge but, if a party decides not to continue beyond that first meeting, there is a nominal fee (from 40 to 80 euros) to pay for the mediator's time.

As a result, although it obliges litigants to consider resolving their dispute through mediation, this provision preserves the voluntary feature of participation in mediation and seems to be a fair compromise between the need to promote mediation and the need to allow the parties to choose freely their dispute resolution process as per their interests.

There is another important change in the 2013 provisions which needs to be mentioned. It is the courts' new power in any proceedings to order the parties, without their consent, at any stage of the proceeding, to try mediation with an accredited mediator.²¹⁸ This discretionary court-referral system allows the judge to refer a case to mediation even when an informational meeting is not required.

In summary, with the 2013 decree, Italy, on the one hand, has moved to a less coercive system which preserves the voluntary feature of mediation, replacing pre-action mandatory participation by an equivalent of the English MIAM for a small

²¹⁶ Decreto 69/2013.

²¹⁷ ie insurance, banking and financial agreements, joint ownership, property rights, division of assets, hereditary and family law, leases in general, gratuitous loans, medical malpractice and defamation.

²¹⁸ New Section 5 (2) (Decreto 28/2010).

portion of civil cases (8%),²¹⁹ and on the other hand has implemented for the rest, which is the majority of cases, mandatory participation through discretionary judicial orders, ie the possibility for the parties to be sent by the judge to mediation without their consent.

At this point, it is not easy to draw conclusions on the new Italian mandatory mediation framework. Statistics of the attempts at mandatory mediation under the first 2010 decree show a very significant increase in registered mediations with a total of over 215,000 applications for mediation before a mediation body between March 2011 and December 2012. It was followed by a sharp drop during the first three semesters of 2013 to approximately 16,000 registered mediations when mediation was again entirely discretionary for all matters.²²⁰ After the enactment of the 2013 regulation, figures show that it rapidly impacted the number of mediations: in the last quarter of 2013 the number of registered mediations climbed back to almost 26,000 and in the first three months of 2014 about 60,000 mediation procedures were initiated, 84% of which are the result of the mandatory information process.²²¹ Overall, over 180,000 mediations took place in Italy in 2015 with a success rate of almost 45%.²²² It is reported that so far the model of mandatory initial informative meeting 'has resulted in not only more mediations, but also a higher success rate'.²²³

The figures are more contrasted when addressing the results of the new provision allowing judges to refer the parties to mediation without their consent during the judicial process. Although statistics show that the number of discretionary referrals

²¹⁹ Giuseppe De Palo and Romina Canessa, 'New Trends for ADR in the European Union' in Pablo Cortés (Chapter 20) (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 408, 416

²²⁰ *ibid.*

²²¹ Ministero della Giustizia, Dipartimento della Organizzazione Giudiziaria del Personale e dei Servizi, Direzione Generale di Statistica, 'ex DL 28/2010 sulla mediazione civile: Statistiche relative al periodo 1° Gennaio - 31 Marzo 2014' <<https://mediazione.giustizia.it>> accessed 3 March 2017, 2.

²²² Ministero della Giustizia, Dipartimento della Organizzazione Giudiziaria del Personale e dei Servizi, Direzione Generale di Statistica, 'ex DL 28/2010 sulla mediazione civile: Statistiche relative al periodo 1° Gennaio - 31 Dicembre 2015' <<https://mediazione.giustizia.it>> accessed 3 March 2017, 7.

²²³ De Palo and Canessa (n 219) 416.

has steadily increased,²²⁴ Matteucci observes that it is still underused by Italian judges.²²⁵ In addition, the new decree has not seriously addressed the issue of the sanctions.

(b) The lack of adequate sanctions

The decree provides some sanctions against the parties whose behaviour proved to be unreasonable. These sanctions already existed in the 2010 decree. The decree law 69/2013 reintroduced them without any variation.

They are twofold:

Firstly, article 8, para 5, of the legislative decree, provides that unjustified failure to participate in the process may be taken into account by the court in the subsequent proceedings. It also provides that, in such subsequent proceedings, a fine can be imposed, to be paid into the state budget, equal to the judicial proceedings administration fee, resulting in this party's fees being doubled. This means that if one party does not attend mediation and the case goes to court, the judge has the power to ask the defaulting party to justify the absence, and, if it cannot do so, to order the party to pay not only legal costs but a fine.²²⁶

Secondly, article 13 provides for an exception to the common rule that costs follow the event in order to give an incentive to continue with the mediation process. If a party is willing to withdraw from the mediation, the mediator has the authority to propose a solution to the dispute. If this is rejected by one of the parties and the case subsequently goes to court, the judge may shift all mediation and litigation costs

²²⁴ Ministero della Giustizia, Dipartimento della Organizzazione Giudiziaria del Personale e dei Servizi, Direzione Generale di Statistica, 'ex DL 28/2010 sulla mediazione civile: Statistiche relative al periodo 1° Gennaio - 31 Dicembre 2016' <<https://mediazione.giustizia.it>> accessed 3 March 2017, 7.

²²⁵ Giovanni Matteucci, 'Mandatory Mediation, the Italian Experience' (22/05/2015) <www.adrmaremma.it/english/matteucci-eng-4.pdf> accessed 5 April 2016, 203.

²²⁶ Alessandra De Luca, 'Mediation in Italy: Features and Trends' in Carlos Esplugues and Louis Marquis (eds), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives* (Springer International Publishing 2015) 345, 358.

onto the rejecting party if the judgment is consistent with the mediator's proposed solution.²²⁷

De Luca observes that, even when the two sanctions were in force under the 2010 Decree, they were not used much. He pursues:

(...) on the one hand, it is not at all clear what kind of circumstantial evidence may be inferred from the failure to participate in the mediation. On the other hand, the exception to the rule that costs follow the event supposes that the mediator put forward a proposal of agreement, which in practice was rare.²²⁸

However, the same sanctions have been restored in the 2013 decree and apply now to the mandatory attendance at the informative and assessment meeting. In addition, De Luca reports about the sanction provided under article 13 of the 2013 decree that a subsequent decree has allowed mediation centres to exclude in their procedure rules the mediator's power to make a proposal, and 'many centres actually provided that the proposal can be made only upon joint request by the parties. Therefore, the parties can easily avoid the risk of sanction when choosing the mediation centre'.²²⁹ It is also observed that lawyers representing the defendant often go to the first informative meeting without the party they represent, only to declare 'we are not interested in proceeding'.²³⁰

De Palo suggests implementing a system whereby parties can choose whether to pursue mediation at the initial informational meeting but failure to appear at this meeting would automatically incur a fine. In addition, once the case goes to court, the law and/or the jurisprudence need to define clearly the concept of unjustified failure to attend the mediation meeting without which the future of the new provisions will be compromised.²³¹

²²⁷ *ibid.*

²²⁸ *ibid.*

²²⁹ *ibid* 357.

²³⁰ Matteucci (n 225) 201.

²³¹ European Parliament, 'The Implementation of the Mediation Directive - Workshop on 29 November 2016' (Directorate General for Internal Policies Legal Affairs, Study PE 571.395) 14.

Alongside the framework of mediation in the context of court litigation, it is worth mentioning here that Italy has also put in place in 2014 a new technique called ‘assisted negotiation by lawyers’.²³² Inspired by the French experiment of *négotiation participative*²³³ introduced in 2011, which is a clause agreement by which disputing parties agree to try to find an amicable settlement with the assistance of their lawyers prior to going to court, the Italian version is quite different as, for a number of disputes, assisted negotiation has become a mandatory pre-action step. Indeed, according to the 2014 Legislative Decree, in certain types of disputes (most consumer protection disputes, damage caused by road and marine accidents and collection matters not exceeding 50,000 euros), assisted negotiation is a mandatory pre-action to be followed by the parties. If a party’s invitation is refused or not accepted within one month by the other party, the mandatory step is deemed satisfied. However, under article 4, the judge may negatively evaluate a party’s refusal to opt for assisted negotiation and could take this conduct into account when deciding on the allocation of legal fees. Any settlement reached by the parties can be testified by the lawyers as being in compliance with public order and becoming then automatically enforceable without the intervention of a judge.²³⁴

This mechanism is very similar to the one previously described for mandatory consideration of mediation, and the 2014 legislative decree expresses that, in case of overlap with mediation, parties are free to choose, except in those cases where the law establishes the prevalence of mediation.²³⁵ Therefore, Italy has introduced a new ADR method in additional areas of law in the context of court litigation, where the primary role is entrusted to the parties’ lawyers as opposed to mediation proceedings where a mediator is involved. Although it confirms Italy’s clear

²³² Decreto-Legge 12 settembre 2014, no 132: Misure urgenti di degiurisdizionalizzazione ed altri interventi per la definizione dell’arretrato in materia di processo civile, convertito con modificazioni dalla L. 10 novembre 2014, no 162 art 2 (Decreto 132/2014).

²³³ Loi no 2010-1609 du 22 décembre 2010 relative à l’exécution des décisions de justice, aux conditions d’exercice de certaines professions réglementées et aux experts judiciaires (Loi 2010-1609).

²³⁴ Decreto 132/2014.

²³⁵ *ibid* art 3.

endorsement of ADR promotion through mandatory techniques of consideration, this new scheme may bring confusion for litigants between mediation and other ADR techniques in the context of court litigation.

4.2.2. France: the introduction of mandatory consideration and mandatory participation in the legal framework

(a) The recent legislation

Until very recently, except in family and employment law, France has been reluctant to implement any general obligation to consider, or to participate in, mediation, although statistics show a very low level of mediation accomplished in the context of court litigation.²³⁶

Mediation has been available since 1995 for civil and commercial matters under the form of court-annexed mediation, in which a judge is entitled, during court proceedings, to refer the case to mediation with the consent of the parties. Court-annexed mediation is accessible in all civil, commercial, employment and family courts at all instances. The process takes place outside the courtroom and with an independent mediator.²³⁷ Alongside these provisions, the *Code de Procédure Civile* (CPC) provides a general duty for judges of first instance courts, in small civil and commercial matters, to try to conciliate the parties.²³⁸ As a result, for the past 20 years, the encouragement to consider mediation or conciliation during court proceedings has mainly relied on each judge's willingness to use mediation, coupled with the consent of the litigants.²³⁹

As was the case for information (outlined in Chapter 3), some valuable experiments have also been attempted to promote consideration of mediation but they remain very rare with yet no real wide scale impact on the use of mediation. For example,

²³⁶ Guinchard (n 100) 161.

²³⁷ CPC arts 131-1 to 15.

²³⁸ *ibid* arts 21, 127, 128.

²³⁹ See para 3.2.1(c), 117.

since 2010, a few courts have tested a system of 'double summons' under which the court summons parties to a mediation or conciliation meeting with a private mediator or conciliator, and simultaneously gives a second, later date for a court hearing. If the parties do not appear before the mediator or do not reach a settlement, they will be heard by the court at the later date. It has been reported that the experiment was very successful. Online mediation is another example of successful initiatives. In April 2009, the Paris Court of Appeal signed an experimental convention with the Internet Rights Forum. The convention set up an initiative for cases that concern at least one private individual in matters relating to online commerce and the provision of internet services. The experiment was inexplicably stopped in 2010 after a decision of the Ministry of Industry.²⁴⁰

More recently and more significantly, the governmental decree no 2015-282 dated 11 March 2015, has introduced a general obligation to consider settlement before going to court. Indeed, since 1 April 2015, parties in civil and commercial disputes are encouraged to seek an amicable settlement before they refer the matter to the court. However, the efficiency of this new obligation remains uncertain as there is no sanction attached to its non-compliance. The judge is only entitled in that case to propose to the parties a mediation or a conciliation measure.²⁴¹

An important step has been taken very recently with article 4 of a new law entitled 'Modernisation of Justice in the 21st Century',²⁴² which provides that a party willing to submit a small claim (less than 4,000 euros) before a first instance civil court must attempt a conciliation with a *conciliateur de justice* beforehand. Otherwise the claim is not admissible in court. This means that a vast majority of small claims are going to be conciliated outside the court system under the authority of a *conciliateur de justice* before being allowed to go to court. The efficiency of this system will obviously rely on the capacity of the *conciliateurs* to perform this duty, knowing that they are usually retired judges, lawyers or civil servants appointed before the court of first instance by the President of the Court of Appeal and that they work on a

²⁴⁰ Vert (n 120) 14.

²⁴¹ CPC art 56, 58, 127.

²⁴² Loi 2016-1547 art 4.

voluntary and unpaid basis. It will also add another stage in the judicial process with the risk of increasing delays and costs. It is too early to assess the efficiency of this provision but it is worth mentioning that this is the first statutory rule in France that mandates litigants to attempt conciliation as a precondition to court on a large scale.

Finally, France has chosen to implement extensively the ADR Directive for Consumers as the law of transposition creates, in addition to the obligation for the traders to inform, the principle of 'a right to mediate' for consumers and the resulting obligation for traders to secure that right and to participate in a mediation process if the consumer is willing.²⁴³

(b) An emerging case law imposing cost sanctions for refusing to engage in ADR

Unlike in the English civil procedure rules, French law does not sanction financially the parties who have not attempted to conclude an amicable settlement before they refer their matter to court. However, there has been an ongoing debate in France to find ways to penalize parties who would fail to consider mediation as a dispute resolution option.

Inspired by the Anglo-Saxon models, a report in 2008 recommended that, where the judge proposes mediation and encourages the parties to meet in order to look into the possibility of mediation, any claim for costs brought pursuant to article 700 of the Nouveau Code de Procédure Civile (NCPC)²⁴⁴ would be automatically rejected if the requesting party has not effectively considered mediation. The same report suggested to add the following sentence to NCPC art 700: the party who refuses to

²⁴³ Ord 2015-1033; Décret 2015-1382.

²⁴⁴ article 700 provides: 'in all proceedings, the judge will order the party obligated to pay for legal costs or, in default, the losing party, to pay to the other party the amount which he will fix on the basis of the sums outlaid but not included in the legal costs. The judge will take into consideration the rules of equity and the financial condition of the party ordered to pay. He may even, sua sponte, for reasons based on the same considerations, decide that there is no need for such order'.

inform itself on mediation when it is proposed by the judge cannot seek the benefit of this article.²⁴⁵

The legislator has not followed this recommendation. However, some jurisdictions have started to apply it and to penalize with costs sanctions parties who failed to consider mediation. For example, in a decision in 2013, the Paris Court of Appeal rejected the claims made by the litigants under article 700 because both parties refused mediation.²⁴⁶ Nevertheless, these decisions are very rare and do not represent a real line of jurisprudence. If it were the case, they would reproduce the English paradox which coerces parties to participate in a voluntary process.

France is currently in a transitional phase far behind England and Italy, searching a way to significantly implement mediation in the context of court litigation. A new step has been taken with the new legislation which has implemented, within a very short period of time, both mandatory consideration (2015 Decree) and mandatory participation (2016 Law). But the message is not clear. Indeed, the 2015 Decree does not provide sanction in case of non-compliance. A system of fine must be put in place if the parties fail to consider an attempt to find an amicable settlement before going to court. Otherwise, these provisions will have no effect on the use of alternative conflict resolution methods including mediation. In addition, the efficiency of the new law introducing mandatory conciliation for small civil claims presupposes certainly a reshaping of the statute and the training of the *conciliateur de justice* to be in accordance with the new central role given to him.

Conclusion

This chapter has shown that, despite different backgrounds in the development of mediation, Italy and France have both introduced formally mandatory participation in mediation on a large scale. For its part, England has chosen to carry on with the policy of cost sanctions. It is even reported that courts have more readily granted

²⁴⁵ Rapport Magendie.

²⁴⁶ CA Paris 5 Septembre 2013, Gazette du Palais 2014, 1819.

orders in support of ADR since the introduction of the Jackson Reform in 2013 due to a more proactive case management and costs management, and made more frequently costs orders against parties who unreasonably refused to mediate.²⁴⁷ While adverse cost orders are not a common feature of civil law countries, similar provisions have been implemented in Italy in the 2013 decree, even though it does not mandate any type of cost shifting sanctions.²⁴⁸ At the same time in France, there are very few examples of judicial decisions penalizing with costs sanctions parties who failed to consider mediation in the context of court litigation.²⁴⁹

However, this trend is not satisfactory. Indeed, experiments have shown that 'cases are more likely to settle at mediation if the parties enter the process voluntarily rather than being pressured into the process, and increased pressure to mediate depresses settlement rates'.²⁵⁰ In addition, the previous developments have shown the clear consensus among academics and practitioners in England to recognize that the policy of cost sanctions has produced inconsistent jurisprudence which has led to uncertainty for litigants.²⁵¹

At the same time, there is an urgent need to relieve our legal systems in terms of costs as well as in terms of delays as mediation is still under-used in the context of court litigation. It seems however that our three countries have started to address the issue by firmly and officially endorsing the development of mandatory consideration in the context of court litigation.

Indeed, they all provide rules that require litigants to consider mediation in the context of court litigation, although under different features and degrees of intensity. Civil and commercial courts in England are under a general duty to encourage the parties to attempt, if appropriate, to resolve their dispute by ADR. This duty of encouragement, which takes place at the very early stage of the

²⁴⁷ Jackson, 'Civil Justice Reform' (n 86) p 5.

²⁴⁸ See para 4.2.1(b), 148ff.

²⁴⁹ See para 4.2.2(b), 153ff.

²⁵⁰ Genn, Riahi and Fleming (n 43) 148.

²⁵¹ Billingsley and Ahmed (n 140) 212.

proceedings and continues at all stages of the action, forces the litigants to consider mediation.²⁵² Italy has implemented mandatory consideration of mediation in various fields through the requirement of attendance at a pre-action informative mediation meeting.²⁵³ Since 1 April 2015 in France, any civil or commercial claim form must now mention that the parties have attempted an amicable settlement before they refer the matter to court.²⁵⁴

This is a very positive trend as mandatory consideration, while being coercive in the sense that it forces litigants to consider their participation in mediation, leaves at the same time entirely intact their choice. It echoes thus Nolan-Haley's recommendation: 'Contemporary mediation consent litigation may be signalling that something is amiss in the grand design of ADR. We would do well to pay attention and bring real consent back into the picture'.²⁵⁵ However, to ensure its full efficiency, it will be argued next that mandatory consideration of mediation needs to be coupled with mandatory mediation information and also be accompanied by appropriate sanctions.

The implementation for civil and commercial matters of these two forms of non-voluntary mediation would leave intact the freedom of the parties in relation to their participation in mediation in the context of court litigation. It would also enable to narrow the dispute before going to court through the requirement of consideration and to increase the rate of successful mediation settlements based on the voluntary nature of the participation process. Such a proposal will be explored in the next part of the thesis, together with the Online court project which is about to be implemented in England.

²⁵² See para 3.1.1, 90ff.

²⁵³ See para 3.2.2(a), 121.

²⁵⁴ See para 3.2.1(c), 117.

²⁵⁵ Nolan-Haley, 'Mediation Exceptionality' (n 196) 1264.

CONCLUSION TO PART II

The two chapters of Part II have given a critical overview of the different forms of non-voluntary mediation implemented in England and compared with the situation in France and in Italy. It has shown that each category is distinct from each other and can be used separately or coupled to adapt the level of compulsion to the objective pursued.

It has also highlighted that, despite the existence of a legal framework of judicial encouragement for litigants to use mediation, England does not provide a clear orientation on the question with the paradoxical formal rejection of mandatory mediation coupled with the policy of cost sanctions. This uncertainty is reinforced with the Online Court project which is about to be implemented and where mediation is incorporated within the judicial process. This period of transition towards non-voluntary mediation and its related issues that England is going through will be examined in the next part of the study in a comparative perspective of the situation in France and in Italy.

PART III
NON-VOLUNTARY MEDIATION
AT A TURNING POINT

INTRODUCTION

The previous chapters have examined the growing implementation in England, France and Italy, of coercive actions imposed on litigants to increase the use of mediation in a court context for civil and commercial matters. It has also shown that, in each country of investigation, the question of non-voluntary mediation is at the heart of a more comprehensive review of the judicial system. Therefore, this situation needs to be clarified, and more specifically, the position of each category of non-voluntary mediation identified (information, consideration, participation) needs to be considered to answer the following questions: How do we increase the recourse to mediation by litigants in civil and commercial matters? Should we force them to attempt mediation in the context of court litigation? Should we force them in the same context to fulfil an obligation of information on and consideration of mediation to ensure their awareness of the process? Should we perhaps do both? The answer lies in the level of coercion that is identified as being the most suitable to promote mediation while respecting the right of access to justice and the voluntary nature of the mediation process.

Part III of the present research aims at answering these questions after the implementation of the Mediation Directive,¹ the ADR Directive et the ODR Regulation² and in light of the most recent developments on the issue, in particular the Briggs reports³ in England recommending the establishment of an Online Court

¹ Directive 2008/52/EC of the European Parliament of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L136/3 (The Mediation Directive).

² Directive 2013/11/EU on Alternative Dispute Resolution for Consumer Disputes [2013] OJ L165/63 (The ADR Directive); Regulation 524/2013 on Online Dispute Resolution for Consumer Disputes [2013] OJ L165/1 (The ODR Regulation).

³ Briggs LJ, 'Civil Courts Structure Review: Interim Report' (Judiciary of England and Wales, December 2015) (Briggs IR); Briggs LJ, 'Civil Courts Structure Review: Final Report' (Judiciary of England and Wales, July 2016) (Briggs FR).

for all money claims up to £25,000 (July 2016) and the latest report from the European Commission on the application of the Mediation Directive (August 2016).⁴

More precisely, the last two chapters will examine the situation of each category of non-voluntary mediation from two main angles. Firstly, England's legal framework, designed to encourage the use of mediation, is at a turning point between its need of adjustments and the new Online Court project where mediation is incorporated within the judicial process. Secondly, in a comparative perspective, what can England learn from what is happening in Italy and in France? To which extent can practices of non-voluntary mediation be shared between jurisdictions of different legal cultures? Are we definitely moving across Europe from an adversarial system to an inquisitorial approach?

To address these issues, the last part of the study will keep the tripartite classification of coercive actions identified under the concept of non-voluntary mediation, ie information, consideration and participation. However, given that mandatory participation has some very different implications on the question of the right of access to justice and the voluntary nature of mediation, it will be treated separately.

Therefore, Chapter 5 concentrates on the issue of mandatory participation in mediation and questions its ability to increase the use of mediation in England in a comparative perspective and in light of the latest reports mentioned above. Chapter 6 will address the issues of mandatory mediation information and mandatory consideration of mediation in England compared with the situation in Italy and France, and will demonstrate their relevance to promote mediation through a new proposal that can be implemented in parallel with the Online Court project.

⁴ Commission, 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters' COM (2016) 542 final.

CHAPTER 5
THE HORIZON OF MANDATORY PARTICIPATION IN MEDIATION
IN ENGLAND IN A COMPARATIVE PERSPECTIVE

Introduction

Mandatory participation in mediation (frequently named mandatory mediation) is the situation where the parties in a court context are compelled to attempt a full mediation process. The decision to reach a settlement always stays voluntary.

The present chapter intends to assess the value and the appropriateness of introducing mandatory mediation in England in the context of court litigation for civil and commercial matters in order to increase its use by litigants, bearing in mind that such practice modifies the components of mediation and the right of access to justice.

As observed in Part II, mandatory participation in mediation exists in specific areas and under various forms in the three countries of investigation, mainly in family and employment law, whereas it is very rarely implemented in civil and commercial matters. Furthermore, whenever mediation has been imposed on litigants, it has been done as an adjunct to the court process and not incorporated into it. It seems that the situation may be changing in England through the project of Online Court⁵ where ADR, including mediation, would become part of the judicial process.

The present chapter will analyse the Online Court project in England in relation to its consequences on the use of mediation after having recalled the controversial nature of the issue of mandatory mediation and its very limited use as an adjunct to the court process in England, France and Italy.

⁵ Briggs IR and Briggs FR.

5.1. Mandatory participation in mediation: an adjunct to the court process

5.1.1. A controversial issue

Implementing mandatory participation in mediation in the context of court litigation has always been a controversial issue. The main criticisms are the distortion of the concept of mediation and the threat that it represents to the free right of access to court.⁶

Some commentators reject these criticisms as regards England arguing that imposing an attempt to mediate in the context of court litigation is the only way to increase the use of mediation in enlarging access to justice by reducing costs and delays.⁷ They recommend that English law should expressly require litigants to engage in ADR or expressly authorise the courts to order litigants to participate in ADR in appropriate cases⁸ or a combination of both, with judges being given ‘a discretionary power to order parties to attend mediation as a prerequisite to access to the state courts in appropriate circumstances’.⁹ The same view is shared by authors elsewhere in Europe, especially in Italy where it is often reported that the experience of mandatory participation in mediation under the 2010 decree was a stunning success in relation to the use of mediation.¹⁰

On the contrary, many observers challenge the concept and the practice of mandatory participation in mediation. Some of them claim that, as mediation practice moves away from the fundamental principle of self-determination, its power to deal with issues of social justice has diminished, and argue that the only

⁶ Hazel G Genn, ‘What is Civil Justice for? Reform, ADR, and Access to Justice’ (2012) 24/1 Yale Journal of Law & the Humanities 397, 411.

⁷ Barbara Billingsley and Masood Ahmed, ‘Evolution, Revolution and Culture Shift: a Critical Analysis of Compulsory ADR in England and Canada’ (2016) 45/2-3 Common Law World Review 186, 188.

⁸ *ibid* 216.

⁹ Julio César Betancourt and John Lee, ‘Mediation in England and Wales: Why Should it be Mandatory?’ (2016) 1/1 Mediation Theory and Practice 95.

¹⁰ European Parliament, ‘Rebooting’ the Mediation Directive: assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU’, (Directorate General for Internal Policies Legal Affairs, Study PE 493.042, January 2014) 43 (‘Rebooting’ the Mediation Directive).

way to increase the use of mediation is 'a return to a consensual understanding of mediation'.¹¹ This approach is relayed in England by some authors who observe that mandatory mediation undermined the voluntariness of mediation processes 'gradually but with brutal force eroding the basic philosophy of mediation'.¹² Members of the judiciary have also taken an active participation in the debate, questioning not only the need to preserve the citizen's constitutional right to access the courts¹³ but also that it is not the role of a court of law to force compromise upon people who do not want to compromise,¹⁴ or adding that, if a court were to compel parties to enter into a mediation, that would achieve nothing except adding to the costs of the dispute resolution process, possibly postponing the judicial determination of the dispute, and damaging the perceived effectiveness of the ADR process.¹⁵

In between, the two major civil justice reforms¹⁶ since the Woolf reforms have adopted a more nuanced view on mandatory mediation. While rejecting the idea of any provision which would compel parties to engage in mediation, they both recommended a cultural change where the courts would be required 'to embrace an approach emphasizing "the management of the dispute resolution as a whole"' through court adjudication or ADR.¹⁷

More importantly, research shows steadily that cases are more likely to settle at mediation if the parties enter the process voluntarily rather than being compelled

¹¹ Jacqueline M Nolan-Haley, 'Mediation: The Best and Worst of Times' (2015) 16 *Cardozo Journal of Conflict Resolution* 731, 737.

¹² Mansur Salanke, 'Voluntariness of Mediation and Cost Sanctions for Parties Refusal to Consider Mediation: an Oxymoron?' (academia.edu) <www.academia.edu/5169933> accessed 10 November 2015, 2.

¹³ Billingsley and Ahmed (n 7) 192.

¹⁴ Lord Dyson MR, 'A Word on *Halsey v Milton Keynes*' (2011) 77/3 *Arbitration* 337, 340.

¹⁵ *Halsey v Milton Keynes General NHS Trust and Steel, Joy & Halliday* [2004] EWCA Civ 576, [2004] 1 WLR 3002 paras 9-11.

¹⁶ Jackson LJ, *Review of Civil Litigation Costs: Final Report* (TSO 2010) (Jackson Report on Civil Litigation Costs); Briggs LJ, 'Chancery Modernisation Review: Final Report' (Judiciary of England and Wales December 2013).

¹⁷ Billingsley and Ahmed (n 7) 191.

into the process.¹⁸ In a study examining the use of mediation in the 10 years after the Woolf Reports, Prince observes that mediation has brought about various 'efficient and expedient benefits to the parties and the state, in terms of time and cost, but this seems to be at the price of designing a process which has unambiguous links to justice'.¹⁹

However, it would appear that the practical implementation of mandatory mediation is rather inversely proportional to the intensity of the theoretical debate.

5.1.2. A very limited use

There have been attempts in England, Italy and France to impose mediation in the context of court litigation. The more frequent and long-lasting implementations have taken place in the three countries in family and employment law. On the contrary, although the Mediation Directive was targeting civil and commercial matters and allowing Member States to make use of compulsory mediation,²⁰ very few jurisdictions have chosen to take up this opportunity. Indeed, very few legal obligations to mediate in the context of court litigation have been implemented in relation to civil and commercial matters.

However, there have been a few initiatives. Some countries have chosen to implement it as a prior step to litigation in court, others during the court process. In some jurisdictions, it is directly prescribed by the law. In others, it is left to judicial consideration/evaluation, ie ordered by a judge.²¹

¹⁸ Hazel G Genn, Shiva Riahi and Katherine Fleming, 'Regulation of Dispute Resolution in England and Wales: A Sceptical Analysis of Government and Judicial Promotion of Private Mediation' in Felix Steffek and Hannes Unberath (eds), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (Hart Publishing 2013) 135, 148.

¹⁹ Susan Prince, 'ADR after the CPR: Have ADR Initiatives Now Assured Mediation an Integral Role in the Civil Justice System in England and Wales?' in Deirdre Dwyer (ed), *The Civil Procedure Rules Ten Years On* (Oxford University Press 2009) 326, 339.

²⁰ The Mediation Directive; Commission, 'Study for an evaluation and implementation of Directive 2008/52/EC – the 'Mediation Directive' Final Report' October 2013, updated March 2016 (Publications Office of the European Union 2016) (Study for Evaluation and Implementation of the Mediation Directive).

²¹ Study for Evaluation and Implementation of the Mediation Directive 48-49.

Let us recall that, in the case of Italy, mandatory attempt at mediation for litigants was introduced by the 2010 Decree as a precondition before going to court in some selected types of civil disputes.²² The scheme was replaced in 2013 by a mandatory mediation information and assessment scheme for more or less the same categories of disputes representing 8% of Italian civil cases. Paradoxically, for the other civil claims, the 2013 Decree gave judges the power to mandate the use of mediation (outside the courtroom with an accredited mediator). As a result, 8% of the civil claims in Italy are today under a mandatory obligation of information and assessment while the rest, ie the majority of cases, can be sent discretionally to mediation by a judge.²³

In France, a new law adopted on 18 November 2016 provides that, for any civil claim under 4,000 euros to be admissible in court, the parties must have attempted before a conventional conciliation with an independent *conciliateur de justice*. This is the first attempt made in France to introduce mandatory conciliation on a wide scale.²⁴

As seen in Chapter 4, England, entangled in the Halsey debate and the issue of access to justice, has always expressly refused to implement formally mandatory mediation. Indeed, although mandatory mediation has been experimented in different pilot projects, it has fallen short of being implemented permanently and nationwide. At a legislative level, the Civil Procedure Rules (CPR) do not provide rules that either directly mandate parties to attempt ADR or provide the courts with clear powers to compel parties to engage in ADR.

As observed by Billingsley and Ahmed:

CPR Rule 1.4 does provide the courts with some discretion to assist the parties in settling the matter but neither this rule nor other ‘ADR rules’ within the CPR

²² Decreto Legislativo 4 marzo 2010, no 28: Attuazione dell'articolo 60 della legge 18 giugno 2009, no 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali (Decreto 28/2010).

²³ Decreto-Legge 21 giugno 2013 no 69: Disposizioni urgenti per il rilancio dell' economia convertito con modificazioni dalla L 9 agosto 2013 no 98 (Decreto 69/2013).

²⁴ Loi no 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIème siècle art 4 (Loi 2016-1547).

oblige the parties to engage in ADR or provide the courts with the powers to compel parties to participate in ADR. CPR Rule 1.4 simply requires the court to help the parties to settle the case, while Rule 26.4 states that the parties 'may' request a stay of proceedings to attempt settlement (...). Even the pre-action protocols speak of the need for the parties to *consider* ADR without stating that they should *engage* in an ADR process.²⁵

Section G of the Admiralty & Commercial Courts Guide entitles judges in commercial courts, not only to adjourn proceedings if it is relevant to encourage the parties to attempt ADR, but also to make ADR orders.²⁶ But the provisions are clear: judges have the power to order the parties to 'consider' ADR, not actually to 'participate' in ADR.²⁷

As detailed in the previous chapter, the most robust use of mandatory mediation, although 'implied',²⁸ has emerged in England through the policy of cost sanctions. Indeed, under the CPR provisions, the court can take into account the unreasonable behaviour of a party towards mediation and make an adverse costs order. The courts have applied these rules and there has been a line of decisions that have contributed to emphasise the significance of mediation in resolving disputes in the context of court litigation by sanctioning parties considered to have behaved unreasonably at the cost stage of the litigation process. Since the level of compulsion is not clearly articulated in the CPR, the policy of cost sanctions has been applied to punish the refusal of a party to participate in a full mediation process as well as the refusal of a party to consider mediation.

However, there seems to be a clear consensus among academics and practitioners to recognise that the policy of cost sanctions is not satisfactory as it is leaving litigants in an insecure situation. It is also pointed out that the regime of cost

²⁵ Billingsley and Ahmed (n 7) 192.

²⁶ G 1.8.

²⁷ Jens M Scherpe and Bevan Marten, 'Mediation in England and Wales: Regulation and Practice' in Klaus J Hopt and Felix Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford University Press 2012) 365, 382.

²⁸ Masood Ahmed, 'Implied Compulsory Mediation' (2012) 31/2 Civil Justice Quarterly 151.

sanctions not only erodes the principle of voluntariness in mediation but also jeopardizes the confidentiality of the process itself, and more worryingly, that the system has the most direct impact on the poorest in society as only those who can afford to take potential cost consequences will be able to ignore judicial pronouncements.²⁹ Despite all these criticisms and findings, the policy of cost sanctions is still regularly applied in England in relation to mediation and, on a comparative perspective, is emerging in France and in Italy.³⁰

To conclude, if we except the ‘implied compulsory mediation’³¹ developed by English courts through the uncertain jurisprudential policy of cost sanctions, England does not impose formally mediation for civil and commercial matters as a precondition before going to court nor do the judges have the power to compel parties to ADR.

Overall, mandatory mediation in court context is used on a very limited basis in civil and commercial matters in our countries of investigation. It is however important to mention that, whenever mediation has been formally imposed on litigants, either in England, France or Italy, it has been done as an adjunct to the court process and not incorporated into it, which means that, apart from the mandatory nature of the attempt, the other characteristics of mediation were preserved. Therefore, mandatory participation in mediation has only been implemented as a non-voluntary process in which a neutral third party, a private mediator, assists disputing parties, on a confidential basis, to reach a consensual resolution to their dispute with the possibility to continue with court if a settlement is not reached.

It seems that there is today in Europe a sort of unofficial compromise to accept that mediation can be imposed on litigants before or during the court process, provided it is taking place outside the courtroom, preserving its main features except

²⁹ Salanke (n 12) 31.

³⁰ See para 4.4, 145ff.

³¹ Ahmed ‘Implied Compulsory Mediation’ (n 28) 151.

voluntariness, and the parties can always go or return to court if they want to.³² It is a form of adjunct to the court process. Even if we accept this compromise in the thought that it will help to increase the use of mediation or at least that it will narrow the scope of the dispute, the real focus must be kept on improving the rate of settlements achieved by mediation in order to enlarge access to justice without adding cost and time uselessly.

It appears therefore that the real question is not whether to implement more or less compulsion on mediation, but rather to focus on compulsory requirements that would strongly increase the potential litigants' awareness of the process and of its benefits. But before we address this question in Chapter 6, we must first take a deep look at the English Online Court project.

Indeed, England is taking a further step with its project of Online Court where mediation is no longer a process prescribed by the law or ordered by a judge and taking place outside the courtroom before or during proceedings with the possibility to always return to court if it fails, but rather it becomes part of the judicial process as a non-voluntary step integrated in the court process. Nextly we will describe the Online Court project with a particular focus on the recommendations on ADR, including mediation, in order to discuss afterwards the implications of such scheme in relation to mediation with comparative elements.

³² The Mediation Directive; Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08 *Alassini v Telecom Italia SpA* [2010] 3 CMLR 17, [2010] ECR I-221, ECLI:EU:C:2010:146, EU:C:2010:146, [2010] EUECJ; Case C-75/16 *Menini and Rampanelli v Banco Popolare Societa Cooperativa* [2017] EUECJ, EU:C:2017:457, ECLI:EU:C:2017:457.

5.2. The English Online Court project (OC): mediation as a non-voluntary step integrated into the court process

5.2.1. A new feature for the resolution of civil disputes

(a) The background

In July 2015, Briggs LJ, judge of the Civil Division of the Court of Appeal was commissioned by the Lord Chief Justice and the Master of the Rolls to undertake a review on the Civil Courts Structure in links with the HMCTS (HM Courts and Tribunals Services) Reform Programme which was launched in March 2015 and focuses on three main areas: (i) using IT to improve the issue, handling, management and resolution of cases, (ii) reducing reliance on buildings and rationalising the court estate and (iii) allocating aspects of the work currently done by judges to court officials under judicial supervision.³³

According to Briggs LJ, the ‘central assumption (...) which underlies both the Reform Programme and his review is that it is now technically possible to free the courts from the constraints of storing, transmitting and communicating information on paper’.³⁴ But the mission entrusted to Briggs LJ was also an opportunity to address more globally the issue of access to justice threatened by the massive withdraw of legal aid funding of civil litigation coupled with the ever-increasing complexity, both of law and civil procedure, and the disproportionate costs of English procedure.³⁵ Briggs LJ’s Interim Report (IR) on his review, setting out provisional recommendations, was published in January 2016. It was followed by further consultations and the Final Report (FR) was published on 27 July 2016.

Among the various recommendations the most radical proposal, which is also relevant for the present thesis, is the establishment of an online court for all money claims up to £25,000 to be launched by April 2020. It would not consist in digitising

³³ Briggs IR para 1.7.

³⁴ *ibid* para 1.14.

³⁵ *ibid* para 1.18.5.

an existing court. This court would provide ‘the opportunity to use modern IT to create for the first time a court which will enable civil disputes of modest value and complexity to be justly resolved without the incurring of the disproportionate cost of legal representation’.³⁶ It would also fully integrate ADR, including mediation, in the court process.

Before analysing the process, we need to replace in context the concept of online court and its link to ADR, including mediation. According to Briggs LJ, there is not in actual operation, anywhere in the world, a recognizable precedent for the OC,³⁷ even though a few countries have already launched programmes working in the same direction such as the Dutch *Rechtswijer 2.0* or the Canadian Civil Resolution Tribunal of British Columbia.³⁸

In England, although a number of tribunals already incorporated processes allowing parties to submit and decide claims online, such as the Traffic Penalty Tribunal,³⁹ the concept of a specific online court first emerged with the February 2015 report entitled ‘Online Dispute Resolution for Low Value Civil Claims’ (the ODR Report) by the ODR Advisory Group chaired by Professor Richard Susskind for the Civil Justice Council.⁴⁰

The ODR Report recommended the establishment of a new, internet-based court service, known as HM Online Court (HMOC) with a three-tier service. Tier One would provide to users an online evaluation in order to classify and categorise their problem, to be aware of their rights and obligations and to understand the options and remedies available to them. Tier two would provide online facilitators who would review papers and statements and help parties through mediation and negotiation. Tier Three should provide online judges who will decide suitable cases

³⁶ Briggs IR para 6.1.

³⁷ Briggs FR para 6.40.

³⁸ *ibid* para 6.41.

³⁹ Briggs IR para 5.132.

⁴⁰ Civil Justice Council (Online Dispute Resolution Advisory Group), ‘Online Dispute Resolution for Low Value Civil Claims’ (February 2015) 6 (The ODR Report).

or parts of cases on an online basis, largely based on papers submitted to them electronically as part of a structured process of online pleading.

The Report specifies that, although the HMOC:

(...) may be regarded and managed as a new division in the court system, its jurisdiction will not be like that of a physical court. Nor will it fully replace any existing court. While we anticipate that HMOC will have full jurisdiction over some types of disputes, we also expect, for other types, that parties will have the option to choose between HMOC and the conventional court system.⁴¹

The concept was also developed in another report published in April 2015 by the organisation JUSTICE which also envisages a three-stage structure. The first stage is an integrated online and telephone platform, very similar to the Tier One ODR Report, offering a first port of call for individuals with potential legal problems, as well as information, advice and assistance. At the second stage, the case would be taken to a dispute resolution officer called a Registrar to identify the relevant issues, the applicable law, the appropriate procedure and the evidence needed to resolve the case. Registrars would have authority to resolve as many cases as possible using ADR methods. At the last stage, registrars will refer to a judge only those cases where no other resolution other than a judicial one is likely to be effective or appropriate.⁴²

Although very close to the ODR Report, the JUSTICE Report seems to propose a broader approach. It is to be applied in any first instance proceedings rather than just the selected types of disputes suggested by the ODR Report and the registrars are carrying a broader range of tasks than the facilitators. Both have however introduced a radically new and different approach to the resolution of civil disputes. Indeed, the ODR Report states: 'one innovation here is bringing an ADR like procedure into the court system itself. This contrasts with traditional ADR which

⁴¹ *ibid* para 6.10.

⁴² JUSTICE, 'Delivering Justice in an Age of Austerity' (April 2015) Executive Summary (The JUSTICE Report).

historically, has been separate and outside the courts as an alternative to traditional litigation'.⁴³

Commenting on both reports, Prince observes:

There are innovative suggestions and recommendations to rely further on mediation techniques in the future and to completely revamp the civil justice system, proposing 'new models of dispute resolution' which will bring ADR and mediation out of the shadows and explicitly into the litigation process.⁴⁴

Briggs LJ goes even further with the use of ADR and adopts a variant of the three-stage structure originally proposed in the ODR Report and recommended in the JUSTICE Report.

(b) The Online Court Project (OC)

Briggs LJ, in his review of the future of the civil courts structure, suggests a vast range of proposals and recommendations other than an online court but for the purpose of the present thesis our focus will be on this key proposal and its implications on ADR, including mediation.

The new court has four main characteristics and is organised along a procedure which contains three main stages and recommends two pre-stages and by-passes. It also provides specific recommendations to promote private mediation.

(ba) Main characteristics

The new court has four main characteristics: it is (i) an online judicial structure, (ii) for money claims up to £25,000, (iii) compulsory for cases within its jurisdiction, (iv) with no necessity of a lawyer.

⁴³ The ODR Report para 6.7.

⁴⁴ Susan Prince, "Access to Court? 'Encouraging' Consumers to use Court-Connected Mediation in Small Claims and Other Cases" in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 79, 98.

(i) The introduction of the proposed OC is part of the digitization process proposed more globally in the HMCTS Reform Programme. However, the OC project would create a completely digital court separate from the present court structure. It will have its own simplified procedural rules rather than the CPR ones, to be easily accessible to litigants in person and to provide a less adversarial environment in which investigation by the court will form an important and distinctive part.⁴⁵ Its success will inevitably depend on digital assistance for those challenged by the use of computers.⁴⁶

(ii) The recommended jurisdiction of the OC would concern money claims up to £25,000 with substantial exceptions including most personal injury and professional negligence claims. It is observed that 'setting the limit at £25,000 will already capture a very substantial part of the business of the County Court, in terms of number of cases'.⁴⁷ Nevertheless, the FR suggests that an initial ceiling of £10,000 could be adopted as part of a soft launch of the new court.⁴⁸

(iii) Unlike the IR, the FR clearly anticipates that the OC will become compulsory for resolving cases within its jurisdiction, with provisions for complex and important cases to be transferred upwards to higher courts.⁴⁹ This means that parties will have no option to choose instead the conventional court system and that all claims within its competence will have to follow the three-stage process. Brigs LJ justifies this position mainly by arguing that it will impede litigants that can afford to use lawyers to have a procedural advantage in choosing the County Court rather than the OC.⁵⁰

(iv) The OC aims to be a civil court navigable by litigants without the need of a lawyer. However, the FR makes clear that it is not a design objective to exclude lawyers but rather that the underlying rationale is to make the new OC as far as

⁴⁵ Briggs IR para 6.18; Briggs FR para 4.37.

⁴⁶ Briggs IR para 6.58.

⁴⁷ *ibid* para 6.39.

⁴⁸ Briggs FR para 6.54.

⁴⁹ Briggs FR Recommendation 5.

⁵⁰ Briggs IR para 6.51.

possible equally accessible to legally represented litigants and litigants in person by providing the latter with investigatory and other assistance during the court process.⁵¹ In relation to the costs regime, although the process would not be free, the report recommends that it should be modelled on the one applicable to the Small Claims Track in order to be 'consistent with its objective of facilitating litigation without lawyers'.⁵² Therefore, it would not allow the recoverability of most legal costs but be limited to court fees and some other expenses.⁵³

(bb) The stages of the process

Cases processed through the OC would progress through three main stages and two recommended pre-stages.

The first stage would implement a largely automated interactive online triage process by which litigants would be assisted in identifying their case (or defence) online in terms sufficiently well ordered to be suitable to be understood by their opponents and resolved by the court. Litigants would be required at that stage to upload the documents and other evidence which the court will need for the purpose of resolution.⁵⁴ Stage 1 is likely to replace the pre-action protocols.⁵⁵ There will be by-passes around, or simplified routes through, Stage 1 for litigants with lawyers or legal department since they will not need triage.⁵⁶ Stage 1 is designed to give both parties a certain level of information about each other's case.

In the FR, Briggs LJ recommends to add two early stages embedded in Stage 1 in order to cover 'the whole ground', ie to check, prior to the triage stage, whether the claim issued is disputed or not.⁵⁷ A Stage 0 would alert potential court users to alternative forms of resolution, sources of free or affordable advice and basic

⁵¹ Briggs FR para 6.22.

⁵² Briggs IR para 6.60.

⁵³ *ibid.*

⁵⁴ *ibid* para 6.7.

⁵⁵ Briggs FR para 6.74.

⁵⁶ *ibid* para 6.23.

⁵⁷ *ibid* para 6.108.

commoditised legal guidance. A Stage 0.5 would be designed to include provision for a short exchange between the parties to find out whether there really is a dispute which the court needs to resolve, for example a claim form requiring an acknowledgment of service stating whether the defendant intends to contest the claim.⁵⁸

The second stage would involve a mix of conciliation and case management conducted partly online, partly by telephone, by a Case Officer, who will not have judicial power but who will be an experienced civil servant.⁵⁹ The Case Officer's primary function would be case management for resolution, ie identifying the most appropriate means of conciliation for each case and the best mode of determination of those cases which do not settle.⁶⁰ Beforehand, the Case Officer would conduct a rapid appraisal of online files compiled or contributed to by litigants in person, so as to ascertain the legal essentials of each case calling for resolution.⁶¹ More importantly, the Case Officer would also have the power to conduct mediation by telephone on the Small Claims Mediation Service (SCMS) model.⁶² However, he would not be entitled to conduct any other ADR within the OC process.⁶³ What is also excluded is the final determination of contests as to substantive rights and duties by the Case Officer.⁶⁴

Therefore, if the dispute cannot be settled by the Case Officer telephone mediation or by another external conciliation means which may include ODR, face-to-face mediation or judicial Early Neutral Evaluation (ENE) by a judge different from the trial judge,⁶⁵ litigants will be entitled to have their civil rights and duties, ie

⁵⁸ *ibid* paras 6.108, 6.110.

⁵⁹ Briggs IR paras 6.7, 7.15.

⁶⁰ Briggs FR para 7.22 (a).

⁶¹ *ibid* para 7.32 (d).

⁶² *ibid* para 7.22 (b).

⁶³ *ibid* para 7.22 (c).

⁶⁴ *ibid* Recommendation 24.

⁶⁵ *ibid* para 2.23.

substantive justice, finally determined by a judge applying the law (Stage 3).⁶⁶ In addition, some of the more routine and non-contentious work currently carried out by judges would be transferred to Case Officers.⁶⁷

In summary, the Case Officer is given the power, after an appraisal of the information given by litigants at Stage 1, to decide the mode of determination of the case in either conducting himself a telephone mediation, directing litigants to an external form of conciliation including private mediation, or sending the case directly to the judge. A party aggrieved by the Case Officer's decision is entitled to have the decision reconsidered by a judge at Stage 3.

Reconsideration of the Case Officer's decision directing the parties' mode of determination or resolution of disputes about litigants' substantive rights and duties, should be made by judges by whichever of a traditional trial, a video hearing, a telephone hearing or on the documents (or by some combination of those) is best suited to the individual case.⁶⁸ Lastly, the FR anticipates restriction of the right to reconsideration by imposing a tight time-limit and perhaps some sanctions if an application for reconsideration is found to have been abused. The report also highlights the idea that reconsideration by a judge must be exceptional.⁶⁹ Decisions made by the judge may be subject to an initial appeal to the County Court and a second appeal to the Court of Appeal. The FR recommends that the procedure for first appeals from the OC should be laid down in the new OC rules, not in the CPR.⁷⁰

Four main characteristics, three main stages and two recommended pre-stages: this is the structure of the OC under the Briggs reports. They also contain specific recommendations to promote private/traditional mediation.

⁶⁶ Briggs IR para 7.11.

⁶⁷ *ibid* para 12.9.

⁶⁸ Briggs FR Recommendation 24.

⁶⁹ *ibid* paras 7.37 and 7.38.

⁷⁰ *ibid* Recommendation 21.

Indeed, the reports observe that mediation in England as an alternative to determination of disputes in court is at best patchy, ie broadly satisfactory for small claims and high value claims but underused for claims of moderate value.⁷¹ Briggs LJ believes that there is a need to increase mediation within and beyond the confines of the OC and recommends to boost pre-issue ADR in re-establishing a court-based out-of-hours private mediation service in County Court hearing centres and the National Mediation Helpline.⁷² Indeed, the court service used to provide free space after court hours for short mediations, and then funded the National Mediation Helpline in 2005 which provided low-cost, fixed-fee, time-limited mediations for disputes in civil and commercial cases. Both were abandoned, the first one being considered less satisfactory than a nationally organised service and the second one as too costly to administrate.⁷³ Instead, the Ministry of Justice set up in 2011 an Online Directory which can be used by the parties to find an ADR provider operating in their local area which is still in operation.⁷⁴

5.2.2. The implications of the OC scheme in relation to mediation

The discussion is not intended to be a debate over the value or appropriateness of resorting to IT to improve our judicial systems. It is assumed and shared with a majority of commentators that, despite some technical and structural challenges,⁷⁵ implementing online judicial resolution should be beneficial to increase and simplify access to justice.

The debate becomes more complex when addressing the question of integrated mediation. Indeed, the OC project, alongside the two previous reports referred to above,⁷⁶ gives a whole new place to mediation in fully integrating the process in the

⁷¹ *ibid* para 2.24.

⁷² *ibid* Recommendation 2.

⁷³ *ibid* para 2.25.

⁷⁴ Ministry of Justice, 'Civil Mediation- Find a civil mediation provider', <civilmediation.justice.gov.uk> accessed 2 December 2016.

⁷⁵ Briggs FR para 6.11.

⁷⁶ The ODR Report; The JUSTICE Report.

judicial procedure. A mediation process is not any more an adjunct to court, ie a process ordered by the law or by the judge to take place outside the courtroom with the possibility for the litigants to return to the court if it fails. As will be explained below, it is likely to become a non-voluntary step integrated in the court process.

It will be argued that the OC project gives an uncomfortable place to mediation, overuses the concept itself and redistributes radically the principles and modes of conflict resolution for litigants.

(a) Mediation: an uncomfortable position

The OC project by integrating mediation at Stage 2 puts mediation in an uncomfortable position because it leaves unresolved (i) the extent/nature of the Case Officer's power, (ii) the issue of possible sanctions towards litigants and (iii) the type of mediation recommended.

(i) According to Briggs' FR, litigants will have the obligation to use the Online Court if their case falls within the scope of its jurisdiction. It implies that not only litigants will have to comply with the online triage process but also that they will have to comply with the mode of resolution 'recommended' by the Case Officer, ie either a telephone mediation conducted by the Case Officer in court, an external form of conciliation including private mediation or direct judicial resolution.

The OC project presents Stage 2 as a step to make conciliation (ie all types of ADR) a 'culturally normal part of the civil court process'⁷⁷ where the Case Officer would choose the most suitable conciliation process for each case 'in conjunction' with the litigants themselves.⁷⁸ At the same time, the Briggs reports make a clear distinction between the use of mediation at Stage 2 and the other types of ADR. The Case Officer, along with its case manager function, will have the possibility to conduct a telephone mediation in person on the existing Small Claims Mediation model, while the other

⁷⁷ Briggs IR para 6.13.

⁷⁸ Briggs FR para 6.113.

conciliation methods (such as ODR, private mediation, ENE) are likely to be outsourced to ADR specific entities.⁷⁹

Although Briggs LJ mentions that conciliation measures available to users at Stage 2 should not be limited to short telephone mediation as there may be cases at all levels of value which would benefit more from some other kind of conciliation process, he nevertheless presents telephone mediation as 'an essential part of the stage 2 conciliation offering' and anticipates that the majority of the cases will be settled at this stage by the Case Officer.⁸⁰ Mediation would then become the norm, the OC's main dispute resolution tool. This development would be in line with the ODR Report and the JUSTICE Report mentioned above, implementing ADR, including mediation, at a second stage before the case can be referred to a judge. Would it however introduce mandatory participation in mediation?

It is not expressly specified if the Case Officer will have the power to impose a telephone mediation on litigants at Stage 2 against their will. However, this can be deduced from the other procedural elements. Indeed, the Case Officer will have the power to decide the mode of resolution of the case and a party aggrieved by the decision will be entitled to have it reconsidered by a judge. Therefore, the idea that the choice of the resolution mode, including telephone mediation, will be made 'in conjunction' with the parties, ie with their agreement, is hardly conceivable in practice. As a result, in the OC, the power to order mediation, traditionally only performed by judges, is transferred to a Case Officer.

In summary, it seems that, under this current design, litigants will have the obligation, if 'recommended' by the Case Officer to start the process of resolution of their dispute with a telephone mediation, the OC's main dispute resolution tool.

(ii) In addition, Briggs LJ suggests to impose 'some sanction if an application for reconsideration is found to have been abused'.⁸¹ Although it does not mention any

⁷⁹ *ibid* para 6.112.

⁸⁰ *ibid*.

⁸¹ *ibid* para 7.37.

specific sanction, this proposition echoes the terminology used in the policy of cost sanctions currently in place in England. The idea is relayed by some authors who suggest that cost sanction should apply for 'unreasonable behaviour during Stages one and two'⁸² or propose that in order 'to reinforce the significance of constructive engagement and the need to behave reasonably, judicial scrutiny should be linked to the court's power to penalise parties in costs'.⁸³ The risk of such proposal would be to replicate the current policy of cost sanctions within the OC and install another source of 'implied compulsory mediation'⁸⁴ where litigants would feel obliged to accept the resolution mode 'recommended' by the Case Officer to avoid cost sanctions in the future.

As suggested by Shipman, a judge's approach today in relation to the cost sanctions regime as to whether a refusal is unreasonable depends on the particular judge's view of justice and the place of ADR in the resolution process.⁸⁵ The same latitude given to judges within the OC will leave litigants in a similar uncertainty about their judicial process, as can be observed today with the policy of cost sanctions. This could be even more pronounced since the OC is expected to be used largely by litigants in person.

As will be developed in the next chapter, the present study will suggest a separate set of sanctions linked to the proposed requirement to explore mediation at a pre-action stage. It will be distinct from the policy of cost sanctions currently in place based on the discretionary judicial scrutiny of the reasonable attitude of the parties. It is expected that these sanctions put in place at a pre-action stage will bring a large number of potential litigants voluntarily at the mediation table and that the policy of cost sanctions will become exceptional.

⁸² Pablo Cortés, *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 456.

⁸³ Masood Ahmed, 'A Critical View of Stage 1 of the Online Court' (2017) 36/1 *Civil Justice Quarterly* 12, 21.

⁸⁴ Ahmed, 'Implied Compulsory Mediation' (n 28) 151.

⁸⁵ Shirley Shipman, 'Court Approaches to ADR in the Civil Justice System' [2006] *Civil Justice Quarterly* 25 (Apr) 181, 210.

(iii) Lastly, the uncomfortable position of mediation lies in the parallel made by Briggs LJ between the OC project and the current successful SCMS model.⁸⁶ In the IR, after having recalled the success of both the Financial Ombudsman Service and the SMCS, he finally chooses to recommend the latter as likely to be quicker, cheaper and to make less demand on the Case Officer by way of legal qualifications or experience.⁸⁷

However, this service, which is as of today the only mediation service provided by the civil courts in England with mediators employed by the HMCTS, and is routinely operated by telephone in all county courts for defended small claims cases up to the value of £10,000, presents two significant differences with the proposed OC telephone mediation process. Firstly, it is formally subject to the consent of the parties. Indeed, in the Directions Questionnaire, the parties declare if they agree to the case being referred to the SCMS. Only if they agree will the case be referred to it. Secondly, the process is entirely gratis which constitutes a real incentive and a way of rewarding litigants for their choice. If such characteristics are not transposed, the attractiveness of the present scheme may be difficult to replicate. In addition, Briggs LJ report that the SCMS scheme is successful,⁸⁸ however, the scheme seems to stagnate.⁸⁹ According to Prince, it could be explained by the fact that the process 'is similar to a face-to-face shuttle mediation in that the mediator moves between the parties but there are no initial introductions and the parties never speak directly to each other'.⁹⁰

But Briggs LJ goes even further by claiming the superiority of his project over the current small claims process with three arguments. Firstly, it enables the parties to communicate details and evidence about their case at the earliest possible stage, therefore providing a substitute for the pre-action protocols process. Secondly, it

⁸⁶ Briggs IR para 7.24.

⁸⁷ *ibid* paras 7.26, 7.27.

⁸⁸ *ibid* para 2.30.

⁸⁹ Susan Prince, 'ODR Advisory Group Small Claims and ODR' (January 2015) <www.judiciary.gov.uk/wp-content/uploads/2015/03/odr-small-claims.pdf> accessed 13 June 2016, 3.

⁹⁰ *ibid* 5.

opens up opportunities for conciliation of their claims, whether as the simple result of the exchange of the Stage 1 materials, or by mediation or ENE well in advance of trial. Thirdly, it enables the case, if not resolved by conciliation, to be managed and made ready for trial.⁹¹ Finally, his project is also comparable in many ways to the Financial Ombudsman Service with the same tri-functions of triage, assisted settlement and adjudicated decision although external to the judicial process.⁹²

Overall, embedded in Stage 2 of the OC procedure as its main resolution tool, mediation is therefore given an uncomfortable position. A clarification of the procedure to be put in place is therefore needed in order to be able to assess whether or not England is going down the path of compulsory mediation (explicit or implied) through this project.

(b) Mediation: a misused concept

The OC Stage 2 places mediation in a situation whereby its original features of voluntariness, neutrality and confidentiality are likely to disappear. Therefore this situation calls for discussion both in terms of contents (i) and semantics (ii).

(i) As developed in Chapter 1, voluntariness is the essential element of mediation. It covers two aspects of the mediation process: the voluntary participation of the parties, which guarantees their freedom of choice, and the voluntary reach of an agreement, which leaves its outcome in their hands. As observed throughout the present thesis, the first aspect has been constantly challenged in Europe over the last decade whereas the second aspect has been left untouched. However, many commentators have justified the implementation of mandatory participation in mediation as a way to increase the use of mediation overall.

This assumption is contradicted by actual studies which demonstrate that implementing mandatory mediation increases the level of participation but has no

⁹¹ Briggs IR para 6.11.

⁹² Pablo Cortés, 'The Online Court: Filling the Gaps of the Civil Justice System' (2017) 36/1 Civil Justice Quarterly 109, 120.

major effect on the rate of settlements.⁹³ This confirms that to compel parties to participate in mediation, which is in fact quite the opposite of the concept of mediation, may be unproductive.⁹⁴ Although rarely formally implemented in Europe, it is nevertheless being experienced in a few countries under various forms. The likely imposition made on most litigants to mediate by telephone with a Case Officer during the court process before having any access to a judge, would confirm the departure from the traditional concept of mediation in terms of voluntariness.

A further central characteristic of mediation is the intervention of a neutral third party chosen by the parties to facilitate with neutrality and through a structured process the resolution of their conflict. Even if traditional mediation can offer different levels of implication of the neutral third party, varying from no evaluation to the expression of the merits of the case by the mediator, the profile of the third party proposed in the OC project differs somewhat from a regular mediator. In the new scheme, the third party would be the Case Officer, a civil servant employed and largely managed by the HMCTS. The report insists that the Case Officer would be independent, answerable to the Lord Chief Justice and would receive mediation training.⁹⁵ However, a Case Officer cannot be considered on the same footing as a traditional mediator from the private sector chosen freely by the parties. Therefore, in the proposed scheme, both the process and the third neutral party will be imposed on the parties.

Finally, it is important to raise in this context the issue of confidentiality, which in principle runs in any mediation, and implies that the mediator and the parties keep confidential what happens during the process and protect it from disclosure. Not only the issue will have to be inserted in a new digitised environment but the principle of confidentiality, upon which mediation is dependent for its success, will have to be addressed at Stage 2 of the process to clarify the position of the Case Officer in his capacity of both mediator and case manager. Also, it is not specified whether the Stage 3 judge will have access to Stage 2 discussions in the same way

⁹³ Genn, Riahi and Fleming (n 18) 148.

⁹⁴ Genn (n 6) 404.

⁹⁵ Briggs FR Recommendation 28.

as is currently happening in the Civil Resolution Tribunal in the Canadian province of British Columbia.⁹⁶ Such access would weaken the principle of confidentiality attached to any mediation process in Europe. In summary, the mediation process devised in the OC project departs significantly from the concept of traditional mediation.

(ii) In this context there is an urgent need to rename the process for many reasons. First of all, mediation will never survive if we continue to use it as:

(...) a container into which people pour (and sometimes extract) collaborative law, citizen review panels, deliberative democracy, settlement hearings (in and out of court), collaborative governance, family conferencing, peer mediation, settlement weeks, joint fact-finding, and appreciative inquiry.⁹⁷

The OC project gives one more example of an inappropriate use of the term civil servant as a first step within the court process. The concept of mediation needs to be narrowed again to its original feature and only used in an out-of-court context to allow citizens to have a clear and unique understanding of it. It does not mean that it cannot be combined with other ADR methods or adapted but it implies that, if we want citizens to naturally recourse to traditional mediation outside the court to resolve their conflict, there is a need to clarify the wording in this area. In labelling a non-voluntary in-court resolution process 'mediation', the change of culture that is called by all will never happen.

Nolan-Haley summarizes the situation in her last article when she writes:

Also clouding the landscape are multiple permutations of mediation - other processes out there labelled mediation but in fact very different from the traditional understanding of mediation as a voluntary process based on party self-determination.

⁹⁶ Victoria McCloud, 'The Online Court: Suing in Cyberspace - How the Online Court Challenges Us to Raise our Legal and Technological Game so as to Ensure Access to Justice' (2017) 36/1 Civil Justice Quarterly 34.

⁹⁷ Peter Adler, 'Predicting the Future of Mediation' (Mediate, 28/11/2014) <www.mediate.com/articles/AdlerFuture.cfm> accessed 22 November 2015.

and concludes that it leads inevitably to confusion 'with parties who have different expectations of the process'.⁹⁸

Therefore, there is a need to clarify the use of the term mediation outside the court system but, as ADR processes tend to be more and more integrated within the court system, there is also a need to find other ways to label them to make litigants understand that this is not traditional mediation that is offered to them but another type of resolution scheme that is halfway between a non-judicial and a judicial process. Mediation as it is used in the new project should be renamed "telephone dialogue assistance". The same cautious approach must be equally taken toward the term 'conciliation' although it is clearly defined in the Online Court project as 'an umbrella expression used in the report to include all types of ADR and also conciliation services provided (or to be provided) by the court service'.⁹⁹ However, the term 'conciliation' is often used to designate mediation and/or at least an out-of-court conventional process. Therefore, it would probably be beneficial for a good understanding of the project to call Stage 2 'Facilitative Stage'¹⁰⁰ instead of 'Conciliation Stage', ie a stage where the Case Officer would advise in real conjunction with the parties the appropriate dispute resolution mode to resolve their dispute.

In addition, the OC project raises new issues in relation to the integration of ADR, including mediation, as part of the judicial process.

(c) A radically new and different approach to the resolution of civil disputes

One of the key findings in the IR was that there is a clear and pressing need for the establishment of an online court to give effective access to justice for more straightforward and modest value disputes without disproportionate costs and delay. In the FR, Briggs adds that the 'Online Court project offers a radically new and

⁹⁸ Nolan-Haley, 'Mediation: The Best and Worst of Times' (n 11) 735.

⁹⁹ Briggs IR Glossary 130.

¹⁰⁰ The ODR Report para 2.3.

different procedural and cultural approach to the resolution of civil disputes',¹⁰¹ leading to a less adversarial, more investigative court which is already the norm in Europe.¹⁰²

Indeed, its structure and the involvement of Court Officers to manage cases, possibly to a resolution through telephone mediation, is in line with this approach in that it promotes a culture shift in the management of disputes. However, the choice made to oblige litigants to use ADR within the judicial process itself raises many issues, including that of the ability of the new system to solve a vast majority of cases during proceedings without having the possibility to have direct access to a judge.

But, before addressing the issue of access to judicial resolution raised by the OC project in (iii), we will have a look at (i) what is happening in France and Italy towards an integrated ADR in the court system and (ii) the implications of such approach on traditional mediation.

(i) Looking abroad, it can be confirmed that the experiences of compulsory judicial ADR conducted in Europe, and more precisely in France, have so far led to mixed results. In France, as a general principle, the judge may try to conciliate the parties at any stage of the proceedings but the attempt is left at the judge's discretion and is very rarely employed according to the latest available data.¹⁰³ In the area of labour law, French legislation requires a conciliation attempt conducted by an employment judge as a mandatory preliminary phase of the court proceedings¹⁰⁴ but the results are very poor as only between 5 and 7% of the cases are settled at that stage.¹⁰⁵

Conversely, a recent report observes that in civil matters, when conciliation is delegated by the judge to the *conciliateur de justice*, to be conducted outside the

¹⁰¹ Briggs FR para 12.6.

¹⁰² *ibid* para 6.42.

¹⁰³ See para 3.2.1(a), 114.

¹⁰⁴ Code du Travail arts L1411-1(2) and R1454-1.

¹⁰⁵ Ministère de la Justice, 'Rapport Lacabarats, L'avenir des juridictions du travail: Vers un tribunal prud'homal du XXIème siècle' (16 juillet 2014) <http://www.justice.gouv.fr/publication/rap_lacabarats_2014.pdf> accessed 20 July 2015, 8.

courtroom on a conventional basis, 58.9% are settled. The latest report of the French Ministry of Justice attributes the low development of judicial conciliation to the fact that the French system of dispute resolution is mainly geared towards an adversarial system where the judge plays a central role. Indeed, the culture of settlement is much wider and deeper implemented in common law countries like England than in civil law countries.¹⁰⁶

However, the situation is also evolving in these countries as France has very recently introduced, for any civil claim under 4,000 euros, the obligation for the parties to attempt a conventional conciliation with an independent *conciliateur de justice* in order for the claim to be admissible in court.¹⁰⁷ A comprehensive review of civil justice is also taking place in Italy with the proposition to integrate mediation or assisted negotiation for value claims of 50,000 euros or less.¹⁰⁸

It seems that, regardless the legal culture and system, Europe is moving forward to an investigative approach, imposing a form of ADR and integrating it into the judicial process as a preliminary phase where the judge is no longer playing the central role but rather sharing it with other judicial providers (eg conciliateurs de justice, case officers).¹⁰⁹

This trend to oblige litigants to attempt ADR as an integrated step in the court process also leads to some evident concerns mainly related to the future of private mediation and to the right of access to a court.

(ii) Regarding private mediation, Briggs LJ explains in his report that:

(...) further research and consultation has suggested that the extent to which mediation has reached a satisfactory steady state, as an alternative to

¹⁰⁶ Ministère de la Justice, 'Rapport sur le développement des modes amiables de règlement des différends' (Inspection Générale des Services Judiciaires, Ministère de la Justice, Avril 2015, No 22-15)
<www.justice.gouv.fr/publication/2015_THEM_Rapport_definitif_reglement_conflits.pdf> accessed 14 June 2015.

¹⁰⁷ Loi 2016-1547 art 4.

¹⁰⁸ Prince, 'Access to court?' (n 44) 88.

¹⁰⁹ Briggs FR para 6.42.

determination of disputes in court is, at best, patchy in the civil courts of England and Wales.

and adds:

Since there is a general consensus (which I share) that it is usually better for parties to civil litigation to be empowered to settle their own disputes, than to have them determined in court, I consider that, both within and beyond the confines of the proposed Online Court, steps ought actively to be taken to re-establish or replace those now discontinued services on a much broader basis than is currently represented by the Small Claims Mediation Service.¹¹⁰

He then recommends, in order to boost the use of private mediation outside the court process, to re-establish a court-based out-of-hours private mediation service in County Court hearing centres prepared to participate along the lines of the service which existed prior to the establishment, and then termination, of the National Mediation Helpline.¹¹¹

In other words, according to Briggs LJ, the increase of private mediation would be perfectly compatible with, and even beneficial to, the integrated mediation proposed by the OC Stage 2. This seems however unlikely, and even contradictory to his own findings. Indeed, he reports that it has been suggested by the mediation community, although he admits that he was not able to verify this evidence statistically, that the presence of a free SCMS is acting as a discouragement to small claims parties to mediate (at the cost of paying a qualified mediator) before issuing proceedings.¹¹²

The same situation may occur in an even more pronounced way with the OC. Why would parties attempt private/conventional mediation before going to the OC if they know that they will automatically be directed to an ADR process - probably telephone mediation - by the Case Officer at Stage 2? And because Stage 2 is not free,

¹¹⁰ *ibid* para 2.24, 2.26.

¹¹¹ *ibid* para 2.25.

¹¹² *ibid* para 2.27.

why would they take the risk to pay twice if their attempt at out-of-court mediation is unsuccessful? In fact, the solutions proposed to reinstall both a court-based out-of-hours private mediation service in County Court hearing centres and a National Mediation Helpline might lead, if these services are not free of charge, to a similar outcome as when they were in operation in the past, ie parties were more likely to use the free Small Claims Mediation Scheme.¹¹³

The integration of automatic in-court mediation within the court system inevitably presents a risk for the future use of private mediation, although the project provides that the Case Officer will be able, at Stage 2, to refer some cases to a private mediator or another form of ADR. It is likely that the vast majority of cases will be processed through a short telephone mediation as, according to Briggs LJ, it will be quicker and cheaper, and will make less demands on the Case Officer by way of legal qualifications or experience.¹¹⁴

(iii) The OC project also introduces a new distribution of the modes of resolution before the civil court which challenges the principle of access to justice.

Access to court is considered to be one of the primary element of the rule of law. In English law the principle was articulated by Phillips LJ as ‘the foundation of the rule of law’ and the right of access to a court is guaranteed under article 6 of the ECHR and article 47 of the CFR. ‘So citizens must have access to the courts to have their claims and their defences determined by judges in public according to the law’.¹¹⁵

Access to court and access to justice used to form one unique principle. However, it has been progressively transformed with the inclusion of ADR, including mediation, into modern civil justice. The principle of access to justice, fragmented today, includes now not only the right of access to court but equally the right of access to ADR mechanisms. This situation has raised another fundamental question over the

¹¹³ Susan H Blake, Julie Browne and Stuart Sime, *A Practical Approach to Alternative Dispute Resolution* (3rd edn, Oxford University Press 2014) para 18.12.

¹¹⁴ Briggs IR 7.27.

¹¹⁵ Lord Neuberger, ‘Justice in the Name of Austerity’ (Tom Sargant Memorial Lecture, Cambridge, 13 October 2015) <www.supremecourt.uk/docs/speech-131015.pdf> accessed 11 August 2016 para 23.

compatibility of mandatory mediation, ie when parties are compelled either by law or by a judge to attempt mediation, with the fundamental right of access to court.

Indeed, over the last fifteen years there has been an ongoing debate, especially through the central decisions of *Halsey*¹¹⁶ in England and *Alassini*¹¹⁷ before the CJEU on the merits of coercive mediation and, more specifically, on whether it obstructs the right of access to court. As a matter of fact, after several years and the introduction of the Mediation Directive, the debate reached a sort of consensus in Europe on the idea that mandatory attempt at mediation would not be a breach of article 6 of the ECHR, provided the parties can still continue with court proceedings if they fail to reach a settlement and provided it does not cause substantial delay in bringing legal proceedings, suspends the period for the time-barring of claims and does not give rise to more than a minimal cost for the parties.¹¹⁸

But this compromise only targeted mandatory mediation as an adjunct to court, ie a process that might take place before or during the court process when prescribed by the law or ordered by a judge, as it would refer litigants to a mediation conducted by a private mediator outside the court. This would, at worst, delay and add some costs to the dispute but would always guarantee litigants an access to court if mediation failed.

With the Online Court, the picture is quite different. Mediation at Stage 2 is not any more an adjunct to court but is integrated and processed within the court proceedings as a preliminary step to access the judge. Therefore, the access to court might not only be delayed or more expensive but above all restricted. Indeed, in the Briggs scheme, it is expected that request for reconsideration of the case by a judge will become exceptional.¹¹⁹ There will be no possibility given to litigants to submit directly their case to a judge at any time of the proceedings. Instead they will need to wait for the Case Officer's decision and then, only afterwards, exercise their right

¹¹⁶ *Halsey* (n 15).

¹¹⁷ *Alassini* (n 32).

¹¹⁸ *ibid* para 67.

¹¹⁹ Briggs FR para 7.38.

of reconsideration and/or resolution. Also, in case of judicial submission, it is not so clear whether the judge at this stage will only reconsider the decision of the Case Officer that determines the mode of resolution, or if the judge will be entitled to resolve the case.

As a result, with this process, the situation appears clearly different from the European consensus mentioned above since the clear majority of cases would be considered for ADR, including mediation, first and foremost before being considered for judicial determination. The free right of access to a judge is now very much narrowed, subject to a Case Officer's decision and not even clearly guaranteed to the litigant.

The debate is not whether the parties have the right of access to court but rather, how do they exercise their right of access to a judge? How do we combine the new scheme with the fundamental principles mentioned above? If the OC process was confirmed as designed today, England could be facing a contradiction between the respect of any citizen's right to go to court to vindicate or to defend a legal claim and the obligation for litigants to attempt mediation or any other form of ADR before exercising their right to judicial resolution. In some way, the debate over the *Halsey* case would be revived.

The solution could lie in allowing litigants after Stage 1 to choose either to try Stage 2 or to go directly to the judge at Stage 3 if they are not willing to use any form of conciliation. This would preserve the right of access to judicial resolution without damaging the possible use of in-court and out-of-court ADR, including mediation. However, this solution would require to change the layout of Stage 1 to oblige potential litigants to receive information and to consider mediation at a pre-action stage, as it will be developed in the next chapter.

Conclusion

The present chapter has firstly recalled the controversial debate over the issue of mandatory participation in mediation in Europe, pointing out its low results in terms of settlements and its very few implementations in practice in the court context for civil and commercial matters in the three countries of investigation. However, the debate on the implementation of mandatory participation in mediation seems to be relaunched by the OC project presented in the Briggs reports. Indeed, the project which aims to provide ‘the opportunity to use modern IT to create for the first time a court which will enable civil disputes of modest value and complexity to be justly resolved without the incurring of the disproportionate cost of legal representation’,¹²⁰ contains the key proposal to fully integrate facilitation and mediation in the court process.

Under the current design of the project, litigants will have the obligation, if ‘recommended’ by the Case Officer, to attempt in the first place a telephone mediation to resolve their dispute. It is anticipated in the Briggs reports that mediation would become the norm, the OC’s main dispute resolution tool. Therefore, it seems that the OC would require the majority of litigants to attempt a telephone mediation before being able to consider judicial resolution, although the project needs to clarify if the decision to mediate will be left at the discretion of the Case Officer. It raises however some worrying issues addressed in the present chapter. Not only does it affect the concept and the semantic of mediation but it threatens also the future of out-of-court mediation, and more importantly questions the fundamental issue of access to judicial resolution.

Such concerns could call into question the viability of the OC project itself as it is presently designed, hence the need to consider today how to modify it and to adapt it to ensure its full success.

¹²⁰ Briggs IR para 6.1.

At this stage, the present study advocates for a more flexible scheme in relation to mediation with the following recommendations that:

- at Stage 2 the Case Officer's power is limited to recommend the mode of resolution rather than to impose it on the parties;
- at Stage 2 the words 'telephone mediation' be changed to 'telephone dialogue assistance' to make clear that it is not mediation but a form of integrated ADR stage, and rename 'conciliation stage' into 'facilitative stage', to clarify it as an umbrella term;
- at any stage during the court process a stay of proceedings may be granted to the parties to let them, if they wish to, go to private mediation or any other form of out-of-court ADR;
- the litigants are given the right to skip Stage 2 after Stage 1 in order to have their case directly submitted to the judge for judicial resolution at Stage 3.

The next chapter will take the discussion even further in proposing to promote mediation only through mandatory information and mandatory consideration, and will consider whether this solution is somehow compatible with the actual OC project or if it is possible to combine them.

CHAPTER 6
AN EXPANDED USE OF MANDATORY MEDIATION INFORMATION
AND CONSIDERATION IN ENGLAND:
A PROPOSAL FOR PROMOTING MEDIATION

Introduction

Chapter 5 showed that one of the three forms of non-voluntary mediation identified in the present study, ie mandatory participation in mediation, when either used as an adjunct or integrated in the context of court litigation, raises serious concerns. Indeed, in addition to giving very low results in terms of settlements, it also distorts the concept of mediation, threatens the use of traditional ADR, including mediation, and challenges the principle of access to court. At the same time, there is an urgent need to address the problem of expanding legal costs (especially in England), also to reduce the number of cases and the length of judicial proceedings (especially in Italy or France) and therefore to find solutions to increase the stagnant use of out-of-court mediation in Europe as an ADR method.

This chapter intends to demonstrate that the best strategy to bring cases to mediation would be to oblige litigants to be aware of mediation and to consider its use in the context of court litigation. In other words, the proposal would be to impose the two other forms of non-voluntary mediation identified in the present study (information and consideration) in order to promote mediation while at the same time preserving the parties' freedom to go either to out-of-court mediation or to judicial resolution. England would then go down the path of mandatory 'exploration' of mediation for all civil and commercial disputes rather than adopting mandatory 'imposition' of mediation.¹²¹

The first part of the chapter will demonstrate that mandatory mediation information and consideration is the only realistic option that reconciles theoretical and practical concerns about the use of mediation in the context of court litigation. To

¹²¹ Neil H Andrews, *Andrews on Civil Processes - volume 1: Court Proceedings* (1st edn, Intersentia Publishing Ltd 2013) para 3.28.

this end, we will consider what is currently in place in England, France and Italy, and what are the different proposals and the best ways to achieve it. We will also examine if it can be combined with the Online Court project. The second part of the chapter will argue that such option will not be efficient if appropriate sanctions are not put in place. It will inevitably lead us to question the policy of cost sanctions currently in place in England and try to find a more appropriate and consistent approach.

6.1. The current situation in England in a comparative perspective and in light of the Online Court project (OC)

The new concept of non-voluntary mediation presented in this study distinguishes mandatory participation from mandatory consideration and mandatory information. Previous chapters have given a clear definition of mandatory participation (frequently named mandatory mediation) as the situation where the parties in a court context are compelled to attempt a full mediation process. The decision to reach a settlement always stays voluntary.

Mandatory consideration and mandatory information are two different forms of non-voluntary mediation which have been considered in Chapters 3 and 4. Their definitions are recalled below. The present study argues that they are the best options for a better and wider implementation of mediation in our legal systems. But before explaining that choice, their current scope in England and abroad will be recalled.

6.1.1. Mandatory mediation information and consideration: two interlinked categories

Mandatory information on mediation has been defined previously as the obligation made to the parties in a court context to be informed about mediation. The more comprehensive the information, the easier the potential litigant will be able to make a decision (advantages, cost, process, length, etc). In this way, every party who intends to bring an action is required to be aware of the mediation option without

being forced to consider its participation in it. The requirement on information tackles the lack of awareness of the public observed in all of Europe on the possibility to use mediation instead of going to court. It has been observed¹²² that there is no express scheme in place today in the three countries of investigation that solely forces potential litigants to inform themselves about mediation. It is either implied by the provisions concerning mandatory consideration of or participation in mediation,¹²³ or coupled with the obligation to consider mediation.¹²⁴

However, it is worth separating the obligation of information which differs in content from the obligation to consider mediation. Indeed, the Mediation Directive has treated separately the question of information to the public.¹²⁵ Recently, a study from the European Commission confirms the need for each Member States to consider ‘the feasibility of introducing an obligation to inform potential parties to a dispute about mediation and its advantages’.¹²⁶ Furthermore, such obligation of information on mediation has been already formalized for some extra-judicial providers such as lawyers or traders. For example, in England and in Italy, lawyers must inform their client about the possibility to use mediation and its benefits.¹²⁷ The Consumers ADR Directive relates to the issue of information separately when requiring traders to inform consumers about consumer ADR.¹²⁸

Mandatory consideration of mediation is the obligation for the parties in a court context to consider whether mediation could be the appropriate resolution method to resolve their dispute. It has been shown throughout the present study that consideration is expressly required under various forms in the context of our judicial systems. For example, parties can be asked to make a statement and/or to fill in a document stating that they have considered the use of ADR prior to or at the

¹²² See ch 3, 88

¹²³ eg Pre-action Protocols and Directions Questionnaires in England.

¹²⁴ eg Informative component in Mediation Information and Assessment Meetings (MIAMs) in England, Pre-action informative meeting in Italy.

¹²⁵ The Mediation Directive art 9.

¹²⁶ Study for Evaluation and Implementation of the Mediation Directive 80.

¹²⁷ CPR Forms N180/N181; Decreto 28/2010.

¹²⁸ The ADR Directive art 13; The ODR Regulation.

early stage of the proceedings. It is the case in England with the pre-action protocols which require parties to state their case, exchange documents and indicate whether or not they have considered the use of ADR.¹²⁹ Further, during the judicial process, at the time of allocation, parties will have again to answer the same question by completing the Directions Questionnaire.¹³⁰ In France, since 2015, any civil claim filed in court must mention the steps taken by the parties to try to reach an amicable resolution of the dispute prior to the commencement of proceedings.¹³¹

Mandatory consideration of mediation can also be organized around a first mediation meeting with either an opt-in mechanism, which means that litigants must attend a first mediation meeting and only afterwards decide to start or not a formal mediation process (eg family MIAM in England), or an opt-out model in which they must attend the first meeting as part of a formal mediation process but are not obliged to stay for the full procedure and have the option to withdraw from it after this first stage (eg informational mediation meeting in Italy). Such requirement of consideration can also be implied by the law and/or the judiciary, as in England with the policy of cost sanctions. Whatever form or model is used, it forces parties to consider their eventual participation in a mediation procedure but is distinct from an obligation to participate directly in the full process.

It has been described in Chapter 4 that in England mandatory consideration of mediation is often associated with mandatory participation in mediation, more specifically in the context of the policy of cost sanctions.¹³² However, the two notions are very different and mandatory consideration has many more points of convergence with mandatory mediation information than with mandatory participation.

Indeed, mandatory consideration of mediation in practice, as mentioned above, often integrates mandatory information, especially when consideration is required

¹²⁹ PD Pre-Action Conduct.

¹³⁰ CPR forms no 180/N181.

¹³¹ Décret 2015-282.

¹³² See para 4.1.3. (a) 134ff.

during a first mediation meeting aiming at giving the parties the possibility of making an informed decision. For example, the family MIAMs in England or the informational mediation meeting in Italy, both combine information and consideration/assessment. Even when there is no mediation meeting, consideration implies prior information on mediation before accepting to embark on a full mediation process (eg English policy of encouragement to ADR). When coupled together, either explicitly or implicitly, the approach is wider and these two forms of non-voluntary mediation can be merged into the expression of ‘mandatory exploration of mediation as opposed to mandatory imposition of mediation’.¹³³

6.1.2. An existing framework for mandatory mediation information and consideration in England for civil and commercial matters

The English Civil Justice System already provides a comprehensive legal framework in civil and commercial matters to oblige litigants to receive information and to consider ADR within the court system. Indeed, as developed already in the previous chapters of the study, the so-called policy of encouragement has implemented a requirement of mediation information and consideration for litigants who are willing to embark on judicial proceedings.

Mediation information and consideration have also been promoted in England through the practice of judicial referral with the SCMS, the Money Claims Centres and the Court of Appeal scheme.¹³⁴ They all require the agreement of the parties to participate in a full mediation process through first obtaining information on mediation and then considering participation.

Regarding commercial disputes, the encouragement is even more robust. Parties are free to consider whatever method of ADR they deem ‘most suitable’ but they are obliged to consider ADR and report back to the court what has been done and give

¹³³ Andrews (n 121) para 3.28.

¹³⁴ CPR 26.2A; Susan H Blake, Julie Browne and Stuart Sime, *The Jackson ADR Handbook* (2nd edn, Oxford University Press 2016) para 16.13.

explanations if it has failed. However, parties cannot be forced to participate in an ADR.¹³⁵

Therefore, in theory for civil and commercial matters, every potential litigant in England is under a requirement to learn about mediation in order to be able to seriously consider it as an alternative method to the litigation court process. In other words, England has a mandatory legal framework in the context of court litigation to raise awareness and consideration of mediation in civil and commercial matters.

However, in practice, this policy does not seem to have increased significantly the recourse to mediation as an ADR method. In England, the Centre for Effective Disputes Resolution (CEDR) observes that, although the number of mediations has increased fivefold between 2003 and 2014, there is currently a slowing of the mediation growth rate. Based on mediators' stated caseloads, the 2014 CEDR report showed that the civil and commercial mediation market has increased by 9% since the 2012 survey, a lower rate than suggested by previous surveys, to stand at an estimated annual 9,500 cases.¹³⁶

The latest 2016 CEDR's mediation audit estimates the current size of the civil and commercial mediation market in England in the order of 10,000 cases per annum (excluding family, employment and small claims mediation). This is just 5.2% more than the 9,500 cases estimated in 2014 'suggesting that there has been a slowing down of growth in the overall market place over the last two years'.¹³⁷ To place these figures into some sort of perspective, about 1.4 million civil claims and petitions are brought to the county courts each year, even though only a very small proportion

¹³⁵ Scherpe and Marten (n 27) 382- 383.

¹³⁶ Centre for Effective Dispute Resolution (CEDR), 'The Sixth Mediation Audit: a survey of commercial mediator attitudes and experiences' (22 May 2014) (CEDR Sixth Mediation Audit) <www.cedr.com/docslib/TheMediatorAudit2014.pdf> accessed 7 March 2015.

¹³⁷ Centre for Effective Dispute Resolution (CEDR), 'The Seventh Mediation Audit: a survey of commercial mediator attitudes and experience' (11 May 2016) (CEDR Seventh Mediation Audit) <[www.cedr.com/docslib/The_Seventh_Mediation_Audit_\(2016\).pdf](http://www.cedr.com/docslib/The_Seventh_Mediation_Audit_(2016).pdf)> accessed 12 September 2016.

(about 3 to 4%) goes on to involve a court hearing.¹³⁸ These figures on mediation are in line with those observed in the rest of Europe.¹³⁹

Although the lack of awareness contributes significantly to the stagnation of the use of mediation across Europe, it cannot explain entirely the persistent resistance to mediation from disputing parties. Even in England where litigants are under the obligation, as mentioned earlier, to explore mediation before going to court, mediation continues to be underused. Some commentators have questioned the effective application of the existing legal framework by the courts.¹⁴⁰ Prince confirms the failure by the judiciary to enforce the rules consistently.¹⁴¹ Others denounce the inconsistency of the policy of cost sanctions.¹⁴² The reasons for the failure might be diverse but the facts are clear: the English legal framework, requiring mandatory mediation information and consideration from litigants in the context of court litigation for civil and commercial disputes has not substantially increased the use of mediation as an ADR method.

The need to find appropriate sanctions for those who do not comply with the legal requirements towards the use of ADR within the court system is certainly part of the answer, and this issue will be addressed in the second part of the chapter, but beforehand there is a need to discuss what are the best practices to force litigants to explore mediation. In that perspective, the next section will give an overview of different models used in other areas of law in England and abroad to impose mediation information and consideration in the context of court litigation.

¹³⁸ Open Justice website, 'The truth about civil cases' (Open Justice, 2016) <open.justice.gov.uk/courts/civil-cases/> accessed 6 December 2016.

¹³⁹ European Parliament, 'The Implementation of the Mediation Directive - Workshop on 29 November 2016' (Directorate General for Internal Policies Legal Affairs, Study PE 571.395) 4, 5.

¹⁴⁰ Karl Mackie, 'The Future of Civil Justice in England and Wales - Costs, Funding and New Court Structures' (Westminster Legal Policy Forum, London, 23rd May 2016) <<http://thebooksout.com/downloads/westminster-legal-policy-forum-keynote-seminar-innovation.pdf>> accessed 4 October 2016, 25.

¹⁴¹ Prince, 'Access to Court?' (n 44) 93.

¹⁴² Billingsley and Ahmed (n 7) 212.

6.1.3. Other models from England and abroad

In England, the two main schemes of mandatory mediation information and consideration that have been implemented in the context of court litigation are the Mediation Information and Assessment Meeting (MIAM) in family matters and the Early Conciliation Advisory, Conciliation and Arbitration Service (ACAS) process for employment disputes. In Italy, steps have been taken already to introduce mandatory mediation information and consideration for civil matters with the implementation of a mandatory information meeting for a small portion of cases rather similar to the current English MIAMs in family matters.

Let us recall that in April 2014, England adopted the Children and Families Act 2014, introducing in its section 10 a compulsory MIAM for those families who wish to access the court in family divorce proceedings where there are issues concerning finance or the arrangements for the children, before they can start an application in court. The parties pay a fee for this meeting which varies from one mediator to another. The defendant who has not made an application has no formal obligation to take part, but the court has the power to adjourn proceedings in order for a MIAM to be attended to by one or both parties.¹⁴³

Prince observes that:

The new law is a clear attempt to assert the policy that couples wishing to go to court must think about using mediation before starting proceedings and yet it stops short of endorsing fully compulsory mediation, choosing instead to mandate information about mediation.¹⁴⁴

As featured in English family law, the MIAM is an opt-in system which requires parties to take a further step to start a formal mediation process and where information and consideration are coupled, ie the mediator gives information about

¹⁴³ Giuseppe De Palo and Romina Canessa, 'New Trends for ADR in the European Union' in Pablo Cortés (Chapter 20) (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 408, 420.

¹⁴⁴ Prince, 'Access to Court?' (n 44) 95.

mediation, examines the suitability of mediation for the case in hand and then discusses possible next steps in the process.¹⁴⁵

To date, the results of family MIAMs are mixed. Figures prior to 2014, when the protocol was made compulsory, show on the one hand that MIAMs reached an overall conversion rate to mediation between 66 and 76% with 68% of mediation agreements, but on the other hand that there was a sharp decrease of attendances at MIAMS between 2013 and 2014.¹⁴⁶ Later they were down by 7% in the last quarter compared to the previous year and are currently only stabilising at around half pre-LASPO levels.¹⁴⁷ It seems that the new legal aid policy has had a negative impact on the introduction of mandatory family MIAMs.

However, these results should be considered with caution. A 2014 study reveals that it should be attributed mainly to the drastic cuts that have been made to Legal Aid in family cases in the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO Act 2012), which has left many parties without access to a lawyer and reduced the recourse to MIAM. Therefore, the study calls for more information on MIAMs.¹⁴⁸

A more recent study conducted by the National Family Mediation (NFM) charity organization after 2014 seems to suggest that the problem of low attendance at MIAMs cannot only be explained by financial considerations or the lack of information. Indeed, more surprisingly, information obtained by NFM through a freedom of information request reveals that in 2014/15, out of 112,000 family law applications to the court, only 1 in 20 had followed the statutory rule for the

¹⁴⁵ *ibid.*

¹⁴⁶ Becky Hamlyn, Emma Coleman and Mark Sefton, *Mediation Information and Assessment Meetings (MIAMs) and Mediation in Private Family Law Disputes - Quantitative Research Findings* (Ministry of Justice Analytical Series 2015) 3, 7.

¹⁴⁷ Ministry of Justice, Statistics Bulletin 'Legal Aid Statistics in England and Wales October to December 2016' (30 March 2017) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/604003/legal-aid-statistics-bulletin-oct-to-dec-2016.pdf> accessed 12 June 2017, 26.

¹⁴⁸ Anna Bloch, Rosie McLeod and Ben Toombs, *Mediation Information and Assessment Meetings (MIAMs) and Mediation in Private Family Law Disputes - Qualitative Research Findings* (Ministry of Justice Analytical Series 2014) 4, 13.

applicant to have attended a MIAM first, despite its compulsory nature. It suggests that, in the early period of the change of rules, it is most likely that the court administration staff did not check the applications thoroughly enough.¹⁴⁹ Prince also underlines that the process can be most successful when both parties attend; however, the defendant has no formal obligation to take part, which restricts the effectiveness of the process.¹⁵⁰

Despite the mixed results observed in family MIAMs in England, there have been calls in the past, by the government¹⁵¹ and by the judiciary,¹⁵² to implement mandatory MIAMs outside the field of family mediation, in civil and commercial matters for instance. They have not been heard.

The case of Italy, where compulsory attendance by the parties to an introductory meeting with a mediator in a small portion of civil cases (8%) before going to court has been implemented in 2013,¹⁵³ is more encouraging although the model is slightly different. The meeting, which must take place within 30 days of the introduction of the claim, also combines information and consideration and is free of charge but the assistance of the parties' lawyer (paid by the client) is mandatory. Unlike the English family MIAM system, the Italian introductory meeting model provides an opt-out regime as the first meeting is already part of a formal mediation process. The parties can nevertheless always withdraw afterwards at little cost. The full mediation process will continue beyond the first meeting only if all parties agree.

¹⁴⁹ Emsley Solicitors, 'Family Mediation and MIAMS - Statistics Revealed' <www.emsleys.co.uk/blog/family-mediation-and-miams-statistics-revealed> accessed 11 November 2016.

¹⁵⁰ Prince, 'Access to Court?' (n 44) 95.

¹⁵¹ Ministry of Justice, *Solving disputes in the county courts: creating a simpler, quicker and more proportionate system. A consultation on reforming civil justice in England and Wales. The Government Response* (Cm 8274, February 2012) 42.

¹⁵² Lord Faulks, 'Keynote speech, Mediation and government' (The Civil Mediation Conference, London, 22 May 2014) <www.gov.uk/government/speeches/mediation-and-government> accessed 11 August 2016, 3; Lord Neuberger, 'A View From On High' (Civil Mediation Conference, London, 12 May 2015) <www.supremecourt.uk/docs/speech-150512-civil-mediation-conference-2015.pdf> accessed 11 August 2016 para 21.

¹⁵³ Decreto 69/2013.

However, it seems that Italy has not yet managed to fully implement its mandatory MIAMs. Statistical data in 2015 show that 52% of defendants did not attend the information mediation meeting before proceeding to court despite its compulsory nature.¹⁵⁴ As in England, enforcement seems to be lacking.

The opt-out Italian model is also to be compared to the model that can be found in England with the ACAS early conciliation process for employment disputes. The Early Conciliation ACAS process, which is free, requires any party (employer/employee) that contemplates bringing a claim before the Employment Tribunal to contact ACAS to obtain information and discuss the case with an ACAS conciliator. However, neither party is obliged to take part in conciliation and can stop the process whenever they wish. The latest ACAS statistics show that 71% of Early Conciliation notifications did not proceed to a tribunal claim.¹⁵⁵

Although the opt-in model appears more respectful of each party's self-determination as it is less coercive, some authors consider that the system gives less incentive than the opt-out system.¹⁵⁶ However, both systems preserve the choice of the parties to participate or not in a full traditional mediation process with the assistance of a private mediator.

But what other lessons can we learn from the above developments? It can be said first that, despite its turbulent implementation, mandatory mediation information and consideration in the form of a pre-action informative and assessment meeting (MIAM, Early conciliation) leads to some very encouraging results (above 50%), both in terms of conversion rate and in terms of settlement rate. It has also the advantage of combining at the same time information and assessment, giving

¹⁵⁴ Carlo Pilia, Pablo Cortés and Paolo Vargiu, 'The Implementation of the Consumer ADR in Italy' in Pablo Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 209, 214.

¹⁵⁵ ACAS Conciliation explained, 'Conciliation explained' (May 2105) <www.acas.org.uk/media/pdf/o/g/Conciliation-Explained-Acas.pdf> accessed 30 January 2017; 'ACAS Annual report and accounts 2015-2016' (July 2016) <www.acas.org.uk/media/pdf/f/m/2015-16-acas-annual-report-accounts-accessible.pdf> accessed 30 January 2017.

¹⁵⁶ De Palo and Canessa (n 143) 415.

potential litigants a very valuable time to make an informed choice about mediation. Research conducted in England on the family MIAMs show that the meeting is crucial in shaping clients' decisions.¹⁵⁷ More generally, it respects the fundamental attributes of traditional mediation in placing coercion at the very early stage, prior to any decision making of the parties. Additionally it is coherent with the English public policy that rejects mandatory participation in mediation in the context of court litigation. However, it needs to be improved.

It is difficult to outline the perfect scheme although some broad orientations can be identified. First the gratis feature of a compulsory pre-action mediation meeting is an important component. It gives a serious advantage over the court system and has a real encouraging effect on litigants as observed in England with the ACAS Early conciliation process or the SCMS. The Italian solution of imposing a low fixed tariff is also worth implementing if the scheme cannot be entirely funded by public funds.

The question of the compulsory assistance of a lawyer needs also to be considered carefully as it inevitably impacts the cost of the pre-action meeting and burdens the mediation procedure. At the same time, it cannot be ignored that lawyers undoubtedly fulfil a function of information towards their clients as observed in England in family MIAMs.¹⁵⁸ Therefore, it would be beneficial for the parties to be able to avoid the compulsory assistance of a lawyer at this pre-action stage if appropriate measures are taken to ensure public awareness of the MIAM attendance requirement. Parties could choose to be assisted by a lawyer at the next stage if they decide to opt-in the mediation process to resolve their dispute. In that case, power could be given to lawyers, like in Italy, to testify the conformity of the mediation agreement in order to make it enforceable for the parties which would add to the celerity of the mediation process. However, the *Menini* decision of the CJEU considers that mandatory legal representation breaches the ADR Directive provisions.¹⁵⁹

¹⁵⁷ Bloch, McLeod and Toombs (n 148) 40.

¹⁵⁸ *ibid* 15, 23.

¹⁵⁹ *Menini* (n 32).

Consideration should also be given to the length of the procedure and the idea that the pre-action compulsory mediation information and consideration meeting should not extend the procedure too much. Therefore, these meetings should be held, like in Italy, within a short time frame of 30 days or, if we consider the opt-in system, the meeting should be held within a defined period before the introduction of the claim.

In addition, the information of the public on compulsory MIAM should be more robustly enforced by the judiciary. Indeed, all studies converge on the conclusion that the mixed results obtained on the MIAMs in England and in Italy are mainly due to the lack of enforcement of the pre-action meeting requirement by the judiciary. This can be probably attributed partly to the novelty of the schemes and the need for the judiciary and the court administration staff to adapt their judicial practices to them. But this cannot be the only reason and some strong measures must be taken such as adequate sanctions to deter litigants from non-compliance to ensure the law is properly enforced.

This will be discussed in the next section of this chapter but it is important to point out at this stage that more support is needed from the government and the judiciary in England to inform and publicize that MIAMs are compulsory so that those meetings will be able to fulfil their primary function, ie to oblige litigants to explore mediation before choosing their mode of dispute resolution.

Mandatory MIAMs and assimilated models are fully appropriate to increase the delivery of mediation and its success in settlement outcomes, provided it is implemented with caution as to their financial and informative features and with a more robust enforcement from the judiciary. If such adjustments were made, mandatory MIAMs would represent a real step forward in the promotion of civil and commercial mediation in England. In addition, it would respect the fundamental elements of traditional mediation in placing coercion before the judicial process and in being consistent with the English public policy that refuses to formally implement mandatory participation in mediation in the context of court litigation.

However, these considerations ought to be confronted with the Online Court project, and more specifically to its provisions in relation to mediation information and consideration.

6.1.4. Mediation information and consideration under the OC Project

The main features of the OC project - also known as the Briggs reports - have been detailed in the previous chapter. The present section will look more thoroughly at its components with relation to information and consideration of ADR, including mediation, as proposed in Stage 1 of the project.

According to the IR, Stage 1 will consist of a mainly automated process by which litigants will be assisted in identifying their case (or defence) online in terms sufficiently well ordered to be suitable to be understood by their opponents and resolved by the court, and required to upload the documents and other evidence which the court will need for the purpose of resolution.¹⁶⁰

In his FR, Briggs LJ notices that this first description of Stage 1 was a 'considerable over-simplification' and was premised on the assumption that there was an issued claim and a real dispute between the parties.¹⁶¹

Therefore the FR suggests that two preliminary stages and by-passes should be integrated into Stage 1. Stage 0 will have to include, for claimant and (perhaps) defendant, all those pieces of vital guidance about treating litigation as a last resort, ie this stage would alert would-be court users to alternative forms of resolution, sources of affordable or free advice, and perhaps some commoditised summaries of the essential legal principles. Stage 0.5 will have to include provisions for a short exchange between the parties designed to find out whether there really is a dispute which the court needs to resolve or only an undisputed claim that simply needs to be enforced and for which the full panoply of Stage 1 triage would be unnecessary.

¹⁶⁰ Briggs IR para 6.7.

¹⁶¹ Briggs FR para 6.108.

Furthermore, there will be by-passes around or simplified routes through Stage 1 for litigants with lawyers (or legal departments) since they will not need the automated interactive triage designed to enable litigants in person to articulate their case.¹⁶²

In effect the first sub-stage embedded into Stage 1 would provide to litigants (in person) an informative step with a rather large scope that would include information on ADR processes, including mediation, but also information on sources of affordable or free advice, and perhaps some commoditised summaries of the essential legal principles. Ahmed argues that it is also a stage where disputes may be diverted to other dispute resolution providers. Consequently, this stage is significant because it is a stage at which a dispute can be contained and prevented from crystallising into claims which would otherwise proceed through the court process.¹⁶³

If this reading of the OC project was to be confirmed, Stage 1 would introduce information and consideration of ADR at a very early stage of the OC procedure. It would be a very positive signal given to the promotion of ADR, and mediation. In addition, it would be imposed on potential litigants as the OC process would be compulsory for cases within its jurisdiction. The requirement that parties should explore ADR at the very beginning of the OC procedure would also offer an equal treatment to all potential litigants with the possibility to make an informed choice.

The other sub-stage would provide a form of simplified pre-action protocol limited to a short exchange of correspondence between the parties designed to ascertain whether there is a real dispute. It would replace the obligation made to the parties to draft and exchange short letters of claims and reply as required under the CPR pre-action protocols. Briggs LJ rejects the idea of having a pre-action protocol procedure separate from the OC, arguing that it is a process used by solicitors in the conduct of most civil litigation which is not suitable for litigants in person.¹⁶⁴

¹⁶² Briggs IR para 6.7.

¹⁶³ Ahmed, 'A Critical View of Stage 1 of the Online Court' (n 83) 19.

¹⁶⁴ Briggs FR para 6.74.

In summary, Stage 1 would gather at the same time an informative and assessment stage on alternatives to court with an exchange of correspondence between the parties to replace the existing pre-action protocols, and, if there is a dispute, end up with the online triage where parties would be required to upload the documents and other evidence which the court will need for the purpose of resolution. Not only the Briggs project eliminates the possibility of having a pre-action protocol procedure added to the OC but more generally refuses simply any idea of a separate, detailed and prescriptive pre-action procedure to the OC process.

While Briggs LJ in his IR agrees that it would be worth considering some adaptation of the MIAM to be added to the civil procedure,¹⁶⁵ he dismisses the idea in his FR.¹⁶⁶ He even goes further when, after recalling the lack of provision for pre-issue ADR identified by representatives of the mediation community, he concludes:

There is a limit to which a review of the structure of the civil courts can provide a comprehensive solution to this perceived deficiency, not least because, apart from the limited provision of a stay to enable the parties to attempt ADR, and the proposals for culturally normal conciliation within the new Online Court, the court's role is limited, in particular at the pre-issue stage.¹⁶⁷

Briggs LJ only recommends to boost pre-issue ADR by re-establishing a court-based out-of-hours private mediation service in County Court hearing centres and the National Mediation Helpline.¹⁶⁸ This position can be explained by the idea that the OC project is designed to deal with cases which are not very complex in nature nor of high value and which are likely to be brought or defended by litigants in person and small businesses. The integration into the process of a formal pre-action stage could generate additional costs and delays, and therefore 'would be counter intuitive to the very aims and purposes of the OC'.¹⁶⁹

¹⁶⁵ Briggs IR para 11.21.

¹⁶⁶ Briggs FR para 11.22.

¹⁶⁷ *ibid* para 11.25.

¹⁶⁸ *ibid* Recommendation 2.

¹⁶⁹ Ahmed, 'A Critical View of Stage 1 of the Online Court' (n 83) 19.

However, the full and direct integration of the traditional functions of a pre-action procedure (promotion of settlement and exchange of information between the parties) into the OC process raises some questions and concerns.

First of all, under the current OC project, pre-action functions would be united at a stage when proceedings have already started and when parties are therefore within the official court process, rendering less flexible the alternative for them to choose an out-of-court ADR process.

Also, today, the pre-action procedure creates a clear and distinct separation between the obligation of the parties to make information available to each other at an early stage and the need to consider resolving their dispute through ADR processes before proceedings are issued. In the OC the gathering at Stage 1 of mandatory ADR information and consideration, with exchange of pre-issue letters and the subsequent obligations to complete their respective statements of the case online, might create unnecessary overlaps, but more worryingly, might bring confusion in the course of the process for litigants in person.

In addition, the OC project contains significant uncertainties on how information and consideration of ADR will be made available to the parties at Stage 1. The project does not explain how and by whom the parties will be assisted. Will Stage 0 be monitored online by the court administrative staff? Or will it be monitored by external ADR providers? How would it be organised within Stage 1? It is likely to involve a time frame, so what will it be? All these questions seem to be important to address. In that perspective, it might be worth exploring the proposal made by the ODR report to give access at Stage 1 to the Case Officer who would be then managing the case and facilitate the settlement of the dispute from the very beginning of the process.

The risk of not delivering effective information, advice and assistance to the parties at Stage 1 may lead the parties to perceive it only as 'a means of initiating a claim'

and to continue to Stage 2, and eventually to Stage 3.¹⁷⁰ This situation could be reinforced knowing that the OC project anticipates that a majority of cases will be quasi-automatically taken to telephone mediation at Stage 2 of the court process under the authority of the Case Officer at a minor cost. Why then explore mediation before?

Therefore, the full and direct integration of the traditional functions of a pre-action procedure into the OC process appears in my view to present some serious challenges. Hence, the Online Court project can be perceived to be better tailored to impose participation in mediation at Stage 2 rather than implement an efficient obligation of ADR information and consideration at Stage 1.

The present study will argue in the next section that many of these questions could be addressed by installing a pre-action online meeting based on the MIAM family court model as a compulsory pre-step which would replace Stages 0 and 0.5 of the current Online Court project or any other kind of pre-action procedure.

6.2. Mandatory mediation information and consideration: a preliminary requirement before going to court for civil and commercial matters

6.2.1. A new proposal: compulsory Online MIAM for small civil and commercial cases

Based on the precedent developments, the present study suggests implementing a free compulsory Online MIAM for most small civil and commercial matters as a preliminary requirement for access to court.

(a) Main characteristics

The MIAM will have four main characteristics: it will be (i) conducted through an out-of-court internet platform by a private accredited mediator on a confidential

¹⁷⁰ Ahmed 'A Critical View of Stage 1 of the Online Court' (n 83) 19.

basis, (ii) public-funded and at no cost for users, (iii) compulsory for every litigant and for (iv) civil and commercial money claims up to £10,000.

(i) The MIAM will be conducted through an out-of-court internet platform by an independent, private mediator that will have to be registered on a specific list accredited by a body such as the Civil Mediation Council. The principle of confidentiality will apply on the same basis as for the family MIAM.¹⁷¹

(ii) The HMCTS will run the MIAM platform and finance it (instead of financing Stages 0 and 0.5 of the OC) and will pay the mediator on a fixed fee basis. It will be free for litigants, giving the scheme a real encouraging effect. If the parties afterwards choose to continue with mediation, they will support the cost as for any private mediation.

(iii) The MIAM will be compulsory. This means that all parties will be under the obligation to attend the compulsory Online MIAM. If the claimant does not comply with the requirement, the claim will not be admissible in court. If the defendant does not attend, a fine will be imposed (sanctions detailed below). The compulsory nature of the meeting will make useless at this stage the participation of a lawyer. There will be no by-passes for parties legally represented or legal departments in order to ensure equal conditions and access for all litigants.

(iv) The compulsory Online MIAM will concern civil and commercial money claims up to £10,000 as they represent 70% of the total number of hearings in the civil courts.¹⁷² No similar data has been found in relation to commercial disputes, but based on the civil cases number it can be foreseen that a large majority of cases of this monetary value will be under the MIAM's requirement. Some exceptions will apply, either because their category already benefits from a pre-issue model (eg car accidents) or the cases are considered not suitable for ADR resolution, including

¹⁷¹ Family Mediation Council, 'Family Mediation in England and Wales: A guide for judges, magistrates and legal advisors' (Family Justice Council 2014).

¹⁷² Prince, 'ODR Advisory Group Small Claims and ODR' (n 89).

mediation, although this latter category is more difficult to apprehend (eg personal injury, medical negligence).¹⁷³

(b) An opt-in procedure

The meeting will have the same functions of information and assessment as the current family MIAM, ie (i) provide information about the principles, process and models of mediation, and information about other methods of non-court dispute resolution; (ii) assess the suitability of mediation as a means of resolving the dispute. In doing so, it will also help the parties to clarify the area of dispute and provide encouragement to start a full mediation process if appropriate. Prior to the meeting each party could be asked to provide the mediator a summary of the facts and the list of issues.

The claimant will initiate the process by choosing a professional private mediator and giving him the contact details of the defendant. If the defendant does not agree with the choice of the mediator, a person named on the list of accredited mediators mentioned above will be assigned by the body in charge of the accreditation. The duration of the MIAM process (from the first contact with the mediator through to the certification) shall be reasonable and not exceed a certain period of time that needs to be determined.

If the defendant does not respond/attend the meeting, the appointed mediator will deliver a form attesting that the claimant has satisfied with the MIAM requirement and will be consequently able to go to court. The defaulting defendant will have to pay a fine for non-attendance of the MIAM unless valid justifications can be provided to the mediator for the absence. If the defendant contests the form issued by the mediator declaring his absence to the MIAM, the possibility to appeal the decision within 14 days to a body such as the Civil Mediation Council could be explored. It would be a mean to avoid judicializing the pre-action online MIAM process.

¹⁷³ Blake, Browne and Sime, *The Jackson ADR Handbook* (n 134) paras 2.49- 2.56.

If all parties are attending, the MIAM will be conducted by the appointed mediator through the internet platform. The meeting will take the form of video-conference/skype to enable all parties to attend 'in person' online, which, unlike the telephone option, will allow a face-to-face conversation between the parties and at the same time avoid any issue of geographical location (exceptions would apply for people that are unable to use or have access to internet).

At the end of the meeting, the parties will complete a form indicating whether they intend to start a full mediation process, ie to opt-in or not. They will not have to explain or justify their decision; their duty will only be to comply with the obligation of attendance. The form will be certified by the mediator attesting that the parties have satisfied the requirement of the initial meeting. Unless this form is provided, it will not be possible for the claimant to initiate a procedure in court.

If the parties agree to go to mediation, the form will acknowledge the parties' informed consent to mediation, their rights and duties during the mediation process and their possibility to always return to court if they wish to, at any time of the mediation process. If the parties do not agree to go to mediation and the claimant decides to go to court, the claim will need to be lodged in court within a reasonable time frame after the issuing of the mediator's certification, ie 30 days like in the Italian system.

(c) Strengths of the compulsory Online MIAM

➤ Most experiments of mandatory mediation information and consideration under the form of a pre-action informative and assessment meeting in England (Family MIAM, ACAS Early conciliation) have demonstrated **very encouraging results (above 50%), both in terms of conversion rate and settlement rate.**¹⁷⁴ The same feature is observed in Italy where an agreement is reached in nearly 45% of the cases when the parties decide to continue with mediation after the first

¹⁷⁴ Hamlyn, Coleman and Sefton (n 146) 7; 'ACAS Annual report and accounts 2015-2016' (July 2016) <www.acas.org.uk/media/pdf/f/m/2015-16-acas-annual-report-accounts-accessible.pdf> accessed 30 January 2017.

mandatory informational meeting. It demonstrates that mediation information and consideration by the parties are crucial to increase participation.¹⁷⁵

➤ The real challenge so far has been the low rate of attendance despite the compulsory nature of the family MIAM in England and the informational meeting in Italy. Analyses show that this situation can be explained mainly by two factors: the lack of enforcement by the judiciary and the non-gratuity of the meeting for litigants. Indeed, the lack of enforcement by the judiciary has been observed in England as well as Italy. This question will be addressed in the next section but it is worth mentioning here that in any case the scheme needs to be kept **compulsory** otherwise the level of attendance will remain low. It can also be said that gratuity gives a real encouraging effect to mediation schemes as it has been observed for example in England with the SCMS. If the online MIAM were free i.e. imposing on potential litigants to be informed and to consider mediation **at no cost**, it would give a greater support to the proposal.

➤ Online MIAM would combine the benefits of both technology and ADR so as to deliver an **equal opportunity to all potential litigants to access easily and rapidly mediation information and consideration**. There will be no need of a lawyer at this stage. However, if the parties decide to pursue with mediation, they could choose to be assisted by a lawyer.

➤ **Traditional access to court and access to out-of-court mediation would be both preserved**, providing to litigants an option of a cheaper and faster dispute resolution method where coercion is only placed at the forefront of the judicial path, giving them the possibility to choose between mediation and the traditional judicial delivery of justice in court.

➤ The scheme would also favour the opt-in model rather than the opt-out solution, although both systems preserve the choice of the parties to participate or

¹⁷⁵ Ministero della Giustizia, Dipartimento della Organizzazione Giudiziaria del Personale e dei Servizi, Direzione Generale di Statistica, 'ex DL 28/2010 sulla mediazione civile: Statistiche relative al periodo 1° Gennaio - 31 Marzo 2014' <<https://mediazione.giustizia.it>> accessed 3 March 2017, 2.

not in a full mediation process. Indeed, the **opt-in system** such as the English family MIAM which requires parties to take a further step to start a formal mediation process **appears to be more flexible and also more respectful of each party's self-determination**, whereas the opt-out system in place in Italy appears more coercive in a sense that litigants have to formally withdraw at the informative meeting from the mediation process.

➤ This solution would ensure **an educative function** and would provide consistency, clarity and unity before potential litigants embark on the judicial process. Therefore, it would help the public to find its way through a complex maze of public and private mediation offers. The solution would also **simplify access to court** by discharging litigants from their pre-action obligations.

➤ **It is also possible to combine it with the OC while staying a separate process.** If the OC were to be implemented as designed in the Briggs Reports, the mandatory pre-action online meeting proposed above would replace its Stages 0 and 0.5. Indeed, the compulsory out-of-court Online MIAM would perform their functions by informing the parties of the need to see court as a last resort, making them aware of alternatives to the court process and also allowing them to ascertain first whether there is a dispute. The OC process would then start at Stage 1 as only a triage stage to initiate the claim, followed either by Stage 2, giving another chance to litigants to either conciliate or try another form of ADR, or by Stage 3 if parties are not willing to conciliate. It would then, on a financial point of view, permute the public funds allocated to the OC Stages 0 and 0.5 to the compulsory Online MIAM.

However, the proposal of implementing mandatory mediation information and consideration through online MIAMs in civil and commercial matters in England is not viable if appropriate sanctions for non-compliance and non-attendance are not put in place and effectively enforced.

6.2.2. The need of adequate sanctions to ensure the efficiency of the compulsory Online MIAM

Today in England, under the CPR provisions, the court can make an adverse costs order if the parties are considered to have behaved unreasonably, including at a pre-action stage.

Some authors call for the same system to be implemented within the online court system, not only for failure to comply with mediation or conciliation during the court process, but also for unreasonable refusal to explore mediation at a pre-action stage.¹⁷⁶

However, as explained in the previous chapter, there seems to be a clear consensus among academics/practitioners that the policy of cost sanctions has produced 'inconsistent' jurisprudence which has led to 'uncertainty' for litigants.¹⁷⁷ Therefore, the policy of cost sanctions should not be replicated to sanction the non-compliance at the proposed compulsory Online MIAM.

A clear frontier must be drawn between pre-action legal obligation and in-court obligation with different sanctions since the nature of the obligation is different.

Indeed, the proposed scheme intends to distinguish clearly mandatory mediation information and consideration from mandatory participation in mediation. While mandatory information and consideration would be implemented at a pre-action stage with the proposed compulsory Online MIAM system, mandatory participation in ADR, including mediation, if introduced through the OC, would be integrated in the court process.

Mandatory information and consideration would consist for litigants to attend a MIAM to explore mediation without any appraisal of their behaviour or decision to

¹⁷⁶ Cortés, 'The Online Court: Filling the Gaps' (n 92) 125.

¹⁷⁷ Billingsley and Ahmed (n 7) 188, 212.

accept or refuse to opt-in. The aim is to force litigants to investigate alternative resolution systems to their dispute fully informed but without any pressure or obligation to proceed to the mediation table. They will only be sanctioned in case of non-compliance to the pre-action meeting, which is acting here as a strong encouragement to participate in out-of-court mediation rather than embarking on a judicial process. Their behaviour could possibly be assessed judicially later in court and penalized under the CPR rules only if they behaved unreasonably during the court process, not at the pre-action stage.

Before making propositions for a specific new set of sanctions applicable only to non-compliance with the compulsory Online MIAM, it is important to review the forms of sanctions that have been experienced in MIAM or like models, for example in family law in England or in Italy for a small portion of civil matters, and to consider the lessons that can be drawn from these experiences.

In England, since the Children and Families Act 2014, parties, in theory, are not able to make a court application if they have not attended a prior MIAM. Furthermore, the court retains the power to adjourn proceedings in order for a MIAM to be attended to by one or both parties. Nevertheless, as previously mentioned, a recent study from the charity National Family Mediation shows that these provisions are not applied. Moreover, the latest Legal Aid statistics (31 March 2017) show that the number of MIAMs were down by 7% in the last quarter compared to the previous year and are currently only stabilising at around half of pre-LASPO levels.¹⁷⁸

In Italy, a condition of access to court has been introduced in 2013 with the theoretical obligation for litigants, in some civil matters, to attend a first informative meeting. The law provides a number of sanctions such as the payment of a fine for failure to participate in the meeting without justification or the payment of legal

¹⁷⁸ Emsley Solicitors, 'Family Mediation and MIAMS - Statistics Revealed' <www.emsleys.co.uk/blog/family-mediation-and-miams-statistics-revealed> accessed 11 November 2016 ; Ministry of Justice, Statistics Bulletin 'Legal Aid Statistics in England and Wales October to December 2016' (30 March 2017) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/604003/legal-aid-statistics-bulletin-oct-to-dec-2016.pdf> accessed 12 June 2017, 26.

costs for refusal of any written agreement made by the mediator.¹⁷⁹ Despite this set of sanctions, the statistical data from 2015 shows that 52% of defendants did not attend the first information meeting.¹⁸⁰

Overall, despite the legal requirements in England and in Italy, many cases still avoid going through the pre-action informative meeting.

What is proposed in the present study is to provide adequate and meaningful sanctions at a pre-action stage to ensure compliance to the mandatory MIAM:

- ✓ If the claimant does not initiate an Online MIAM, the claim will not be admissible in court. MIAM becomes a condition of admissibility of a proceeding under the form of a certification delivered by the appointed mediator attesting that the applicant has satisfied the MIAM requirement.

- ✓ If the defendant has been reached by the mediator, made aware of the claim with the date and time of the Online MIAM and does not attend, a monetary penalty will be applied. The penalty shall be automatic and predictable. It shall be automatic because it will apply immediately upon the defendant's non-attendance without a valid reason, such reason being assessed by the mediator from a list of standard valid reasons to be set. It shall be predictable because the amount of the penalty will be legally established and correspond to the full cost of an online MIAM, including the cost of the mediator. Therefore, any default of attendance will contribute to the funding of the compulsory Online MIAM platform. It must be noted too that, while civil monetary penalties such as a fine for violation of a statute or regulation are quite common in some legal systems (eg Italy), the implementation in England of such penalty, especially for small civil and commercial claims, will necessitate the introduction of new, appropriate court rules.

¹⁷⁹ Decreto 69/2013.

¹⁸⁰ Ministero della Giustizia, Dipartimento della Organizzazione Giudiziaria del Personale e dei Servizi, Direzione Generale di Statistica, 'ex DL 28/2010 sulla mediazione civile: Statistiche relative al periodo 1° Gennaio - 31 Dicembre 2015' 7 <<https://mediazione.giustizia.it>> accessed 3 March 2017.

A joint automatic system of non-admissibility of the claim for non-compliance by the plaintiff and of monetary penalty for non-attendance by the defendant will ensure compliance of all potential litigants to the compulsory Online MIAM. These sanctions will help to ensure greater consistency, predictability and certainty.

However, it is expected that the risk of avoidance would be greatly minimised with the Online MIAM platform since it provides a clear and structured process. This is essential to ensure the fulfilment of the obligation to explore mediation before starting judicial proceedings, with the aim of increasing strongly the recourse to mediation at that stage thereby diverting a very large number of cases from the court.

Conclusion

Overall, the present study recommends to implement the compulsory Online MIAM as a pre-condition to court for all small civil and commercial matters through an internet platform. It will constitute a unique preliminary step before going to court and will be coupled with an adequate and meaningful set of sanctions to ensure the enforcement of the scheme.

MIAMs or like models, when implemented and more importantly when attended, have proved their great efficacy, both in terms of conversion to mediation and in terms of settlement rate. This is because the MIAM's approach, not only combines the most effective elements of both the voluntary and the mandatory mediation models but it leaves self-determination at the centre of the mediation process itself. It is also in line with the EU policy to support ADR schemes, including mediation, only if the right for each citizen to an effective remedy before a tribunal is preserved.

More importantly, it is likely to increase the use of mediation, both inside and outside the court context, through what Nolan-Haley defines as the 'return to

consent' in the mediation process which will attract potential users to engage with it again.¹⁸¹

Finally, while possibly suitable for all small cases in civil and commercial courts, the proposed compulsory Online MIAM is also fully compatible with the Briggs Online Court project provided its Stages 0 and 0.5 are removed and their functions transferred to the mandatory pre-action online meeting for cases within its jurisdiction.

CONCLUSION TO PART III

The last two chapters have shown that non-voluntary mediation in England is at a turning point and has to move forward. They have also demonstrated that the possible options to choose from are as follows:

(i) Mandatory participation in mediation, either in expressly requiring litigants to engage in ADR through a mandatory pre-action stage which would oblige them to participate in a mediation process before they can proceed to court (eg Ontario, Canada), or in expressly authorizing the courts to order litigants to participate in ADR (eg Italy).

(ii) Mandatory exploration of mediation as submitted in the present chapter with the implementation of a compulsory Online MIAM as a precondition to court for all small civil and commercial matters through an out-of-court internet platform introducing a unique preliminary step before going to court with a joint automatic system of non-admissibility of the claim and monetary penalty.

(iii) Small claims Online Court, the three-stages project outlined in the Briggs reports, which keeps the existing cost sanctions system in case of unreasonable behaviour (at a pre-action stage or during the court procedure) at judicial discretion.

¹⁸¹ Nolan-Haley, 'Mediation: The Best and Worst of Times' (n 11) 737.

(iv) A possible combination of the two separate processes of compulsory Online MIAM and the Online Court project, provided that:¹⁸²

- ✓ **Stages 0 and 0.5** are removed and their functions transferred to the compulsory Online MIAM for cases within its jurisdiction, ie informing the parties of the need to view court proceedings as a last resort, informing the parties of alternatives to the court procedure and allowing the parties to ascertain whether there is a dispute.
- ✓ **Stage 1** becomes solely an automated online process where the parties will be required to fill in their claim or defence and upload documents or evidence they wish to rely on, with the possibility to be assisted by a Case Officer.
- ✓ **Stages 2 and 3** are reviewed in the following manner:
 - at Stage 2 the Case Officer's power is limited to recommend the mode of resolution rather than to impose it on the parties;
 - at Stage 2 the words 'telephone mediation' be changed to 'telephone dialogue assistance' to make clear that it is not mediation but a form of integrated ADR stage, and rename 'conciliation stage' into 'facilitative stage', to clarify it as an umbrella term;
 - at any stage during the court process a stay of proceedings may be granted to the parties to let them, if they wish to, go to private mediation or any other form of out-of-court ADR;
 - the litigants are given the right to skip Stage 2 after Stage 1 in order to have their case directly submitted to the judge for judicial resolution at Stage 3.

It seems that, at the time of writing, the Online Court is likely to be rapidly implemented in civil justice in England. Indeed, the Prisons and Courts Bill presented at the end of February 2017 provided, in its Part II, for the creation of a rule committee to support an online court/tribunal with a common set of

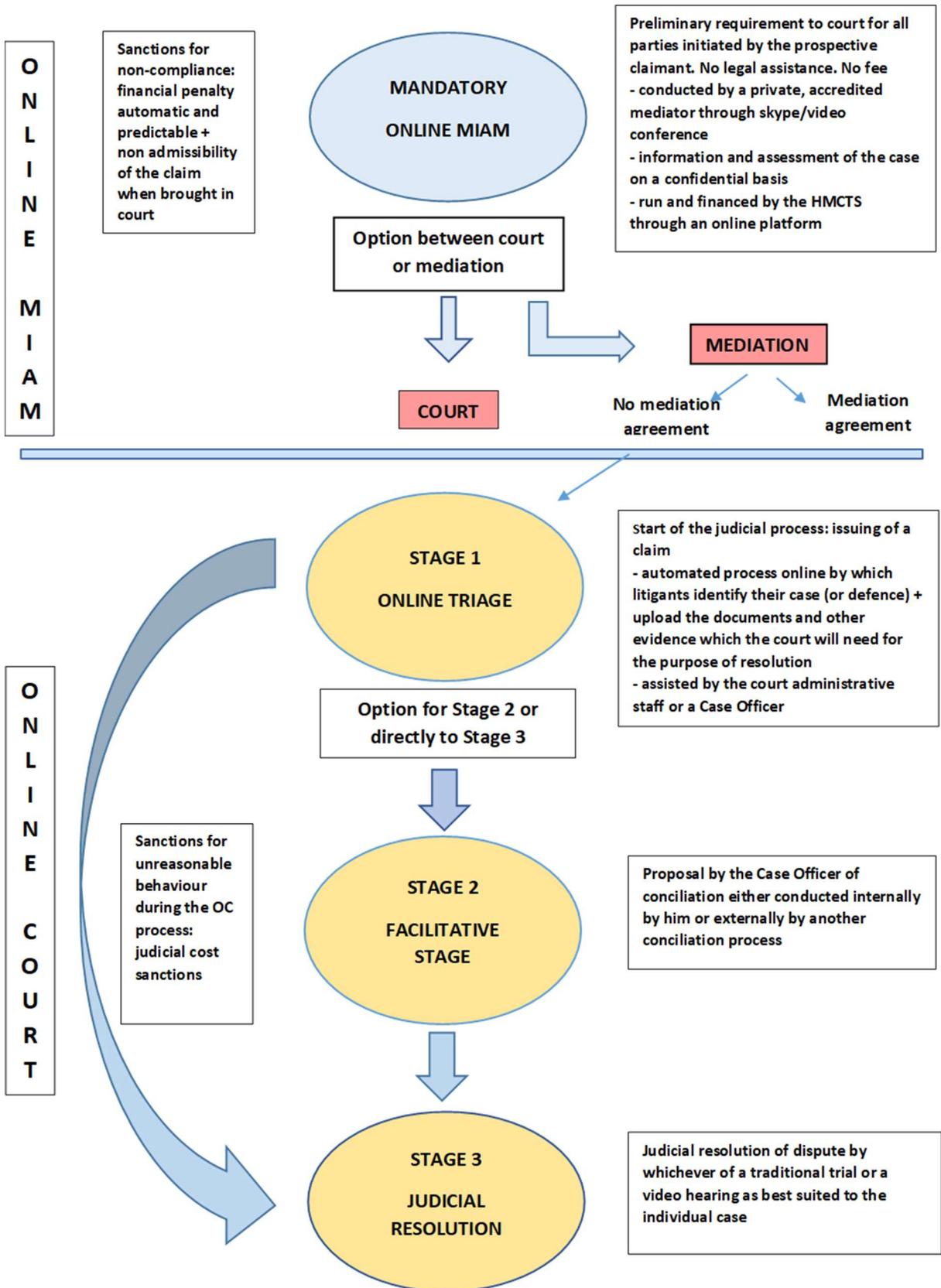
¹⁸² See diagram p 223.

rules/practice directions.¹⁸³ The Prison and Courts Bill fell with the dissolution of Parliament in May 2017. Its Part II has been reintroduced as a stand-alone Courts Bill. It will most certainly be based on the work of Briggs LJ, which may need clarifications and adjustments, especially in relation to the place and integration of ADR, and in particular mediation, in the English judicial proceedings. On May 2017, The Civil Procedure Rule Committee announced the launch in July 2017 of a pilot scheme for the new online court with the primary aim of testing the software.¹⁸⁴ Once this first pilot scheme is in place, it may be possible to re-evaluate the present project in light of the first results with a view to take into account the proposals contained in the present thesis.

¹⁸³ Pat Strickland and others, 'The Prisons and Courts Bill' (House of Commons Library Briefing Papers CPB 7907, 15 March 2017) 70.

¹⁸⁴ John Hyde, 'Online Court Pilot Set to Begin this Summer' (The Law Society Gazette, 18/05/2017) <www.lawgazette.co.uk/law/online-court-pilot-set-to-begin-this-summer/5061173.article> accessed 1 June 2017.

SMALL CLAIMS PROCEDURE SCHEME



CONCLUSION

I. A proposed classification of the different levels of coercive action used to promote mediation in a court context.

The present research comes from the observation that a potential litigant has today in Europe a multiple choice of alternatives to court litigation, but, paradoxically, pathways to these ADR processes are not clearly sign posted; therefore the public has to find its way through a very complex maze of public and private offers. And in addition, European judicial systems are endeavouring to implement more and more coercive techniques of ADR in civil and commercial matters.

Therefore there is a need to clarify the place of ADR, and in particular of mediation, outside and inside the court system. The present study has chosen to consider this issue of clarification within the limited framework of what is happening between mediation and coercion in the context of court litigation. It has examined the existing situation in England and compared it with two EU member states, France and Italy, because of their contrasted approach.

In that perspective, Chapter 1 has built a classification of the measures that have been taken, initially on a voluntary basis, to increase the use of mediation in the context of court litigation and have been progressively imposed on litigants.

Indeed, when reviewing the current framework of mediation in Europe in a court context, it appeared that compulsion has been used towards participation in mediation, but also that steps have been taken to oblige litigants to consider their participation in mediation, or to be informed about this form of ADR.

I have therefore identified the following three categories:

- Mandatory mediation information, which is defined as the obligation made to the parties in a court context to be informed about mediation.

- Mandatory consideration of mediation, which is the obligation for the parties in a court context to consider whether mediation could be the appropriate resolution method to resolve their dispute.
- Mandatory participation in mediation (frequently named mandatory mediation), which is the situation where the parties in a court context are compelled to attempt a full mediation process. The decision to reach a settlement always stays voluntary.

Overall, the classification proposed (information, consideration, participation) gives a continuum of levels of coercive action experienced to increase the use of mediation in a court context. The gathering of these three categories constitutes, from the point of view of the present analysis, what I call non-voluntary mediation and define as 'the different levels of coercive action imposed on the parties in a court context to increase the use of mediation'. This concept seeks to capture the relationship between coercion and mediation within a court context.

The study has shown that mediation has permeated the court apparatus which has raised lively debates on the issue between those who argued that mediation should only be voluntary and that the courts when trying to promote mediation only distort the mediation process, and those who believed that ADR only begins to develop when it is subject to some degree of mandating. This latter position was also supported by the urgent need in most EU countries to control civil justice expenditure, to reduce backlog in pending cases or/and unbearable litigation costs.

In practice, although introduced in a number of European countries, there is a real diversity mirrored in the models of regulation and in the methods of integration of non-voluntary mediation. It has been found that France and Italy have chosen to give a comprehensive legal framework to mediation while England has not implemented specific pieces of legislation in the area of mediation. Regarding the method of integration, it appears that forms of non-voluntary mediation are either used at a pre-action stage of the court proceedings (eg attendance at a pre-action

informational meeting) or introduced during the court litigation (eg judicial order to mediate).

But more predominant is the fact that access to justice, originally confined to the right of access to court, has been modified by the expansion of ADR. This development has created new questions. More specifically, one category of non-voluntary mediation, ie mandatory participation in mediation, has raised a fundamental question over its compatibility with the fundamental right of access to court. So far, it seems that a consensus has been reached in Europe that mandatory mediation is not a denial of justice as long as it does not prevent the parties to access the court within a reasonable time frame.¹

After having outlined and contextualized in chapter 1 the concept of non-voluntary mediation, it has been necessary to examine its situation in an international and EU perspective. Chapter 2 first looked at the models and benchmarks of three countries outside Europe, ie USA, Australia and Canada, which have influenced European domestic regulations of non-voluntary mediation, especially England. This section has shown that the selected countries have been practising for several decades, along with traditional voluntary private mediation, non-voluntary mediation, and more particularly mandatory mediation on a wide scale. The latter has produced rather good results when the mandatory front-end feature of the scheme is balanced by the parties' freedom of choice over other aspects of the process. Overall, these countries did not hesitate to use mandatory mediation to achieve the 'culture shift' for resolving disputes from traditional court process to settlement through ADR.² However, Nolan-Haley has commented that the ADR success in the USA is hiding an anti-democratic situation, demonstrated by a substantial reduction in the number of court procedures, which has led to the deprivation of effective judicial protection.³

¹ Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08 *Alassini v Telecom Italia SpA* [2010] 3 CMLR 17, [2010] ECR I-221, ECLI:EU:C:2010:146, EU:C:2010:146, [2010] EUECJ; Case C-75/16 *Menini and Rampanelli v Banco Popolare Societa Cooperativa* [2017] EUECJ, EU:C:2017:457, ECLI:EU:C:2017:457.

² Barbara Billingsley, Masood Ahmed, 'Evolution, revolution & culture shift: a critical analysis of compulsory ADR in England and Canada (2016) 45(2-3) Common Law World Review 186.

³ Jacqueline M Nolan-Haley, 'Is Europe Headed Down the Primrose Path with Mandatory Mediation?' (2012) 37/4 North Carolina Journal of International Law and Commercial Regulation 981.

Along with the implementations abroad which have influenced Europe, the second part of the chapter described how mediation, in all its forms, has been continuously supported since the 1990's by the European Institutions, which have issued consultation papers and reports, adopted resolutions, and finally enacted the Mediation Directive followed by the ADR Directive, supported by the Consumer ODR Regulation.⁴

Although the scope of application of the Mediation Directive was limited to civil and commercial cross-border disputes, its purpose was also to promote mediation as an out-of-court alternative means and even to allow Member States to enact national legislation making mediation compulsory, provided it would not deny the parties access to the court after an unsuccessful mediation.

The European Courts of Justice have provided so far an embryonic case law on compliance by national legislation of these provisions, highlighted by the *Alassini* jurisprudence and confirmed by the recent *Menini* decision. These decisions have validated the principle that there can be a procedural law requiring the participation in a mandatory mediation process prior to submitting a claim but subject to some conditions, among which a minimal costs for parties and a reasonable delay for court access.⁵ As a result, many Member States took the opportunity of the Mediation Directive either to reinforce or to introduce in their domestic legal system, mandatory elements in the mediation process.⁶

However, the studies which were issued on the impact of the Directive all concluded up until now that the text had failed in its objectives to increase the use of mediation in general in Europe and more interestingly most of them recommended to

⁴ Directive 2008/52/EC of the European Parliament of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L136/3 (The Mediation Directive); Directive 2013/11/EU on Alternative Dispute Resolution for Consumer Disputes OJ L165/63 (The ADR Directive); Regulation 524/2013 on Online Dispute Resolution for Consumer Disputes OJ L165/1 (The ODR Regulation).

⁵ *Alassini* (n 1); *Menini* (n 1).

⁶ Commission, 'Study for an evaluation and implementation of Directive 2008/52/EC – the 'Mediation Directive', Final Report, October 2013, updated March 2016 (Publications Office of the European Union 2016) 48 (Study for Evaluation and Implementation of the Mediation Directive).

introduce more of mandatory mediation in our judicial systems to develop mediation.⁷

But the 2016 report from the European Commission evaluating the application of the Mediation Directive considered that there was no need at this time to revise the Directive and adopted a more nuanced position towards coercion within mediation. Indeed, while expressing its reservations about imposing compulsory participation in mediation on a large scale due to its incompatibility with article 47 of the CFR, the EU Commission recommends obligatory information sessions and 'an obligation on courts to consider mediation at every stage of judicial proceedings'.⁸

In doing so, the Commission implicitly calls for the expansion of mandatory mediation information and consideration to be widely implemented in the context of court litigation, and therefore, interestingly, distinguishes implicitly the different levels of non-voluntary mediation along the lines of the classification made in this study. It also validates the possibility of using these categories on their own or in various combinations, when considering to what extent non-voluntary mediation should be implemented in our civil justice systems to increase the use of mediation.⁹

II. A critical and comparative overview of each category of non-voluntary mediation.

The second part of the thesis has given a detailed and critical overview of the existing forms of non-voluntary mediation in England and compared it with Italy and France. This approach was chosen in order to be in capacity to provide, in the

⁷ European Parliament, Report on the implementation of the directive on mediation in the Member States, its impact on mediation and its take-up by the courts' (July 2011, Committee on Legal Affairs, (2011/2026(INI)) ; European Parliament, "Rebooting' the Mediation Directive: assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU", (Directorate General for Internal Policies Legal Affairs, Study PE 493.042, January 2014); Study for Evaluation and Implementation of the Mediation Directive.

⁸ Commission 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters' COM (2016) 542 final 12.

⁹ *ibid* 8.

last part of the study, pathways to increase the use of mediation within the court context, especially in light of the recent Online Court (OC) project in England.¹⁰

Although it has been sometimes difficult to draw a formal and definite frontier between the different levels of coercive action because of the variety of solutions and the highly evolving nature of the topic, the specific nature of the situation of non-voluntary mediation in England has involved separating Part II in two chapters. Indeed, England, while officially rejecting mandatory mediation, has transformed mandatory consideration into an implied requirement to participate in mediation through the policy of cost sanctions.

Chapter 3 analyzed separately the development in England of the first category of non-voluntary mediation identified, ie mandatory mediation information. Chapter 4 concentrated on the two other forms of non-voluntary mediation, namely mandatory consideration of mediation and mandatory participation. In both chapters, the comparison between England on the one hand, and Italy and France on the other, is interesting as, in spite of a variety of approaches and levels of development towards ADR, the three countries are all trying to promote mediation through the expansion of non-voluntary mediation.

Chapter 3 has shown a great diversity among the three countries of investigation when addressing the question of information of the public on mediation in civil and commercial matters, and more specifically, the issue of mandatory mediation information. Although there is no express scheme in place at the present time in the countries of investigation that solely imposes on parties to be informed about mediation, France is taking more and more initiatives to increase the information of the public on mediation and England has already made real improvements in that field, addressing presently the question of mandatory mediation information through a more comprehensive review on its civil courts structure. For its part, Italy has taken the step of compulsory mediation information, coupled with mandatory

¹⁰ Briggs LJ, 'Civil Courts Structure Review: Interim Report' (Judiciary of England and Wales, December 2015) (Briggs IR); Briggs LJ, 'Civil Courts Structure Review: Final Report' (Judiciary of England and Wales, July 2016) (Briggs FR).

consideration, in requiring since 2013 the attendance of the parties at an informational mediation meeting as a pre-condition to court, in some categories of civil and commercial matters.¹¹

The very low rates of mediation observed in Europe show that improving the awareness of the public on a voluntary basis by all means (public campaign, brochures, etc) is certainly a way to increase the use of mediation and to encourage potential litigants to think differently about litigation, but is insufficient to achieve the change of culture needed towards ADR. The thesis has taken the view that attention to mandatory mediation information should be reinforced.

Indeed, mandatory mediation information is a flexible instrument that can be put in place under different forms (questionnaire, meeting), through different routes (in person or through an internet platform), by different agents (lawyers, mediators, judges, court staff, other providers) at different levels (in each court, at each level of jurisdiction, at a national level, outside the court). It is also adaptable to the different legal cultures and to the choice of each country, which can decide either to restrict it only to general information on the mediation process or to include in it some sort of advice or assessment. This great adaptability of mandatory mediation information is also reflected in its cost which can vary depending on the scheme chosen to implement it. In other words, mandatory mediation information is a requirement that every country can modulate according to its own situation and policy.

Secondly, mandatory mediation information is a form of non-voluntary mediation that distorts neither the original concept of mediation nor the traditional process of court litigation. The obligation is situated on the fringes of the mediation process itself and none of the essential components of mediation (eg confidentiality) is thus affected. The recourse to traditional court litigation with its outcomes is also left intact. Once the requirement of information has been fulfilled, the parties regain their full freedom of choice in terms of dispute resolution process.

¹¹ See para 3.2.2, 120.

For all these reasons, mandatory mediation information appears to be an unavoidable measure to put in place in all European Member States. In effect, the present study in its last chapter has explored the possibility of expanding it in association with mandatory consideration of mediation through the implementation of a mandatory MIAM to a large number of civil and commercial cases in England.

The logic would have been to consider separately the two other categories of non-voluntary mediation as each of them contains a different degree of coercion. But the situation in England, as previously explained, made easier to consider them together in Chapter 4.

England has been constantly refusing to formally implement mandatory mediation and has chosen instead to promote mandatory consideration of mediation through a comprehensive legal framework of judicial encouragement for litigants to use mediation. Initially the CPR provided rules to enable judges to sanction litigants that would not comply with the obligation of consideration, but progressively the policy of cost sanctions has been extended to cases where litigants had refused to participate in mediation. This policy has led to the introduction of 'implied compulsory mediation' in England, has produced 'inconsistent' jurisprudence which has led to 'uncertainty' for litigants.¹²

While adverse cost orders are not a common feature of civil law countries, similar provisions have been implemented in Italy in the 2013 decree even though it does not mandate any type of cost shifting sanctions. At the same time, in France, there are few examples of judicial decisions penalizing with costs sanctions parties who failed to consider mediation in the context of court litigation.

However, from the point of view of this study, neither the trend of cost sanctions, nor the trend of imposing formally on litigants mandatory mediation, is satisfactory, although the latter has been implemented in a sporadic fashion. Beyond the question

¹² Masood Ahmed, 'Implied Compulsory Mediation' (2012) 31/2 Civil Justice Quarterly 151; Billingsley and Ahmed (n 2) 186.

of the compatibility of mandatory mediation with the right of access to justice, experiments have shown that ‘cases are more likely to settle at mediation if the parties enter the process voluntarily rather than being pressured into the process, and increased pressure to mediate depresses settlement rates’.¹³ Indeed, voluntariness preserves both traditional mediation and traditional access to justice.

But an optimistic development can be observed in the constant effort of the three countries to increase the recourse to mandatory consideration of mediation in the court context. While being coercive in the sense that it obliges litigants to consider their participation in mediation, it leaves at the same time entirely intact their choice to attempt it.

Indeed, the three countries of investigation, although under different features and intensity, provide rules that require litigants in the context of court litigation to consider mediation. Civil and commercial courts in England are under a general duty to encourage the parties to attempt, if appropriate, to resolve their dispute by ADR. This duty of encouragement, which takes place at the very early stage of the proceedings and continues at all stages of the action, obliges the litigants to consider mediation. Italy has implemented mandatory consideration of mediation in some various fields through the requirement of attendance to a pre-action informative mediation meeting. Since 1 April 2015, in France, any civil or commercial claim form must now mention that the parties have attempted an amicable settlement before they refer the matter to court.

However, after Part I and Part II, the answer to the key question of the present study remained open: To what extent should non-voluntary mediation be implemented to promote the use of mediation in England?

¹³ Hazel G. Genn and others, *Twisting Arms: Court Referred and Court Linked Mediation under Judicial Pressure*, (Ministry of Justice Research Series 1/07, May 2007) 148; Klaus J Hopt and Felix Steffek, *Mediation: Principles and Regulation in Comparative Perspective* (Oxford University Press 2012) 7; Felix Steffek and Hannes Unberath, *Regulating dispute resolution: ADR and access to justice at the crossroads* (Hart Publishing 2013) 148.

Indeed, this question called for further discussions regarding the position of each category of non-voluntary mediation identified that needed to be addressed in the last part of the thesis, ie: Should we force litigants to attempt mediation in the context of court litigation? Or should we force them in the same context to fulfil an obligation of information and of consideration of mediation? Should we perhaps do both? It is suggested that the answer lies in the degree of coercion we choose to impose on litigants in respect of the right of access to justice and the voluntary nature of mediation.

III. A proposal for promoting mediation in England in the context of court litigation.

The last part of the study has clarified the position of each category of non-voluntary mediation in England, also considering the situation in France and in Italy, and in light of the English OC project which is due to be operational by 2020.¹⁴ It has also formulated a proposal for promoting mediation in England through the imposition of information and consideration of mediation in the context of court litigation to be implemented in parallel with the establishment of the OC.

In relation to mandatory participation in mediation, Chapter 5 has recalled the controversial theoretical debate over the issue, its low results in terms of settlement and its limited implementation in Europe, thus far always as an adjunct to court, ie a process taking place in a court context but outside the courtroom.

The chapter then has observed that the debate on mandatory mediation is in some way relaunched today by the English OC project which proposes, inter alia, to integrate mediation within the court process as its main dispute resolution tool. Indeed, the OC would require the majority of litigants to attempt a telephone mediation before being able to consider judicial resolution, although the project needs to clarify if the decision to mediate will be left at the discretion of the Case Officer. It raises however worrying issues that are addressed in the chapter. In effect,

¹⁴ Briggs IR; Briggs FR.

the chapter has discussed how the OC project would impact not only the concept and the semantic of mediation, but also the future of out-of-court mediation and, more importantly, the fundamental issue of access to judicial resolution.

Such concerns could call into question the viability of the OC project itself as it is designed at the present time. Hence the need to consider today how to modify it and to adapt it to ensure its full success. At this stage, the study has advocated for a more flexible scheme in relation to mediation with the following recommendations:

- at Stage 2 the Case Officer's power is limited to recommend the mode of resolution rather than to impose it on the parties;
- at Stage 2 the words 'telephone mediation' be changed to 'telephone dialogue assistance' to make clear that it is not mediation but a form of integrated ADR stage, and rename 'conciliation stage' into 'facilitative stage', to clarify it as an umbrella term;
- at any stage during the court process a stay of proceedings may be granted to the parties to let them, if they wish to, go to private mediation or any other form of out-of-court ADR;
- the litigants are given the right to skip Stage 2 after Stage 1 in order to have their case directly submitted to the judge for judicial resolution at Stage 3.

Chapter 6 has taken the discussion further in proposing to promote mediation only through mandatory information and consideration, and considers whether this solution would be somehow compatible, or if it is possible to combine it with the actual OC project.

It has pointed out first that there is a high level of interconnection between mandatory information and mandatory consideration of mediation, not reducing their own specificity but rather highlighting their many points of convergence. Indeed, in practice, it is observed that mandatory consideration of mediation often integrates mandatory information, especially when mandatory consideration is required during a first meeting to give the parties the possibility of making an informed decision.

Secondly, it has revealed that, although England has a mandatory legal framework in the context of court litigation to raise awareness and consideration of mediation in civil and commercial matters, this does not seem in practice to have increased significantly the recourse to mediation as an alternative dispute method.¹⁵

Therefore, the study has identified and assessed other schemes of mandatory mediation information and consideration put in place in other areas of law in England and abroad, and especially mandatory MIAMs or like models put in place for family matters in England and in Italy. Overall, it has concluded that, despite their turbulent implementations in both countries, mandatory mediation information and consideration under the form of a pre-action informative and assessment meeting led to some very encouraging results both in terms of conversion rate and in terms of settlement rate.¹⁶ It presents the advantage of combining at the same time information and assessment, giving to potential litigants a very valuable time to make an informed choice about mediation. More generally, it respects the fundamental attributes of traditional mediation in placing coercion prior to the judicial process and is coherent with the English public policy that rejects mandatory participation in mediation in the court context.

However, it has been noted that the schemes described above are in need of improvement. Therefore, the study has envisaged an approach aimed at enhancing the financial and informative features of the present schemes and strengthening their enforcement by the judiciary.

The chapter then has compared these schemes with the provisions of the OC project in relation to mediation information and consideration, which are directly

¹⁵ Centre for Effective Dispute Resolution (CEDR), 'The Seventh Mediation Audit: a survey of commercial mediator attitudes and experience' (11 May 2016) <[www.cedr.com/docslib/The_Seventh_Mediation_Audit_\(2016\).pdf](http://www.cedr.com/docslib/The_Seventh_Mediation_Audit_(2016).pdf)> accessed 12 September 2016.

¹⁶ Anna Bloch, Rosie McLeod and Ben Toombs, *Mediation Information and Assessment Meetings (MIAMs) and Mediation in Private Family Law Disputes - Qualitative Research Findings* (Ministry of Justice Analytical Series 2014) 40; Ministero della Giustizia, Dipartimento della Organizzazione Giudiziaria del Personale e dei Servizi, Direzione Generale di Statistica, 'ex DL 28/2010 sulla mediazione civile: Statistiche relative al periodo 1° Gennaio - 31 Marzo 2014' <<https://mediazione.giustizia.it>> accessed 3 March 2017, 2.

integrated in the two sub-stages 0 and 0.5 of the first stage. It has then raised the issue of the disadvantages of such option. Indeed, in the OC the pre-action functions would be gathered within the formal court process when proceedings have already commenced, delaying the opportunity for the parties to be informed instead about the out-of-court ADR processes prior to initiating a claim.

Also, the present pre-action procedure creates a clear and distinct obligation for the parties to make information available to each other at an early stage and to consider resolving their dispute through ADR processes before proceedings are issued while in the OC the gathering at Stage 1 of mandatory ADR information and consideration with exchange of pre-issue letters and the subsequent obligations to complete their respective statements of the case online, might create unnecessary overlaps, but more worryingly, might bring confusion in the course of the process for litigants in person.

In addition, the OC project contains significant uncertainties on how ADR information and consideration will be made available to the parties at Stage 1. For example, the project does not explain how and by whom the parties will be assisted. The risk of not delivering effective information, advice and assistance to the parties at Stage 1 may lead the parties to perceive it only as 'a means of initiating a claim' and to continue to Stage 2, and eventually to Stage 3.¹⁷ This situation could be reinforced knowing that the OC project anticipates that a majority of cases will be quasi-automatically taken to telephone mediation at Stage 2 of the court process under the authority of the Case Officer at a minor cost. Why then explore mediation before?

Hence, the full and direct integration of the traditional functions of a pre-action procedure into the OC process seems to present serious challenges. Therefore, the present study has suggested instead to implement a free compulsory Online MIAM for most small civil and commercial matters as a preliminary requirement for access to court.

¹⁷ Masood Ahmed, 'A Critical View of Stage 1 of the Online Court' (2017) 36/1 Civil Justice Quarterly 12, 19.

The MIAM will have the main following characteristics: it will be conducted by a private accredited mediator through an out-of-court internet platform, on a confidential basis, will be public-funded and at no cost for users, and compulsory for every litigant in civil and commercial money claims up to £10.000.

It will have the same functions of information and assessment as the current family MIAM, ie (i) provide information about the principles, process and models of mediation, and information about other methods of non-court dispute resolution; (ii) assess the suitability of mediation as a means of resolving the dispute.

At the end of the meeting, the parties will complete a form indicating whether they intend to start a full mediation process, ie to opt-in or not. They will not have to explain or justify their decision; their duty will only be to comply with the obligation of attendance. The form will be certified by the mediator attesting that the parties have satisfied the requirement of the initial meeting. Unless this form is provided, it will not be possible for the claimant to initiate a procedure in court.

This solution would present the following advantages:

- In view of similar experiments in England (Family MIAM, ACAS Early conciliation) and Italy, it should lead to **good results in terms of conversion and settlement rates.**

- It would fulfil **an educative function** and provide consistency, clarity and unity before potential litigants embark on the judicial process and **simplify access to court** by discharging litigants from their pre-action obligations.

- It would ensure attendance by being at the same time **compulsory** and **at no cost.**

- It would deliver an **equal opportunity to all potential litigants to access easily and rapidly mediation information and consideration** with no need of a lawyer at this stage.

➤ It would **preserve traditional access to court as well as access to out-of-court mediation**, as coercion is only placed at the forefront of the judicial path, giving litigants the possibility to choose between mediation and the traditional judicial delivery of justice in court.

➤ It would favour the opt-in model (versus the opt-out solution) which **appears to be more flexible and also more respectful of each party's self-determination**.

➤ **It would be possible to combine it with the OC while staying a separate process.** If the OC were to be implemented as designed in the Briggs Reports, the mandatory pre-action online meeting proposed above would replace its Stages 0 and 0.5. Indeed, the compulsory out-of-court Online MIAM would perform their functions by informing the parties of the need to see court as a last resort, making them aware of alternatives to the court process and also allowing them to ascertain first whether there is a dispute. The OC process would then start at Stage 1 as only a triage stage to initiate the claim, followed either by Stage 2, giving another chance to litigants to either conciliate or try another form of ADR, or by Stage 3 if parties are not willing to conciliate. On a financial point of view, it would then permute the public funds allocated to the OC Stages 0 and 0.5 to the compulsory Online MIAM.

However, the proposal of implementing mandatory mediation information and consideration through online MIAMs in civil and commercial matters in England is not viable if appropriate sanctions for non-compliance and non-attendance are not put in place and effectively enforced.

The thesis has proposed to introduce adequate and meaningful sanctions at a pre-action stage to ensure compliance to the mandatory MIAM:

- If the claimant does not initiate an Online MIAM, the claim will not be admissible in court. MIAM becomes a condition of admissibility of a proceeding under the form of a certification delivered by the appointed mediator attesting that the applicant has satisfied the MIAM requirement.

- If the defendant has been reached by the mediator, made aware of the claim with the date and time of the Online MIAM and does not attend, a monetary penalty will be applied. The penalty shall be automatic and predictable.

In conclusion, this model, introduced in parallel with the OC project, appears to be the best way to move forward to promote mediation in England. In addition to all the advantages described above, it does combine the most effective elements of both the voluntary and the mandatory mediation models but it leaves self-determination at the centre of the mediation process itself. It is also in line with the EU policy to support ADR schemes, including mediation, on the condition that the right for each citizen to an effective remedy before a tribunal is preserved.

As far as possible the present study has tried to state the law as at June 2017. Also, the research has considered the existing situation of non-voluntary mediation in England in comparison with France and Italy, in a European perspective, taking into account the European framework of regulations, consultations, reports and decisions of the European Courts of Justice in relation to the topic. At the time of writing, it is not possible to predict the outcome of the Brexit negotiations and whether or not the English legislation would remain in line with the EU framework on mediation and consumer ADR. In any case, the relationship between ADR and the court system in England will be crucial for the future. As a last word, we are witnessing without a doubt a time of great change, although 'Civil justice reform is a subject that never rests.'¹⁸

¹⁸ Sir Terence Etherton MR, 'The Civil Court of the Future ' (The Lord Slynn Memorial Lecture, London, 14 June 2017) <www.judiciary.gov.uk/wp-content/uploads/2017/06/slynn-lecture-mr-civil-court-of-the-future-20170615.pdf> accessed 28 June 2017, para 1.

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