An Analysis of English Law in Referring Disputants to Consensual ADR Methods

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Abstract

Alternative Dispute Resolution (ADR) is increasingly successful in settling civil disputes outside court. ADR is often cost-effective and quicker than litigation, but it remains underused in England and Wales. This is a significant issue as litigation becomes increasingly expensive and funding options are limited. More importantly, the majority of the cases that come to court are of small value, and in many of these cases, individuals (especially Litigants in Person) are not well informed about the alternative dispute resolution options and those who use them usually have higher satisfaction. This thesis thus analyses English laws that are in place to refer disputants to consensual ADR. In doing so, it seeks to identify the reasons behind the low uptake and looks for ways to promote ADR in suitable cases. While encouragement to ADR through education and facilitation is the most favoured policy option in England and Wales to promote ADR, the option to use compulsion to undertake ADR is the most debated option, but there is strong resistance among the judiciary and the policymakers. Nonetheless, both the judiciary and policymakers speak favourably about ADR, and some measures have been introduced, notably mandatory family Mediation Information and Assessment Meeting (MIAM), employees' mandatory notification to ACAS, mandatory sectoral Consumer ADR schemes and the new Online Civil Money Claim are the significant ones. There is not enough in-depth analysis of these measures to show how far these initiatives have been successful in increasing the uptake of ADR. Therefore, this study seeks to fill this gap by carrying out an analysis of these measures and comparing them when appropriate to identify best practices and makes recommendations for reform. Importantly, this study critically examines how ADR is being embedded into the English civil justice system and argues for a balanced relationship between litigation and ADR because they complement each other.

This thesis is dedicated to my daughter

Ashiya Abbasy

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Table of Abbreviations

ACAS	Advisory, Conciliation and Arbitration Scheme service
ADR	Alternative Dispute Resolution
ARM	Automatic Referral to Mediation
Brook. L. Rev.	Brooklyn Law Review
CEDR	Centre for Effective Dispute Resolution
CJC	Civil Justice Council
CJEU	Court of Justice of the European Union
CJQ	Civil Justice Quarterly
CLWR	Common Law World Review
ECLR	European Competition Law Review
CMC	Civil Mediation Council
CPR	Civil Procedure Rules
CRPA	Consumer Rights Protection Act
DNCRP	Directorate of National Consumer Rights Protection
EC	Early Conciliation
Edin. L.R.	Edinburgh Law Review
ERD	External Resource Development
ET	Employment Tribunal
Geo L.J.	The Georgetown Law Journal
ISDLS	Institute for the Study and Development of Legal Systems
LIP	Litigant in Person
MLR	Modern Law Review
MOJ	Ministry of Justice
MIAM	Mediation Information Assessment Meeting
OCMC	Online Civil Money Claim
RTA	Road Traffic Accident
SCMS	Small Claims Mediation Service
TSO	The Stationery Office
UNCITRAL	United Nations Commission on International Trade Law
YLJ	Yale Law Journal

Introduction

i. The definition of ADR

Alternative Dispute Resolution (ADR)[1] is increasingly becoming popular to settle civil disputes outside the court process without going through lengthy and costly court proceedings.[2] There is no universal definition of ADR[3] but commonly, it refers to a range of out of court dispute resolution options that help parties to resolve their disputes (for the purpose of this study, civil disputes) with the help of a neutral third party without going to the court.[4] This study carries out a detailed analysis of English law in referring disputants to consensual ADR methods.

There is much discussion on what is meant by ADR.[5] As noted above, ADR is an umbrella term that comprises various alternative options to resolve civil disputes which have unique and separate characteristics. As different dispute resolution processes have been developed, ADR today includes theories on different types of dispute resolution and dispute resolution system design. For instance, some[6] might argue arbitration is not a form of ADR because it is a regulated adjudicative process, and others may argue that negotiation does not technically fall under ADR because it involves lawyers and their clients but no neutral third party. This would be better explained by explaining the types and features of ADR.

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[1] For the purpose of this study the term ADR is used to refer consensual forms of ADR including mediation.

[2] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (TSO 2009), Civil Justice Council (CJC) ADR Working Group, *ADR and Civil Justice: Interim Report* (October 2017) and CJC ADR Working Group, *ADR and Civil Justice: Final Report* (November 2018).

[3] S. Blake, J. Browne and S. Sime, *A Practical Approach to Alternative Dispute Resolution* (3rd Edition, OUP 2014) and H. Brown and A. Marriott, *ADR Principles and Practice* (3rd Edition, Sweet &Maxwell, 2011) p2.

[4] See section 1.2 of chapter 1.

[5] *A Practical Approach to ADR* (n 3).

[6] H. Brown and A. Marriott, *ADR Principles and Practice* (2nd Edition, Sweet &Maxwell, 1999).

The idea of ADR is to provide not only extrajudicial or out of court dispute resolution but also appropriate dispute resolution,[7] which means that the process matches the needs of the parties and the kind of dispute at hand. The features of ADR vary in different options; for example, some processes are informal (e.g. negotiation and mediation) whereas some are formal (e.g. arbitration); some involve lawyers and clients only (e.g. negotiation), whereas some involve a natural third party (e.g. mediation) and some involve specialists or experts (e.g. early neutral evaluation and expert determination). Additionally, ADR can be divided into two categories based on its outcomes; adjudicative and non-adjudicative/consensual ADR options.[8] In adjudicative ADR, a neutral third party makes a decision that is binding on the parties, which is more like formal litigation (e.g. arbitration), but this process provides more flexibility and more privacy than litigation. For instance, parties have more control over the choice of the form of adjudicative ADR to be used, and the person or organisation would carry out the process.[9] This type of ADR is most useful in cases where there is a need for independent decisions and parties want to keep the process confidential.[10] These features make arbitration particularly appealing for resolving international commercial disputes.

On the other hand, in non-adjudicative ADR, both the process and outcome are controlled by the parties. Consensual ADR includes a range of options including negotiation, mediation, conciliation and early neutral evaluation. Mediation is by far the most frequently used option in England and Wales,[11] and this study examines it as the paradigmatic example of consensual ADR.[12] Unlike the adjudicative ADR, in non-adjudicative processes, the third party does not impose a decision on the party instead helps the parties to reach an amicable solution to their dispute by facilitation, evaluation or recommendations. For example, in facilitative ADR such as mediation, the third party (the mediator) facilitate the negotiation between the parties and encourages them

[7] Ibid.

[8] S. Blake, J. Browne and S. Sime, *The Jackson ADR handbook* (2nd edition, Oxford University Press 2016).

[9] *A Practical Approach to ADR* (n 3).

[10] *ADR Handbook* (2nd edn) (n 8).

[11] For the purpose of this study the UK refers to England and Wales.

[12] *ADR Principles and Practice* (3rd Edn) (n 3).

to discuss and reach a solution suitable for both parties. In contrast, in evaluative ADR such as early neutral evaluation, the third party provides recommendations and suggestions but does not give a final decision. Additionally, in evaluative processes, the third party focuses on the legal merits of the case instead of focusing on the interest of the parties. There are other types of consensual ADR such as negotiation where there is no third party involved and the parties/their legal representatives on behalf of them decide the case.[13] In consensual ADR, the outcome is not binding on the parties unless they agree to it and reduced into writing which then becomes binding. This type of ADR is most appropriate in cases where the parties wish to have more flexibility, such as they want to control the process as well as the outcome,[14] especially when disputants need a quick resolution while maintaining or even restoring their personal or professional relationships.

The main features of ADR involve more control by the parties, informality, more efficiency, and in some cases more self-fulfilment and these features are examined in chapter 1.[15] However, arbitration is an adjudicative process which led to different views among commentators on whether arbitration should still be considered a form of ADR.
In place of the emphasis on party control and flexibility that are important features of traditional ADR, the arbitration process is structured, formal and adjudicative in nature.[16] Some commentators[17] argue that while there are similarities between litigation and arbitration, there is no reason to exclude it from the ADR concept because it still shares some of the common features of ADR such as the outcome is confidential, the parties have control over who act as the arbitrator and how the process will be conducted.[18] Therefore, some commentators who were very critical about arbitration as a form of ADR, now accepts that arbitration should be regarded as part of ADR.[19]

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[13] A. Nylund, 'Access to Justice: Is ADR a Help or Hindrance?' In Laura Ervo, Anna Nylund (eds), *The Future of Civil Litigation* (Springer, Cham 2014) pp. 325-344.

[14] Ibid.

[15] See section 1.3.

[16] O Rabinovich-Einy & E Katsh, 'Technology and the Future of Dispute Systems Design' (2012) 17 Harvard Negotiation Law Review 151-199, 188.

[17] J Sternlight, 'Is Binding Arbitration a Form of ADR: An Argument That the Term ADR Has Begun to Outlive Its Usefulness' (2000) J Disp Resol 97-111, 111.

[18] Ibid.

[19] *ADR Principles and Practice* (n 3) p112.

However, there are a number of jurisprudential issues have developed with regard to the interrelation of litigation and the traditional concept of ADR. For instance, there are issues concerning the traditional concepts of privilege and confidentiality and ADR processes.[20] ADR process, discussions are protected like "without prejudice" negotiations, so one party cannot use the discussion in subsequent litigation to show it as evidence or argue that the other party has admitted liability. However, problems often arise when ADR process fails, or there is any dispute about it. For instance, the confidentiality in ADR creates difficulties when ADR fails and the matter goes to court because discussions in ADR are protected like "without prejudice" negotiations which means one party cannot use the discussion in subsequent litigation to show it as evidence or argue that the other party has admitted liability.[21] Besides, voluntariness in using ADR is another feature that is under the scrutiny of the academics in light of the low uptake of ADR. These issues are discussed below and throughout this thesis where relevant.

This thesis examines non-adjudicative/consensual ADR, mediation being the main one, because of its distinctive advantages over litigation (e.g., flexible, consensual, confidential, quicker and cheaper)[22] and because it is by far the most used ADR process in England and Wales.[23] Henceforth, for ADR, I mean consensual ADR processes, being mediation the main one. Although there is no universal definition of mediation, it is defined as a process where a neutral third (the mediator) who assists parties to communicate so they can find a common ground from where to reach an amicable settlement.[24] For the purpose of this study, a broad definition of mediation has been taken that includes other consensual forms of ADR where a neutral third party assists the party to reach an amicable settlement such as conciliation, early neutral evaluation and some consumer ADR schemes which use mediation technique to resolve disputes between disputants.

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[20] *A Practical Approach to ADR* (n 3) p13.

[21] O. Rabinovich-Einy & E. Katsh, 'Digital Justice' (2014) 1 IJODR 5-36, 21.

[22] For a detailed discussion of these features see section 1.3 of chapter 1.

[23] CJC Final Report (n 2).

[24] See subsection 1.2.1 of chapter 1.

ii. Benefits and limitations of ADR

The growth of ADR outside the courts in England and Wales was largely due to dissatisfaction with the high costs, limited remedies and delay of court procedures. This issue is of great importance because the high costs and excessive delay in formal litigation mean many litigants, in particular who are litigants in person (LIPs), cannot afford litigation, whereas ADR offers more accessible redress routes to LIPs. Despite the advantages of ADR and apparent problems with the litigation system, the number of litigants resorting to ADR options to seek resolution of their disputes is still low.[25] As such, this thesis will examine how English courts are encouraging ADR in recent times and what can be done further to improve the current practice.

Unlike litigation, where the rights-based approach is followed, in ADR process, parties focus on the interests-based approach. It can be said that the main purpose of ADR is to maximise the disputants' decision-making, and it is the parties' responsibility to resolve the dispute based on mutual terms. Hence, the role of the neutral third party (e.g., mediator) is to support the parties to make their own decision. In doing so, the mediator helps the parties to identify issues and discusses between then with a view to reach suitable solution. Confidentiality in the ADR process attracts parties who want to keep their matter private, for example, parties to a family dispute involving kids and commercial disputes. This feature allows parties to open up to each other confidently, knowing that discussion in the process is protected like "without prejudice" negotiations, so one party cannot use the discussion in subsequent litigation to show it as evidence or argue that the other party has admitted liability. This feature is further discussed in chapter 1 below.[26]

[25] H Genn, 'Court-based ADR Initiatives for Non-family Civil Disputes: the Commercial Court and the Court of Appeal' (Department of Constitutional Affairs (DCA Research Series, February 1, 2002); H Genn, 'Central London County Court (CLCC) Pilot Mediation Scheme: Evaluation Report' (Lord Chancellor's Department Research Series 5/98, 1998); Jackson Final Report (n 2), Briggs LJ, Civil *Courts Structure Review: Interim Report* (December 2015); Briggs LJ, *Civil Court Structure Review: Final Report* (July 2016); CJC Interim Report (n 2) and Final Reports (n 2).

[26] This feature is further discussed in subsection 1.3.4 of chapter 1.

Unlike litigation, which is formal in nature, ADR process is informal that allows the process to be conducted anywhere and, in any format, suited to the parties. The Flexible nature of the ADR processes allows these to be conducted anywhere and by any means which includes online technologies. It is undeniable that face-to-face meetings are important for ADR processes, but many ADR processes are to a significant extent paper based. Besides, face-to-face meetings require parties to take time off from work and travel to conduct the ADR which incur costs and time to the parties. However, if the ADR is conducted online, the problems with the conventional ADR process can be mitigated significantly.[27] Due to the evolvement of intricate software, some forms of ADR are conducted fully online where the whole process is automated using innovative techniques, and advanced technologies and these are commonly referred as online dispute resolution (ODR).[28] It is observed that ADR terminology and methodologies are still evolving.[29] With the increased use of technologies in the design of dispute resolution processes, there is an ongoing debate whether the traditional concept of ADR is still fit for purpose. Because delay, high costs and unsatisfaction with the formal litigation were the main reasons for the growth of ADR which is often cheaper and efficient in appropriate cases. However, ADR in its current state has its own limitations such as parties are required to take time off work, travel to physically attend mediation which costs time and money. While the conventional concept of ADR provides attractive features, for example, face-to-face negotiations, which creates an atmosphere for settlements, making ADR available online is more accessible, quicker and cost-effective. With the blessings of modern technologies and innovative software, it seems possible to provide dispute resolution online efficiently at a lesser cost.[30] Hence, this study examines the impact of technology in the ADR landscape and how it could be used to increase the accessibility of ADR which will eventually increase the uptake of ADR.

[27] *ADR Handbook* (n 8) p260.

[28] ADR Principles and Practice (3rd Edn) (n 3).

[29] Ibid.

[30] O Rabinovich-Einy & E. Katsh 'Digital Justice' (n 21).

iii. Low usage of ADR and the need for more ADR

Despite the advantages of ADR over litigation, evidence suggests that the usage of ADR is low in England and Wales.[31] A study conducted by Hazel Genn into civil mediation at Central London County Court in 1996/97 observed a 5 per cent demand for mediation.[32] Subsequent studies also confirmed that ADR is underused in England and Wales.[33] The evaluations of the three pilot schemes ran by the DCA from June 2005 to June 2006[34] indicated that ADR is efficient, cheaper and provide a range of remedies than those are available at the courts. The outcome of these evaluations indicated that district judges spent significant amount of their time in reading files and hearings[35] which would not be needed if cases settle out of court using ADR. Conveniently, during the evaluation period mediation process saved 121 hours of judicial time.[36] Further, the research also highlighted that parties saved a significant amount of time where the parties engaged in mediation and as a result the case settles subsequently. Importantly, the time for referral to mediation was noted to be significantly lower (five weeks) than small claims hearing (thirteen weeks).[37] The potential costs savings of not proceeding to court can be substantial which can be seen from the CEDR's Ninth Annual Mediation Audit published in 2021 which estimated £4.6 billion would be saved by parties engaging in mediation.[38] This is further discussed in chapter 2.[39]

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[31] See point (iii) above.

[32] Genn CLCC (n 25) p15.

[33] Genn, 'Court-based ADR Initiatives' (n 25); H Genn and others, *'Twisting arms: court referred and court linked mediation under judicial pressure'* (MOJ Research Series 1/07, May 2007); Jackson Final Report (n 2), Briggs Interim Report (n 25) and Final Report (n 25); CJC Interim Report (n 2) and Final Report (n 2).

[34] S Prince and S Belcher, *An Evaluation of the Small Claims Dispute Resolution Pilot at Exeter County Court* (Dept for Constitutional Affairs, London 2006); M Doyle, *Evaluation of the Small Claims Mediation Service at Manchester County Court* (Dept for Constitutional Affairs, London 2006); and Craigforth, *Evaluation of the Small Claims Support Service Pilot at Reading County Court* (Dept for Constitutional Affairs, London 2006).

[35] Ibid.

[36] Prince, 'An Evaluation of the Small Claims Dispute' (n 34).

[37] Ibid.

[38] N Doble, 'Compulsory ADR' (2021) Available at https://www.independentmediators.co.uk/thoughts-on-the-cjc-report-on-compulsory-adr/ [hereinafter, last accessed 20 August 2021]; CEDR, The Nineth

The spirit of the Civil Procedure Rule (CPR) overriding objectives is that cases should be death with justly and at proportionate costs. As such, it is important to examine whether the current court practices adhere to this objective. The CPR introduced a number of mechanisms such as pre-action protocols (PAP) and conducts, part-36 offers to settle[40] and case management[41] which encourages parties to consider early settlements. These mechanisms are discussed throughout this thesis especially in chapter 2.[42] While the existing mechanisms promote negotiation and mediation, but these are not enough as found by the Civil Justice Council (CJC).[43] Hence the push for more ADR.

iv. Promotion of ADR and Justice issue

The policymakers are increasingly looking for ways to promote early settlement of disputes through ADR in England and Wales to reduce pressure on the courts.[44] This study observes that there are two schools of thought, and academics are divided in their opinions about the promotion of ADR as opposed to formal litigation.[45] The issue of

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Mediation Audit (May 2021). Available at <https://www.cedr.com/wp-content/uploads/2021/05/CEDR_Audit-2021-lr.pdf>.

[39] See subsection 2.6.3.

[40] CPR r36.

[41] CPR r26.

[42] See section 2.2.

[43] CJC Interim report (n 2).

[44] *ADR Principles and Practice* (n 3), D Girolamo 'Rhetoric and civil justice: a commentary on the promotion of mediation without conviction in England and Wales' (2016) 35 (2) C.J.Q. 168; CJC Interim Report (n 2) and Final Report (n 2), Ministry of Justice, *Transforming our Justice System* (September 2016). Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf .

[45] O Fiss, 'Against Settlement' (1984) 93 YLJ 1073; H Genn, 'Tribunals and Informal Justice' (1993) 56 MLR 393; M Cappelletti, 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement' (1993) 56 MLR 282; I Gunning, 'Diversity Issues in Mediation: Controlling Negative Cultural Myths'(1995) Journal of Dispute Resolution 55; D Allen, 'Against Settlement? O. Fiss, ADR and Australian Discrimination Law' (2009) 10 IJDL 191, 19; P Cortes, *The Promotion of Civil and Commercial Mediation in the UK*, University of Leicester School of Law

whether ADR carries public value to the same extent as the courts (e.g. establishing rights and creating precedents) and can provide similar standards of justice as the court has been the centre of attention of the academics' debate.[46] Justice is defined by some commentators like Owen Fiss and Hazel Genn as when parties are given access to courts and their rights are vindicated by judges using legal principles, not private law.[47] They argue consensual ADRs do not use legal principles as such unable to provide justice to parties involved.

Critics base their argument mainly on the parties' right to access to justice.[48] It has been argued that ADR could not substitute for the public value of court adjudication[49] because adjudication provides substantive justice which ADR cannot because ADR does not use legal principles.[50] The primary function of the court is to uphold the right of the parties ensured by the law, whereas the purpose of ADR is to satisfy the interest of the concerned parties.[51] This is the most important distinguishing feature between litigation (and adjudicative ADR processes), and consensual ADR and academics put emphasis on this point when debating whether ADR should be promoted or not.[52]

Critics argue that ADR cannot deliver justice in the same way as the court, and the continued pressure to use ADR as opposed to the court can lead to coerced settlements, which, it has been argued, stands in the way of the development of law[53] and increasingly leading to the vanishing of trials from the civil courts.[54] It is important to

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Research Paper No. 15-23; H Edwards, 'Alternative Dispute Resolution: Panacea or Anathema?' (1985) 99 Harvard Law Review 668; C Meadow, 'Whose Dispute Is It Anyway? : A Philosophical and Democratic Defense of Settlement (In some cases)' (1995) 83 Georgetown Law Journal 2663; C. Meadow, 'The trouble with the adversary system in a postmodern, multicultural world' (1996) 38 William and Mary Law Review 5–44.

[46] Ibid, A. McThenia and T. Shaffer, 'For Reconciliation' (1984) 94 YLJ 1660.

[47] Fiss (n 45), Genn,'Tribunals and Informal Justice' (n 45).

[48] Ibid. Cappelletti, 'World-Wide Access-to-Justice Movement' (n 45).

[49] Ibid.

[50] Meadow, 'Whose Dispute Is It Anyway?' (n 45) 2681.

[51] Fiss (n 45); H. Genn, *Judging Civil Justice* (CUP, 2008).

[52] Ibid.

[53] Genn, *Judging Civil Justice* (n 51), Edwards, 'ADR: Panacea or Anathema?' (n 45) 679.

[54] Ibid.

note that trials are very crucial to establish parties' legal rights and hence reducing disputes.[55] The authoritative role and quality of the courts significantly support settlement through private dispute resolution, and ADR is only successful when it is complemented by an effective adjudication process.[56] Critics emphasise that, 'Cases settle in the shadow of the law - without a functional civil court system cases would not settle peacefully'[57] as such they argue that ADR is an important supplement to the courts.[58] Moreover, critics argue that undue pressure on the parties to consider ADR as opposed to the court may clash with the parties' rights under Article 6 of the European Convention of Human Rights (ECHR).[59]

On the other hand, many commentators strongly support the promotion of ADR on the ground that it advances self-determination and autonomy[60] and empowers parties to 'control the outcome'.[61] Data from existing studies suggest that most cases are settled before reaching the trial stage, and in fact, only around 3-4 percent reached the trial stage in the last decade.[62] Undeniably, some of these cases settle via different means at different stages before the trial incurring high costs to the litigants. Hence, proponents of ADR are of the view that making ADR more effective would help to achieve early resolution, hence saving time and costs to the parties and could potentially reduce

[55] Ibid, p74.

[56] H Genn, 'Why the privatisation of civil justice is a rule of law issue' (36th F A Mann Lecture, Lincoln's Inn, 19 November 2012); Hon Justice Winkelmann, 'ADR and The Civil Justice System' (AMINZ Conference 2011 - Taking Charge of the Future, New Zealand, August 2011).

[57] Winkelmann, 'ADR and The Civil Justice System' (n 56) 3; Lord Neuberger, 'Equity, ADR, arbitration and the law: different dimensions of justice' (the Fourth Keating Lecture, Lincoln's Inn, 19 May 2010).

[58] Ibid.

[59] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; Phillips LJ, 'Alternative Dispute Resolution: an English viewpoint' India (2008) 74(4) *Arbitration* 406.

[60] Gunning, 'Diversity Issues in Mediation' (n 45).

[61] Allen (n 45) p191.

[62] J. Slingo, 'MoJ seeks views on expanding mediation' *The Law Society Gazette* (London, 03 August 2021) <https://www.lawgazette.co.uk/news/moj-seeks-views-on-expanding-mediation-/5109448.article#:~:text=The%20government%20issued%20a%20call,heart%20of%20the%20future%20system'.>P Cortes, 'Making Mediation an Integral of The Civil Justice System' University of Leicester School of Law Research Paper (2018)*;* P Cortes, The Promotion of Civil and Commercial Mediation in the UK (n 45) 4 and Briggs Interim Report (n 25) para 2.24.

caseloads from the court.[63]

Importantly, the increased use of ADR in cases that are suitable for settlement could also be expected to save court time which can be invested in cases that require the attention of the courts.[64] Thus, it can be argued that in this way ADR also increases access to justice for those cases that end up being resolved in courts.[65] It can be noted that ADR offers processes that are suitable in a particular case and in line with the party's needs hence making justice more accessible. At the same time, this enables the society to increase access to justice by promoting process pluralism that enables the allocation of disputes to the most suitable dispute resolution option, rather than a one-size fill all approach.[66] It is important to ensure parties are offered appropriate alternative dispute resolution according to their needs and the type of dispute concerned and needs of the parties akin to multi-door courthouse envisaged by professor Sander.[67] This rhetoric was reflected in the recent comments by Geoffrey Vos MR who recommended introducing a single "online funnel" and all disputes will pass through this funnel and be directed to the appropriate dispute resolution.[68]

It is undeniable that the high costs of litigating at courts means most parties cannot afford to go through the court procedure,[69] and this acts as a barrier to access to justice. Arguably, complex court procedure and its outcomes act as hindrance to access to justice. This is further compounded by the fact that the adversarial nature of the civil procedure is too onerous for LIPs because it encourages competition and focuses on

[63] Edwards, 'Panacea or Anathema?'(n 45) 673.

[64] Legal Services Commission, *A Report on Legal aid and mediation for people involved in family breakdown* (HC 256, Session 2006-2007)

[65] Ibid.

[66] Nylund (n 13).

[67] F Sander and S Goldberg , 'Fitting the forum to the fuss: user-friendly guide to selecting an ADR procedure (1994) 10 Negotiation J 49–68; F. Sander, 'The multi-door courthouse' (1976) 1 Barrister 18–21 and 40–42;

[68] G Vos, 'Reliable data and technology – the direction of travel for Civil Justice' (Law Society Webinar on Civil Justice and LawTech, 28 January 2021) Available at <https://www.judiciary.uk/wp-content/uploads/2021/01/20200128-MR-to-Law-Society-Lawtech-data-technology-economic-effect.pdf>.

[69] *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51; Cortes, 'Making Mediation an Integral of The Civil Justice System' (n 62).

disagreement rather than cooperation. Arguably, court is more concerned with past problems and injustice made, not future solutions which is important in certain disputes where ongoing relationships are important such as employment, family and commercial disputes. In terms of outcome in the courts, it is limited by legal rules, which provides mostly monetary compensation as the primary and almost exclusive remedy. Hence commentators argue that 'the law and legal practices might hinder access to perceived justice'.[70] Conversely, ADR has the potential to offer an alternative process based on negotiations, dialogue, cooperation and broader interests best suited to the parties' needs. In this way, 'The results could be more satisfactory as a broader range of remedies and solutions could be included, and different forms of justice could be used'.[71] Hence, it could be argued ADR in appropriate cases provides deeper and richer access to justice as opposed to the expensive courts.[72] Participants in ADR procedures and their satisfaction with procedures lead to satisfaction with the substantive outcome.[73] ADR offers procedural justice in that parties have an opportunity to tell their story, that they are listened to, treated with dignity and in an even-handed way[74] which highlights mediation is more democratic than formal litigation, which is dominated by professionals.[75] Arguably, the ADR process enhances access to justice by allowing the parties to resolve their disputes in their own way and also by providing a range of solutions to their dispute, like an apology.[76] It is acknowledged that settling in ADR means some compromise, and the outcome may be less what parties would get in the court. However, ADR has other benefits as it increases access to justice by preventing cases from resorting to litigation which in effect saves parties' time and money; saves taxpayers' money, reduces caseloads from the court and reduces delay.[77]As such, the objective should be making "justice" more accessible by offering an appropriate dispute resolution process that will meet the needs of the party concerned and suitable for the

[70] Nylund (n 13).

[71] Ibid.

[72] Meadow, 'Whose Dispute Is It Anyway? (n 45) p2691.

[73] R Bush & J Folger, The Promise of Mediation (Jossey-Bass, 1994).

[74] J Hyman and L Love, 'If portia were a mediator: An inquiry into justice in Mediation' (2002) 9 Clinical Law Review 157.

[75] Meadow, 'Whose Dispute Is It Anyway?' (n 45) p2689.

[76] Brooke LJ in *Dunnett v Railtrack* [2002] 1WLR 2434, at [14].

[77] Genn, *Judging Civil Justice* (n 51) p82.

types of cases in question. In this way, the society can, at least in theory, increase access to justice.[78]

v. The contrasting views on mandatory ADR

Among the possible ways to refer more suitable cases to ADR, using some kind of compulsion is the most debated one among academics. This study looks at wide range of ways to promote ADR, including using compulsion to encourage more disputants to consider ADR in suitable cases. This study examines, as we shall see,[79] whether compulsion to a limited extent (e.g., attendance at an information session) can be introduced, which only applies to parties' attendance, not settlement; hence the voluntariness of ADR will be intact. ADR is largely voluntary in England and Wales[80] , which is one of the reasons for the low uptake of ADR. Existing studies[81] suggest that policymakers and the judges have been looking for solutions to the low uptake of ADR and they have offered some recommendations, among which using some kind of compulsion to channel cases to ADR has been the most debated option among the judges, academics and ADR providers.[82] However, the government and the senior members of the judiciary have always opposed the introduction of compulsory ADR due to the concern that it might clash with parties' right to access to justice.[83] The debate mainly started with the judgement in the *Halsey v Milton Keynes General NHS Trust*[84] where Dyson LJ stated that the courts do not have the power to compel unwilling parties to undertake ADR as it imposes an unacceptable obstruction on their right of access to the court. This judgement has sparked a substantial debate among senior members of the judiciary and academics which is examined in detail in chapter 2

[78] Nylund (n 13).

[79] See section 2.3 of chapter 2.

[80] *ADR Handbook* (n 8).

[81] See for example CJC Final Report (n 2); Cortes, 'Making Mediation an Integral of The Civil Justice System' (n 62)*;* Jackson Final Report (n 2) and Woolf LJ, *Access to Justice: Final Report* (1996).

[82] See for example Lord Phillips, 'ADR: an English viewpoint' (n 59); P Randolph, 'Compulsory mediation?' (2010) New Law Journal; M. Ahmed, 'Implied Compulsory Mediation' (2012) 31(2) *Civil Justice Quarterly* 151-175.

[83] Jackson Final Report (n 2); Dyson LJ in *Halsey* (n 59).

[84] [2004] 1 WLR 3002, at [9].

of this thesis.[85] Nonetheless, things are about to change with the decision Court of Appeal (COA) in *Lomax v Lomax*[86] and CJC's recent finding that parties can be lawfully compelled to undertake ADR in certain circumstances, which are discussed below.[87]

Some commentators argue that the existing power of the judges under CPR to encourage parties to consider ADR[88] as well as using costs sanction[89] for unreasonable refusal to consider ADR indicate that mediation is impliedly mandatory in England and Wales.[90] When advocating support for mandatory ADR, mandatory mediation schemes that are in operation in other jurisdictions such as Canada, the USA, Canada,[91] Germany[92] and Greece,[93] are often referred by the commentators in advancing their arguments that compulsory ADR does not necessarily clash with parties' right to access to justice under Article 6 of ECHR.[94] In contrast, there is a possibility that weaker parties especially LIPs will feel undue pressure consider ADR[95] which may clash with the parties' rights to access to courts.[96] But the decisions of the Court of Justice of EU (CJEU) in *Rosalba Alassini v Telecom Italia SpA* [97] and *Menini v Banco Popolare Società Cooperativ*[98] have effectively weakened the argument that compelling unwilling

[85] See section 2.3.

[86] *Lomax* [2019] EWCA Civ 1467.

[87] CJC, Compulsory ADR (June 2021).

[88] CPR 1.1- 1.4.

[89] CPR 44.3-44.5.

[90] Ahmed 'Implied Compulsory Mediation' (n 82).

[91] Rule 24.1 of the Rules of Civil Procedure.

[92] Section 278, Germany Civil Procedure Code.

[93] Article 214 of the Greek Civil Code.

[94] Clarke MR, 'The Future of Civil Mediation' (The Second Civil Mediation Council National Conference, Birmingham, 08 May 2007) 4.

[95] Cortes, 'The promotion of Civil and commercial Mediation in the UK' (n 45).

[96] See Jackson Final Report (n 2); J Tornhill, 'Vladimir Putin and his tsar quality' *Financial Times* (London, 6 February 2015); Neuberger LJ, 'A View from on High' (Civil Mediation Conference, 12 may 2015); Dyson LJ in *Halsey* (n 59).

[97] (Joined Cases C-317-320/08) [2010] 3 C.M.L.R. 17 ECJ.In this case the CJEU was concerned with the parties' rights under art 6 of ECHR.

[98] [2018] C.M.L.R 15. In this case the CJEU was concerned with parties' rights to access to justice under Article 47 of the Charter of Fundamental Rights of the European Union.

parties to consider ADR will violate their right to access to the court. In both cases, the CJEU held that a party's fundamental rights can be restricted provided that it corresponds to objectives of general interest pursued by the measure in question. A detailed examination of these cases is carried out in chapter 2.[99] In the landmark case of *Lomax v Lomax,*[100] the COA recognised for the first time that the English courts do have the power to compel unwilling parties to engage in Early Neutral Evaluation (ENE) which is another form of ADR. Finally, the CJC, in their recent report on compulsory ADR, recommended that English courts do have the power to compel parties to consider ADR, and it is lawful in certain circumstances, which is examined in chapter 2 of this thesis.[101]

It can be noted that there are some mandatory measure already in place in England and Wales such as mandatory requirement for separating couples in certain private law proceedings relating to children and proceedings for a financial remedy to attend an initial Mediation Information Assessment Meeting (MIAM),[102] mandatory notification to ACAS Early Conciliation for employment disputes,[103] and mandatory sectoral consumer ADR schemes for traders. Additionally, the new Online Solution Court (currently piloting as Online Civil Money Claim (OCMC))[104] is very crucial for this study because previously ADR was only an outside process but now it is part of the court as it is embedded into the second stage of the OCMC which is intended to settle more cases through ADR techniques.[105] This is expected to make ADR culturally normal, and it is likely to increase the credibility of ADR as it is now part of the civil justice system.[106] The design of the OCMC indicates that it will have a great impact on the current ADR landscape because of its emphasis on ADR. Hence this study examines the OCMC in chapter 5 of this thesis.

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[99] See subsection 2.3.2.

[100] *Lomax* (n 86).

[101] See subsection 2.3.4.

[102] See section 4.3 of chapter 4.

[103] See subsection 4.2 of chapter 4.

[104] See chapter 5.

[105] Briggs Final Report (n 25).

[106] C. Irvine, 'The sound of one hand clapping: the Gill review's faint praise for mediation' (2010) 14 Edin. L.R. 85.

vi. Incentives and penalties

It is observed that while there is some doubt about compulsory ADR, there is a strong support for using costs sanction to encourage more litigants to consider ADR in suitable cases.[107] For instance, Woolf LJ and Jackson LJ were not in favour of mandatory ADR, but they advocated for the robust use of costs sanctions to increase the uptake of ADR.[108] In line with their recommendations, judges are now as part of their case management duties obliged encourage litigants to settle their disputes out of court.[109] Furthermore, the CPR equipped the judges with the power to penalise parties for their unreasonable behaviour, including unreasonable refusal to consider ADR.[110]

The CJC, in their final report[111] emphasised that costs sanction should be administered by the courts to punish parties who unreasonably refuse to consider mediation.[112] One problem with this costs penalties do not well in small claim cases where fixed recoverable rules apply.[113] Besides, English judges remain reluctant to use costs sanction in practice, especially against LIPs as well as litigants with small claims.[114] and this reluctance of the judges is partly responsible for the failure of the existing mechanisms designed to encourage parties to mediate. This study notes that despite the threat of costs sanction for unreasonable refusal to consider ADR, the uptake of ADR is still low, probably because using costs sanction alone to penalise parties is not that effective where parties are unaware of ADR options. As such, commentators argue that signposting to ADR coupled with the threat of cost-penalties is likely to increase the use of ADR.[115]

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[107]Jackson Final Report (n 2); P Cortes, 'The online court: filling the gaps of the civil justice system?' (2017) 36 C.J.Q 109-126; M Ahmed, 'A Critical View of Stage 1 of the Online Court' (2017) 36 C.J.Q. 12.

[108] Jackson Final Report (n 2); Woolf Final Report (n 81).

[109] CPR rr.1.4(1), (2).

[110] CPR rr44.2 (4) (a), 44.2(5)(a) and 44.4 (3) (ii).

[111] CJC Final Report (n 2).

[112] Ibid.

[113] See CPR r27.14 and r45; Fixed recoverable costs (FRCs) set out the amount of legal costs that the winning party can claim back from the losing party in civil litigation.

[114] Cortes, 'Making Mediation an Integral Part of The Civil Justice System'(n 62).

[115] Ibid.

It should be bear in mind that ADR is not always cheap, and it can be time-consuming and costly if the parties start the process at a later stage or fail to settle. If ADR is used in an inappropriate way or at an unsuitable time, the process may fail, which is likely to add extra costs to resolve the case if the case goes to court. Looking at the bright side, although failed ADR add additional costs and time, parties may be benefitted by obtaining a better understanding of the case or clarifying issues somewhat, which might help to lead towards settlement. It may also help to change the perspectives of one or both parties, and it may lead to a solution in the future. ADR, in particular mediation process, works as a filter by removing the cases capable of settlement from the busy court system, thus saves the court's time and saves taxpayers' money and only sends those cases to court that needs the attention of a judge and worth trying.[116] At the same time, it provides parties with remedies suitable to their needs quickly at less costs in suitable cases.

vii. The aim of the thesis

This study notes that ADR is underused[117] in England and Wales which has recently been acknowledged by the government in their recent consultation paper.[118] This is a very important issue to explore in-depth to find the reasons behind the low uptake of ADR. This is important given the costs of litigation is increasingly high, and most litigants cannot afford it. This is not to say ADR is always cheap as a failed ADR can significantly increase the costs of the disputes and settling in ADR means some compromise and outcome may be less than what parties would in the court. However, there are other benefits of undertaking ADR which are discussed above. Although the costs of the case is a paramount consideration for the disputants, there are other issues

[116] T Allen, 'Judging civil justice: a critique of the 2008 Hamlyn Lectures given by Professor Dame Hazel Genn QC: Part II' [2012]. Available at https://www.cedr.com/articles/?item=Judging-civil-justice-a-critique-of-the-2008-Hamlyn-Lectures-given-by-Professor-Dame-Hazel-Genn-QC-Part-II .

[117] Genn 'Court-based ADR Initiatives' (n 25); Genn CLCC (n 25); Jackson Final Report (n 2), CJC Interim (n 2) and Final Reports (n 2).

[118] Ministry Of Justice, *Dispute Resolution in England and Wales: Call of Evidence* (August 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1008487/dispute-resolution-in-england-and-wales-call-for-evidence.pdf> .

involved that are important too. For instance, litigation is formal, and the adversarial system is too onerous for LIPs. While remedies available at court are limited, ADR can provide creative remedies suited to the need of the parties, such as an apology or a good reference letter. Hence, promoting ADR in suitable cases could be beneficial for the parties. Therefore, the main aim of the thesis is to examine where ADR is currently used and look for ways to increase its use in more suitable civil cases. In doing so, this study examines the various areas of civil law such as family, employment and consumer sectors where ADR is being used to find out how ADR is being promoted in these areas. A detailed analysis of the practice of ADR in these areas will be carried out to see what factors are responsible for the low uptake of ADR in England and Wales. Once the reasons for the low uptake is identified, this study will seek to propose further ways that can be used to improve the current practice and increase the use of ADR in suitable cases.

As possible options to increase the take up of ADR, this study will look at different ways to educate parties about ADR and incentivise ADR process (discussed in chapters 3, 4 and 5); using some kind of compulsion and costs penalties (discussed in chapter 2); and making ADR process more accessible using modern technology (discussed in chapters 3, 4 and 5) to encourage more parties to consider ADR in suitable cases. This is important because the drive for greater use of ADR came with the Woolf reform[119] and has been echoed in subsequent government policy papers and civil justice reform reports[120] but after two decades the result is not satisfactory as highlighted in this chapter. Existing studies[121] suggest that some of these options are already in operation such as compulsory MIAM in family disputes, mandatory notification to ACAS in employment disputes and mandatory ADR schemes in regulated consumer sectors in England and Wales but not that effective as hoped by the policymakers.

[119] Woolf LJ Final Report (n 81).

[120] For example, Jackson Final report (n 2); Briggs Interim Report (n 25) and CJC Interim Report (n 2) etc.

[121] L Clenshaw, 'MIAMs aren't a guaranteed deal-maker' [2015] Solicitors Law Journal; J. Edward, 'Closer Collaboration between judicial and Mediation Communities Part 1: Mediation/ MIAMs– How They Work in Practice (2016) 46 Family Law Journal 1168-1171; CJC Interim (n 2) and Final Reports (n 2).

Thus, this study seeks to identify effective mechanisms that can assist in channelling more appropriate civil cases to ADR. Also, this study looks for ways to make people aware of the advantages of using ADR as opposed to courts to resolve their disputes. This study examines the proposed design of the OCMC which indicates a change in the paradigm of civil justice. In particular, subject to the recommendations this study put forward, it is envisaged that Stages 1 and 2 of OCMC could be perfect platforms for educating and encouraging more parties to consider ADR in appropriate cases.

It is observed that the justice system is increasingly being framed online with ADR integrated to it to provide easy and affordable justice. This is another option this study aims to explore to see whether increased use of technology would help achieve the main objective of this study (channelling more suitable cases to ADR). Furthermore, this study seeks to identify the best practices of ADR to inform the design of legal and policy strategies in other areas of civil law that would be helpful in building more effective pathways to divert adequate suitable cases to ADR. In doing so, this study seeks to identify different ways of providing information and advice about ADR more effectively to litigants in the English civil justice system. Accordingly, this study hopes to find effective and practical options that will work in practice to encourage parties to consider in ADR in suitable cases.

Thus, this study will seek to find recommendations as to the best way forward to channel more suitable cases to ADR options in England and Wales.

viii. Research Questions

The central inquiry of this thesis is to critically analyse the current practice of consensual ADR in England and Wales and its interaction with the court litigation, with a view to identifying best practices that will contribute to diverting suitable civil disputes to mediation and other appropriate consensual ADR options.

In summary, this study addresses the following questions:

(a) Why is ADR (and mediation in particular) promoted by English law to settle civil claims in England and Wales?

(b) How are individuals informed about and encouraged to use mediation or other types of consensual ADR?

(c) In what ways more suitable civil cases can be diverted to mediation or other types of consensual ADR?

(d) To what extent can modern technology be used to effectively promote mediation or other types of consensual ADR?

ix. Original contribution of this study

This study examines and seeks to shed light upon an area that has been the centre of attention for academics, the judiciary and policymakers: how to channel more appropriate civil cases to mediation or other appropriate consensual ADR methods. Importantly, so far, there is very limited analysis in recent key developments such as the OCMC; and very limited analysis of mediation techniques used in other sectors, such as consumer ADR schemes, employment conciliation, and MIAMs. As such, this study critically analyses these developments, in particular the OCMC as it incorporates ADR in the court system itself. From this analysis, this study seeks to identify the strength and weaknesses of the existing mechanisms in England and Wales which will be helpful to remedy the existing problem in the ADR landscape, i.e., low uptake. Indeed, there are not many studies that examined and carried out a critical analysis of the existing mechanisms which could be helpful to see how these operate in practice and how successful these are in referring suitable civil cases to ADR.

This thesis investigates the reasons behind litigants' reluctance to participate in ADR despite its benefits over litigation when successful; therefore, it seeks to identify what further measures could be introduced to encourage parties in suitable cases to participate more often in ADR options instead of going to court. This issue is also acknowledged by the government in their recent consultation paper.[122]

Given that only around 3 percent of civil cases reach trial, it can be argued that the vast majority of claims can be resolved through ADR without the need for a court judgment. While this study recognises that parties' right to access to court must respected as it is

[122] MOJ Consultation on ADR (n 118) p3.

seen as a human right, the significant delay and increasing costs of litigation means most litigants cannot afford litigation which is a bar to their access to justice. This thesis thus seeks to reach conclusions that would be useful in advancing consensual ADR options in England and Wales. In doing so, it examines and integrates the range of current developments in England and Wales in proposing new ways to channel more appropriate civil cases to mediation.

This study seeks to examine the impact of modern technology in making ADR more accessible and affordable for parties which has been the centre of attention of the senior members of the judiciary and the policymakers. In accordance with the overriding objective, cases should be dealt with justly and at proportionate costs.[123] As such, the main policy consideration of any dispute resolution should be to provide resolution quickly and at less costs. Moving dispute resolution online would further this objective as highlighted in recent civil justice reform reports.[124] There seems to be s growing support among the judiciary about reframing the justice system online with ADR options integrated within the process as part of the reform programme to make the justice system accessible and affordable to litigants.[125] The spirit is further reinforced by the government's new Judicial Review, and Courts Bill[126] introduced to the parliament in July 2021. The new Bill emphasised on the online justice system, and under the provisions of the bill, a new online procedure rules committee would be created with the powers to require certain types of proceedings to be initiated, conducted, progressed or disposed of by electronic means.[127] However, this raises concern as the very nature of the ADR process is that it is conducted face to face which creates an atmosphere for settlement. Hence, with ADR process is gradually moving online, there is a concern that it may reduce the settlement rates. This study looks at whether technology can be

[123] CPR r1.1(1).

[124] See for example Briggs Interim (n 25) and Final Report (n 25), CJC Final Report (n 2) and Interim Report (n 2); CJC, CJC, *The Resolution of Small Claims: Interim Report* (April 2021).

[125] G Vos, 'Reliable data and technology' (n 68); G Vos, 'The Relationship between Formal and Informal Justice' (Speech at the re-launch of Hull University's Mediation Centre, Hull, 26 March 2021) Available at <https://www.judiciary.uk/wp-content/uploads/2021/03/MoR-Hull-Uni-260321.pdf> ; G Vos, 'London International Disputes Week 2021: Keynote Speech' (London, 10 May 2021)) Available at https://www.judiciary.uk/wp-content/uploads/2021/05/MR-to-LIDW-10-May-2021.pdf>.

[126] Judicial Review and Courts Bill, HC Bill (Session 2021 -22) [152].

[127] Sections 18 and 21 of the Bill.

effectively used in suitable cases to advance the current position of ADR. This is a relatively new area, and given there are not many studies that critically examine the impact of technology in the promotion of ADR and open justice.

Finally, this study identifies different ways to best channel civil disputes to mediation or other consensual ADR options and how to make ADR more easily accessible for the parties. In the face of time-consuming and expensive litigation process in England and Wales, this study believes that the promotion of ADR would be helpful to ordinary litigants who cannot afford litigation. This study, therefore, contributes to the policy design and practice of ADR options and thus brings an original contribution to the existing literature.

x. Methodology

This study is mainly based on the doctrinal approach. The main aim of this study is to critically analyse the current practice of consensual ADR options to find out how English law refers appropriate civil cases to consensual ADR options. In this regard, it is important to look into the primary sources (noted below) such as the constitution and statutes in England and Wales to find out the existing provisions that refer disputants to ADR.

It is also equally important to analyse the existing secondary sources that examine the existing law and provide a critical view on how they are referring civil cases to ADR. To do this, I have chosen the doctrinal approach, which is also known as the black-letter law approach includes extensive use of legal authorities and statutes to explain and understand the law.[128] Importantly the main aim of the 'black letter' approach is to analyse primary and secondary sources to clarify the law on any particular issue.[129]

It can be said that doctrinal legal research refers to an in-depth analysis of existing statues and case laws through legal reasoning.[130] In regard to ADR, I will look at the

[128] M McConville and W. Chui (eds), *Research Methods For Law* (EUP 2007).

[129] Ibid, at 5.

[130] A Kharel, Doctrinal Legal Research (February 26, 2018). Available at SSRN: https://ssrn.com/abstract=3130525 or http://dx.doi.org/10.2139/ssrn.3130525.

important Court of Appeal decisions in cases like *Halsey,*[131]*PGF II,*[132] *and Lomax*[133] and the legal propositions developed from these landmark cases.

The purpose of this study is to build new principles, add some new knowledge and existing literature in the practice of ADR which make the doctrinal approach most appropriate for this study. I will have to locate reliable and accurate data from the available authoritative sources,[134] study previous research reports,[135] review existing case laws[136] and analyse the facts based on legal reasoning basis to examine the proposition and draw the conclusion of my overall study. This analysis will enable me to make new inferences as such, I have chosen to use the doctrinal approach.

I have also applied the socio-legal approach to answer some parts of the research questions above. This study examines the English law in referring disputants to ADR as such it is important to carry out a contextual analysis of the law to see how it operates in practice and what are the implications. This is important for this study as this study carries out a critical analysis of the existing law in this context and recommends reforms. As this approach requires analysis of existing law and social situation where it applies, it would allow me to examine the wider impact of the law that operates in the field of ADR by taking into consideration of wider issues and derive new ideas, perspectives or insights.

This study acknowledges that in order to answer the research questions I have chosen, there is a need for some form of empirical evidence. Due to the nature and limited scope of this study, I will rely on the existing empirical studies such as by the Department for Constitutional Affairs (now Ministry of Justice)[137] and Civil Justice Council[138]

[131] *Halsey* (n 59).

[132] *PGF II SA v OMFS Co 1 Ltd* [2013] EWCA Civ 1288.

[133] *Lomax* (n 86).

[134] For example, Genn 'Court-based ADR Initiatives' (n 25); Genn CLCC (n 25); Genn, *Twisting Arms* (n 33); Prince, 'An Evaluation of the Small Claims Dispute' (n 34); Doyle (n 34); and Craigforth (n 34).

[135] Ibid.

[136] For example *Halsey* (n 59); *PGF II* (n 132), *Lomax* (n 86) etc.

[137] See Genn 'Court-based ADR Initiatives' (n 25); Genn CLCC (n 25);,Genn, *Twisting Arms* (n 33); Prince, 'An Evaluation of the Small Claims Dispute' (n 34); Doyle (n 34); and Craigforth (n 34).

[138] See CJC Interim Report (n 2).

conducted in this area and use them to support my claim that ADR is underused in England and Wales. I will carry out a critical analysis of the findings of these previous studies which would allow me to justify the findings of this study.

The first part of this research includes a literature-based study. It is important to conduct a full literature review, looking at the views of academics and legal practitioners both within this jurisdiction and internationally. It examines the evolution in the legal theory developed by Fiss, Menkel Meadow, Genn and others, on the issue of whether ADR is capable of delivering justice to the parties. Also, a full review of the legal position about the use of consensual ADR options, in particular mediation in England and Wales, including legislation, European Union requirements, procedural regulations and relevant case law, is carried out. This study covers the existing studies in this area, academic's views, the approach of judges and government consultation papers. Specifically, most of the materials needed for this study are generated from the following sources.

- The most important Primary Sources discussed in the thesis are as follows:

  - Legislation- Employment Rights (Dispute Resolution) Act 1998, Enterprise and Regulatory Reform Act 2013, Employment Rights Act 1996, Children and Families Act 2014, Legal Aid, Sentencing and Punishment of Offenders Act 2012 and Human Rights Act 1998 and Judicial Review and Online Court Bill.
  - Civil Procedure Rules- Civil Procedure Rules 1998, in particular rules 1, 3, 26, 44, Practice Direction 51R and Practice direction – Pre-action Conduct and Protocols.
  - Case laws in particular *Halsey v Milton Keynes NHS Trust* [2004] EWCA Civ 576, *Dunnett v Railtrack Plc* [2002] EWCA (Civ) 303; [2002] 1 W.L.R. 2434, *Lomax v Lomax* [2019] EWCA Civ 1467, *PGF II SA v OMFS Co 1 Ltd* [2013] EWCA Civ 1288; [2014] 1 W.L.R. 1386, *Alassini v Telecom Italia SpA* (C-317/08) [2010] 3 C.M.L.R. 17 ECJ and *Menini v Banco Popolare Societa Cooperativa* (C-75/16) EU:C:2017: 457 (ECJ) etc.

- Relevant European Union regulations and directives- EU directive 2008/52/EC, Directive 2013/11/EU (Directive on consumer ADR) and Regulation 524/2013 on online dispute resolution.

- The most important Secondary Sources discussed in the thesis are as follows:

  - Journal articles, academic and practitioner books, articles in practitioner publications, codes of conduct for mediators from the library, online sources such as Westlaw, LexisNexis, HeinOnline, Google Scholar and ssrn.
  - Reports on ADR such as Civil Justice Council (CJC) Working Group report on ADR and Civil Justice,[139] CJC report on the resolution of a small claim,[140] CJC report on compulsory ADR,[141] CJC Briggs LJ's Civil Courts Structure Review reports,[142] Jackson LJ's Review of Civil Litigation Costs reports,[143] Civil Justice Council ODR Advisory Report on Online Dispute Resolution for Low-Value Claims,[144]etc.)
  - Government Policy papers such as Modernising Consumer Markets: Consumer Green Paper (2018); Government's 2011 paper, Resolving Workplace Disputes: A Consultation (2011) and Government's 2021 consultation paper on Dispute Resolution in England and Wales (August 2021).

xi. Structure of the thesis

This thesis is divided into six chapters.

Chapter 1 discusses the developments of ADR in the UK and the USA. It critically examines the ADR movements in these jurisdictions and offers a clear picture of why

[139] CJC Interim (n 2) and Final Reports (n 2).

[140] CJC, *Resolution of Small Claim* (n 124).

[141] CJC, Compulsory ADR (June 2021)

[142] Briggs Interim (n 25) and Final Reports (n 25).

[143] Jackson Final Report (n 2).

[144] CJC ODR Advisory Group, *Online Dispute Resolution for Low-Value Claims* (February 2015).

and how ADR has been promoted. This chapter explains what ADR is and why consensual ADR methods, especially mediation, are the preferable options to resolve disputes. It observes despite the benefits ADR has to offer, such as when successful, it can be cost-effective, consensual, confidential, quicker and flexible, it remains underused. Hence, this chapter analyses the current practice of ADR, and in which areas of civil disputes is mediation being used. Besides, this chaper examines the factors that indicate whether a particular case is suitable for ADR in light of the factors developed in *Halsey* and the recent recommendations by the CJC. Importantly, this chapter investigates the existing gaps in the current ADR infrastructure and whether there is a need for further initiatives to channel more cases to mediation.

Chapter 2 critically analyses the scholarly articles on ADR to identify the theoretical aspects that underpin the justification in the promotion of mediation and other consensual ADR options. This chapter discusses the theoretical background of ADR in the context of its place in the civil justice system. Thus, inter alia, this chapter critically analyses the facets of proportionality in civil justice and whether ADR can only be considered a mechanism to resolve disputes or whether it could also be considered as a method to achieve justice. This chapter also analyses the procedural justice in ADR and observes that ADR provides procedural justice by making sure parties get the opportunities to tell their story, their problems are heard, and they are treated with respect. Besides, this study examines the issue of compulsion in encouraging parties to undertake ADR in light of the existing case laws, judicial commentary, judgement of the EU courts, academic discussions and the recent report by the CJC on compulsory ADR.

Chapter 3 examines the practice of mandatory consumer ADR which is a pragmatic example of consensual ADR and encourages parties to settle as soon as their disputes arise. Considering the large number (more than 100) of ADR schemes are in operation which is beyond the scope of this study, this chapter particularly looks at the ombudsmen model which is common in the majority of the consumer ADR schemes, and it employs mediation techniques. In doing so, this chapter seeks to identify how far these schemes have been successful in resolving disputes out of court and whether lessons from these could be used to inform the policy changes in non-regulated sectors of consumer disputes where there are a large number of unresolved consumers disputes.

Chapter 4 examines other recent initiatives introduced in England and Wales to find out to what extent these have addressed the current problems with ADR processes, i.e. low uptake. This chapter notes that some of the recent developments such as MIAM for family disputes, Early Conciliation (EC) for employment disputes, and Small Claim Mediation Service, have been introduced to channel suitable cases to ADR. This chapter seeks to identify how far these initiatives have been successful in channelling more cases to ADR. In doing so, it seeks to identify the best practices and what lessons can be learned from them to inform the policy design where ADR is underused.

Chapter 5 of this thesis examines the Online Civil Money Claim (OCMC) in detail, which is a significant step in that its ambition is to frame the judicial system fully online with ADR embedded in it. This chapter observes that OCMC starts with an automated claim stage (stage 1), and it is followed by telephone mediation (Stage 2) and finally by a determination by a District Judge (Stage 3). This chapter seeks to identify what impact it would have on the ADR landscape in England and Wales. Besides, it considers whether ADR at stage 2 of the OCMC should be mandatory or opt-out system. Thus, this chapter critically analyses the three stages, in particular stages 1 & 2, of the OCMC and seeks to identify whether the OCMC can be used as the perfect platform for educating and informing parties about the existing ADR schemes and channel more civil cases to ADR.

Chapter 6 This chapter addresses the research questions in light of the findings, summarises the recommendations and makes concluding remarks.

Chapter 1: The history and developments of ADR

1.1 Introduction

The reputation of the English civil justice system is well known and well respected.[145] Access to justice is one of the main ingredients of the rule of law, and the main aim of the courts is to provide easy access to justice to the parties.[146] However, the increasing cost of litigation means it is unaffordable for most litigants.[147] Also, complex procedural rules, limited remedies and the adversarial nature of litigation mean it is not helpful for many litigants, especially LIPs. ADR emerged in England and Wales as an alternative to expensive and time-consuming litigation. It is observed in the introductory chapter that ADR in suitable cases is advantageous than litigation, but it is underused in England and Wales.[148] Hence there is a call for the promotion of ADR so that parties think about ADR as culturally normal.

This chapter looks at the history and development of ADR, in particular mediation in the UK and the USA, because it is important to understand why ADR was introduced and what factors underpin in a particular jurisdiction. In doing so, it looks into the development of ADR in the USA briefly to see why ADR was introduced there in the 1970s and how it became successful. ADR has a long and respected history in England and Wales.[149] ADR had been formally incorporated into CPR in 1998 following the publication of Lord Woolf's Final Report[150] on Access to Justice which was a significant step towards the promotion of ADR as opposed to formal litigation. CPR puts an obligation on the courts to encourage litigants to use ADR options in suitable cases.[151] Subsequent civil justice reforms such as the Jackson Review of Civil Litigation

[145] *ADR Handbook* (n 8).

[146] ibid; *Unison* (n 69).

[147] CJC Interim (n 2) & Final Report, (n 2); Briggs Interim Report (n 25) & Final Report (n 25); Jackson Final Report (n 2).

[148] CJC Interim Report (n 2) p7.

[149] *ADR Handbook* (n 8).

[150] Woolf Final Report (n 81).

[151] CPR 1.4 (1) (e).

Costs,[152] the Briggs Chancery Modernisation Review,[153] the Briggs Civil Court Structure Review (CCSR)[154] and more recently, CJC ADR Working Group Report on ADR and Civil Justice highlighted the importance of ADR and encouraged its increased use as opposed to formal litigation.[155] Notably, the government of England and Wales is in favour of ADR and has taken steps to promote ADR.[156]

This chapter seeks to identify what makes ADR more advantageous than litigation by analysing its features. As noted in the introductory chapter that ADR is not a panacea and is not suitable for all cases. This chapter examines what factors indicate that a particular dispute is suitable for ADR or not and whether they are effective.

Thus, this chapter discusses the developments of ADR, in particular mediation in the UK and the USA. It critically examines the ADR movements in these jurisdictions and offers a clear picture of why and how ADR has been promoted. This chapter explains what ADR is and why mediation is the preferable option of consensual ADRs to resolve disputes. It observes despite the benefits mediation has to offer, e.g., cost-effective, confidential, efficient and flexible, it remains underused. This chapter seeks to identify the place of ADR within the civil justice system. In doing so, this chapter analyses the current practice of ADR, and in which areas of civil disputes is ADR being used. Importantly, this chapter investigates the existing gaps in the current ADR infrastructure and whether there is a need for further initiatives to channel more cases to mediation.

1.2 The Concept of ADR

It is observed in the introductory chapter that there is no universal definition of ADR,[157] but it commonly refers to a range of out of court dispute resolution options that help

[152] Jackson Final Report (n 2).

[153] Briggs LJ, *Chancery Modernisation Review: Final Report* (2013).

[154] Briggs Final Report (n 25) and, Interim Report (n 25).

[155] M Ahmed, 'The merits factor in assessing an unreasonable refusal of ADR: a critique and a proposal'(2016) 8 J.B.L 646-669.

[156] 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* (CM8274, 2012) 42.

[157] *A practical Approach to ADR* (n 3); *Principles and Practice* (n 3) p2.

parties to resolve their disputes with the help of a neutral third party without going to the court. Definition of ADR varies but the main theme is the same, i.e., resolution of civil disputes out of court. For instance, the Department of Constitutional Affairs defined ADR as, '[T]he collective term for the ways that parties can settle civil disputes, with the help of an independent third party and without the need for a formal court hearing'.[158] Shirley Shipman defined ADR as procedures that are to provide mechanisms for resolving civil disputes'.[159] ADR options include adjudicative such as arbitration, adjudication of construction disputes and non-adjudicative processes such as mediation, negotiation, conciliation; negotiation, expert determination, and early neutral evaluation.[160]

The concept of ADR is still evolving and developing.[161] In fact, ADR is generic and wider concept that consist of a broad range of activities and 'embracing huge difference of philosophy, practice and approach in the dispute and conflict field'.[162] There are academic arguments[163] regarding the definition of ADR. From its literal meaning, some argue the word "Alternative" means it is alterative to formal litigation and other processes that are adjudicative processes such as arbitration. Whereas some commentators argue that it is an alternative to the normal negotiation process in that it requires something more than the conventional negotiation process.[164]

As discussed above,[165] these different comments about the definition of ADR led to the call for Arbitration and other forms of ADR that are adjudicative in nature to be excluded from ADR. However, as argued, the concept of ADR is still evolving, and it is continuously being analysed and understood, and it is now accepted that arbitration including other forms of dispute resolution process involving a third party

[158] See www.dca.gov.uk/civil/adr/.

[159] S Shipman, 'Court approaches to ADR in the civil justice system' (2006) 25 C.J.Q. 181-218.

[160] See section (i) of the introductory chapter above.

[161] *ADR: Principles and Practice* (n 3) p2.

[162] Ibid, p2.

[163] See Introduction, point (i).

[164] *ADR: Principles and Practice* (n 3) p2.

[165] See Introduction, point (i).

determination, are also forms of ADR.[166] In a closer look at the characteristics of adjudicative forms of ADR, it would reveal that these processes share most characteristics of ADR such they are confidential and flexible (e.g. party control over the choice of the form of ADR to be used and selection of third party/adjudicator etc.)

1.2.1 Mediation as an example of consensual ADR

Mediation is the pragmatic example of the consensual ADR and predominantly highest used option of ADR in England and Wales. Interestingly, there is no statutory definition of mediation in England and Wales. Mediation is defined by the Practice Direction on Pre-Action Conduct of the CPR as independent third party assisted negotiation.[167] In addition, Ministry of Justice defined mediation as a flexible, cost-effective, efficient, confidential process that enables the parties to discuss their disputes in the presence of a neutral third party with a view to settle.[168] Briggs LJ, in the Chancery Modernisation Review report, defined mediation as a structured form of ADR.[169] Simply defined, mediation is a process where a neutral third (the mediator) assists parties to communicate so they can find a common ground from where to reach an amicable settlement. In doing so, mediation process focuses on the interests and preferences of the parties, not on the rights defined by the substantive law.

It can be noted there has been major shifts in the practice of ADR in England and Wales for the last two decades or so. The emergence of mediation as the predominantly most used primary consensual form of ADR and its place in mainstream of dispute resolution has been one of the significant developments in the ADR field,[170] and that is why it is worth studying this particular consensual ADR option.

Following the Wolf Reform,[171] there is an established public policy in England and Wales that the litigation should be used as a last resort and parties should be encouraged

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[166] *ADR: Principles and Practice* (n 3) p2.

[167] See Practice Direction on Pre-Action Conduct, para. 8.2(2).

[168] Available at <www.justice.gov.uk/guidance/mediation/index.htm>.

[169] Briggs, *Chancery Modernisation Review* (n 153) para 5.4.

[170] *ADR: Principles and Practice* (n 3) p15.

[171] See subsection 1.5.2.1 below.

to settle their disputes without resorting to the court.[172] As processes that assist parties with their negotiations towards dispute settlement, non-adjudicatory ADR fully supports this public policy.[173] Subsequent studies, including but not limited to Lord Jackson's report on Review of Civil Litigation Costs, Briggs LJ's report on Civil Courts Structure Review and CJC's report on ADR and Civil Justice highlighted that mediation is predominantly most used consensual ADR option in England and Wales and encouraged its use. However, this encouragement for greater use of ADR has faced strong opposition from leading academics like Owen Fiss,[174] Hazel Genn[175] and they argue that ADR places compromise ahead of justice.[176] An in-depth analysis of the academic debate has been carried out in chapter 2 of this thesis. Despite the concerns and warnings from academics, mediation has become a preferred method for achieving timely and cost-effective solution among parties, practitioners, judiciary and policymakers.

For the purpose of this study, a broad definition of mediation has been taken that includes other consensual forms of ADR where a neutral third party assists the party to reach an amicable settlement such as conciliation, early neutral evaluation and some consumer ADR schemes, especially ombudsman process that used mediation technique to resolve disputes between disputants. Although the main focus of this study is on mediation, it will also consider other consensual ADR options where appropriate throughout the thesis. It is observed that the structure of the consensual ADR options is similar (i.e. parties come together with the presence of a neutral third party to resolve their dispute amicably), however, the role of the neutral third differ such as in mediation the mediator facilitates the process whereas in conciliation the conciliator actively proposes options to the parties.[177] As this study uses mediation as the pragmatic example of consensual ADRs, it would be better to explain the mediation process to see how it works in practice.

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[172] Per Oliver L.J. in *Cutts v Head* [1984] 2 W.L.R. 349.

[173] *ADR: Principles and Practice* (n 3) p30.

[174] Fiss, 'Against Settlement' (n 45).

[175] Genn, *Judging Civil Justice* (n 51).

[176] See chapter 2, section 2.5.2 for further discussion.

[177] See subsection 4.2.1 of chapter 4 for detail discussion of conciliation process.

1.2.2 Mediation process

As mediation is not subject to comprehensive regulation in England and Wales, there is no statutory requirement of how mediation can be structured. The flexibility is a great benefit of mediation which gives the parties ultimate control over how the mediation can be structured. Usually, the regulatory framework for mediation derives from the contract between the parties and the mediator, comprised in the agreement to mediate,[178] and mediation is invariably commenced as a result of this agreement to mediate. The agreement to mediate plays a vital role in the process, as this primary willingness to engage in mediation may lead to a settlement in the spirit of compromise.

There is no set procedure for mediation in England and Wales, so the parties are free to agree upon a process that best suits their needs. Before the mediation, the mediator is provided with the summary of the case and relevant documents by the parties. These will be built upon during the parties' opening statements, usually in an opening session with all parties present.[179] In the opening joint session, the mediator introduces everyone and parties are given opportunities to set out their position in relation to the issues in the case.[180] Following this, the mediator is likely to continue in separate sessions, with the mediator going from party to party, perhaps with further joint sessions as the need arises. The mediator will work with the parties towards a settlement, ending the mediation when the dispute has been settled or the parties are no longer able to continue to mediate.[181]

There are no formal requirements on the form or content of any settlement agreement reached as a result of mediation.[182] Although it is common practice to have a written agreement signed by both the parties and the mediator,[183] this is not a legal

[178] *A Practical Approach to ADR* (n 3) p256.

[179] K Hopt and F Steffek, *Mediation: Principles and Regulation in Comparative Perspective* (OUP 2013) p406.

[180] *A Practical Approach to ADR* (n 3) p269.

[181] Hopt, *Mediation: Principles and Regulation* (n 179) 406.

[182] K. Mackie and others, *The ADR Practice Guide: Commercial Dispute Resolution* (3rd Edition, Tottel Publishing 2007) ch. 12.

[183] T Allen, A Binding Settlement (or Not)?: The Mediator's Dilemma (21 Feb 2014).

requirement.[184] It is also possible for the parties to agree to a non-binding agreement, for example, with a *cooling-off* period to allow them to reflect upon what has been agreed to before formalising it at a later date.[185] Once the mediator is satisfied that the agreement fully reflects all of the parties' objectives, the parties are asked to sign it.[186] In the event of no settlement, the mediator records why the parties could not reach a solution.[187]

ADR is being widely used in a number of areas of civil disputes in England and Wales such as in family disputes, employment disputes and consumer disputes. The government has introduced a number of mechanisms to promote mediation in England and Wales such as the Small Claims Mediation Service, MIAM for family disputes, Early Conciliation for employment disputes, mandatory sectoral consumer ADR schemes for traders and the OCMC. These are examined in detail in chapters 3, 4 and 5 of this thesis.

1.3 Features of ADR

ADR is praised for its benefits, such as it is consensual, flexible, confidential, efficient and can produce creative remedies that are not available at courts and these features are examined below.

1.3.1 Consensual nature of ADR

ADR is attracted to the parties because of its features, and the judiciary and academics praise it for its focus on problem-solving as opposed to litigation that sticks to strict legal rights. The practice of ADR is that it is largely voluntary in England and Wales.[188] There are some compulsory measures are in place such as mandatory attendance at a MIAM, notification to ACAS EC and sectorial ADR schemes but compulsion only applied to attendance or notification requirement, not settlement; hence the voluntarism

[184] *Brown v Rice* [2007] EWHC 625 (Ch); [2008] FSR 3 [25].

[185] Mackie, *The ADR Practice Guide* (n 182) p228; Article 9 (2)(d) of DIRECTIVE 2013/11/EU.

[186] Ibid.

[187] *Brown* (n 184).

[188] Ahmed, 'Implied Compulsory Mediation' (n 82).

in ADR remains intact. In ADR processes, while the parties retain control over the process, an independent third party facilitates the process to help the parties to reach a suitable solution to their problem, but parties are not required to settle which allows them to leave the process anytime and resort to the court.[189]

While the use of ADR is strongly encouraged in England and Wales, there is not clear guidance on how far this encouragement should go which is a grey area and most debated among academics.[190] Some commentators[191] argue that the voluntary nature (in terms of participation) of the ADR is responsible for the low uptake of ADR to a greater extent and call for the use of compulsion to channel more cases to mediation. Using some pressure to direct claims to ADR has been the most debated option among judges, academics and ADR providers.[192] The issue of compulsion is discussed under in chapter 2.[193]

1.3.2 Flexibility

The informal nature of consensual ADR is another important factor to consider contrary to adjudicatory ADR and formal litigation. Whereas litigation and adjudicative ADR process take place within a controlled framework, non-adjudicatory ADR processes are ordinarily conducted in private, behind closed doors with no observers apart from the parties. This flexible nature allows the process to be conducted anywhere and, in any format, suited to the parties. Hence disputants who want their matter private (e.g., disputants in family, employment and commercial matters), ADR is the perfect platform for them.

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[189] See section 2.3 of chapter 2 for a detailed discussion on this issue.

[190] L Allport, Exploring the common ground in mediation, University of Birmingham Research paper (August 2015).

[191] S Prince, 'Encouragement of mediation in England and Wales has been futile: is there now a role for online dispute resolution in settling low-value claims? (2020) 16 International Journal of Law in Context 181–196.

[192] See for example Phillips LJ, 'ADR: an English viewpoint' (n 59) Randolph, 'Compulsory mediation?' (n 82).

[193] See section 2.3.

ADR process is more flexible as opposed to the strict litigation process.[194] In England and Wales, the court process is very detailed and technical such as pre-action protocols before issuing a claim in the court, rules of trial and rules of evidence.[195] This is further compounded by the fact that the litigation system is adversarial in nature in this jurisdiction. Conversely, parties to ADR have flexibility in regards to the whole process, e.g. the parties have the overall control of the ADR process, they are free to choose the mediator, what issues to be discussed, and they can walk out at any time during the ADR process without the fear of being punished later because the confidentiality of the ADR prevents what happened during the process to be put before the judge.[196] Hence, in ADR, parties generally have a central role, with lawyers (if represented) having a supporting function.

The flexible and informal nature of ADR creates an atmosphere for discussion where parties can freely discuss the merits of their positions free from strict legal rules with the intention to come to a solution suitable to their needs. As the ADR process offers parties to discuss their issues together and come to a solution to their problems, it helps to maintain the future relationship, which is important in some cases such as in family and employment matters.

Nonetheless, in some cases, ADR can be used as a dangerous instrument for increasing power by the stronger party due to the flexible and informal nature of the ADR process. For instance, problems arise when the parties are not on equal footings, such as where a party who is rich or wants to delay the process can use ADR cynically to put pressure on the other party who is poor or in a hurry.[197] Due to the lack of procedural and substantive rules, ADR is open to abuse and manipulation by the stronger party who use coercion and manipulation to obtain a settlement which is unjust for the weaker party.[198] At one level, therefore, the consensual ADR process empowers both or all the parties. At another level, it can also empower individual parties in their relationship with one another. Power may come in complex and often unclear packages, and processes and

[194] *ADR Handbook* (2nd edn) (n 8).

[195] *A Practical Approach to ADR* (n 3) p14.

[196] Genn, *Judging Civil Justice* (n 51) p82.

[197] Neuberger LJ, 'A View from on High' (n 96) para 3.

[198] Cortes, 'The Promotion of Civil and Commercial Mediation in the UK' (n 45).

the way they are managed may help to redress power imbalances between the parties.[199] This issue is further discussed in chapter 4, where this is more relevant.[200]

1.3.3 Quicker and cheaper

The low cost of ADR is another factor for considering ADR instead of litigation. It is well established that, unlike litigation, ADR is often efficient and cost-effective in suitable cases. While ADR saves costs to the parties, it also saves public expense by preventing parties from going to court.[201] As noted above,[202] settling case through ADR saves costs when settled early stage before costs are incurred.[203] Typically, in some cases, high costs are incurred because they settle at a later stage, and some cases do not even settle due to the vast expenses already incurred. Therefore, to get to the full benefits of ADR parties should try to resolve their dispute at the earliest opportunity.[204] If parties use ADR on time, it is likely to save them a lot of money as well as prevent them from going through the stressful, complicated, lengthy court process.[205] However, ADR is not always cheap as discussed in chapter 2[206] and a failed ADR adds extra costs to the case.[207]

Although there is an inherent risk that ADR can be time-consuming and costly if the parties start ADR at a later stage or fail to settle. If ADR is used in unsuitable cases or at

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[199] *ADR Principles and Practice* (n 3) pp 32-33.

[200] See subsections 4.2.3.4 and 4.3.3.3.

[201]Ibid, p87.

[202] See point (iii) of Introduction; Subsection 2.6.3 of chapter 2.

[203] Jackson Final Report (n 2); R Moore, *Supplementary evidence submitted by the Department for Constitutional Affairs* (02 August 2004) https://publications.parliament.uk/pa/cm200304/cmselect/cmconst/907/907we03.htm2021.

[204] Ibid.

[205] Neuberger LJ, 'The Gordon Slynn Memorial Lecture 2010: Has Mediation Had Its Day?' (Nov. 11, 2010) Available at < http://www judiciary.gov.uk/Resources/JO/Documents/ Speeches/moj-speech-mediation-lectureA.pdf>; R L Wissler, 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2001) 17 Ohio State Journal of Dispute Resolution 641-680.

[206] see subsection 2.5.3.

[207] *ADR Principles and Practice* (n 3) p 39.

an unsuitable time, the process may fail which is likely to add extra costs to resolve the case if the case goes to court.[208] Looking at the bright side, although failed ADR add additional costs and time, parties may be benefitted by narrowing down their issues, understanding each other's positions that might help to lead towards settlement.[209] It may also help to change the perspectives of one or both parties, and it may lead to a solution in the future.[210] The time and costs benefits of ADR are discussed throughout this thesis, especially in introductory chapter[211] and chapter 2.[212]

1.3.4 Confidentiality

Another feature of the ADR process is that the process is confidential as opposed to the court proceedings, which are not confidential, and court processes are often open. In the ADR process, discussions are protected like "without prejudice" negotiations, so one party cannot use the discussion in subsequent litigation to show it as evidence or argue that the other party has admitted liability.[213] This act as a safety net for a party who showed a willingness to settle during the ADR process against the other party who may wish to use such willingness as evidence to show that the other party admitted liability. This protection provides parties with the opportunity to walk out from the ADR process at any time without the fear of being punished later in court because what happened in the ADR process is confidential and it cannot be put before the court if the case goes to the trial.[214]

On the other hand, the protection of confidentiality in the ADR has been subject to criticism because of its effect on subsequent or collateral proceedings and in the development of law.[215] This issue is discussed in detail in the next chapter.[216]

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[208] Cortes, 'The Promotion of Civil and Commercial Mediation in the UK' (n 45) 1; Ahmed, 'Implied Compulsory Mediation' (n 82); Genn, *Twisting Arms* (n 33).

[209] Ibid.

[210] Wissler, 'Court-Connected Mediation' (n 205).

[211] See point (iii).

[212] See subsection 2.6.3.

[213] *ADR Handbook* (n 8).

[214] *Halsey* (n 59) at [14].

[215] CJC Interim Report (n 2) para 20.

[216] See subsection 2.5.1 of chapter 2.

Importantly, the confidentiality in the ADR process sometimes causes problems when the matter goes to court, such as common problems arise when the court determines the costs because the court may have insufficient information to penalise[217] parties due to the without prejudice negotiations.[218] This feature also is open to misuse when both the parties are not on equal footing, and the stronger party may take advantage of the weaker party knowing that whatever happens in the ADR is confidential. Also, sometimes more powerful parties use confidentiality as a tool to bully or threaten the weaker opposing parties into a settlement. This is where other features of ADR (consensual and flexibility) allow the parties to walk out and resort to the court. Nonetheless, confidentiality is a strong incentive for parties to consider ADR, especially those who care about their reputation, such as businesses, universities and public authorities.

1.3.5 Creative Outcome

There are various benefits of using mediation and other non-adjudicatory ADR forms because they are not limited to rights and the law. In suitable cases, ADR can offer the same or tailored remedies the court has to offer.[219] It is the parties in the ADR process who decides the outcome, which allows them to tailor the remedies suited to their needs. It is open to parties to have regard to a wide range of factors in arriving at an agreed resolution of the issues that include or example, parties can agree to payment terms, conditional terms for future events, creative solutions (e.g., an apology, acknowledgement or explanation etc.), issue of public or private statement and personal undertaking to do or not to do something in future etc. Therefore, it can be argued that there are merely examples of an infinite variety of outcomes that people may design in constructive dialogue that a court would not have the power or ability to order.[220]

Conversely, litigation is extraordinarily limited both in the kind of factors that the court can take into account in arriving at its determination and in the scope of the judgments that it can make once it has decided which party should succeed and which party should

[217] See subsection 2.3.5 of chapter for discussion on cost penalties.

[218] Neuberger, 'A View from on High' (n 96) para 3.

[219] *A Practical Approach to ADR* (n 3).

[220] Allport (n 190).

fail. Litigation is entirely rights-based and concerned with the parties' rights conferred by law.[221]

Ironically, settling in ADR may involve some concession or compromise, but it could save the parties the costly, lengthy and stressful litigation process. Nonetheless, it is the decision of the parties whether to settle or not, but they will never be forced to settle and some compromise may be justified where time and costs have been saved.[222]

1.4 Cases suitable for ADR

This study acknowledges that ADR is not a panacea as it is not suitable for all cases. In England and Wales, ADR is used in all kinds of contractual disputes, consumer claims, neighbourhood disputes, housing disputes, tortious claims, regulatory and public sector disputes, and family disputes.[223] Nonetheless, in some circumstance's ADR may not be suitable or useful because it is not a panacea and not suitable in all cases.[224] In line with the overriding objective[225] of CPR, courts are required to further the overriding objective by actively manages cases which includes encouraging parties to use ADR procedures in appropriate cases.[226] In order to perform this duty, the case management judges need to know which cases are appropriate for referral to ADR.[227] Hence, it is of great importance to identify whether a particular dispute is appropriate or will find ADR useful before embarking on the process because the costs implications of a failed ADR can be significant.[228] Indeed judiciary and academics offered useful guidance in determining whether a particular case is suitable for ADR, which are discussed next.

1.4.1 The *Halsey* factors

[221] *ADR Principles and Practice* (n 3) pp32-33.

[222] *A Practical Approach ADR* (n 3).

[223]Ibid.

[224] *Halsey* (n 59) at [16].

[225] CPR r1.1.

[226] CPR r1.4 (2)(e).

[227] Shipman,'Court Approaches to ADR' (n 159) p194.

[228] Genn, *Twisting Arms* (n 33).

Although it may be challenging to articulate which type of cases are not suitable for ADR, in *Halsey*[229] the COA held that most civil and commercial disputes are not unsuited for ADR.[230] In this case, the COA provide a non-exhaustive list of factors that may be relevant to the question of whether a party has unreasonably refused ADR such as:

> (a) nature of the dispute;
> (b) 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.[231]

The courts should consider these factors in determining whether a party's refusal to participate in ADR options is unreasonable for the purpose of penalising that party with costs sanction.[232] While these factors are used to define whether a party in a particular dispute behaved unreasonably in refusing to undertake ADR, a finding of unreasonableness would indicate that the case would have been appropriate for ADR whereas a finding of justified opt-out would indicate the case was not appropriate for ADR.[233] Hence, these factors offer useful guidance for judges to identify appropriate cases that are suitable for ADR and encourage parties accordingly.[234] Whether these are useful for parties themselves to decide their dispute is suitable for ADR or not is subject to analysis of these factors. These factors were subject to anxious scrutiny in subsequent case laws, academic debate[235] and serious questions were raised against some of the factors such as the merits factor and reasonable prospect of success factor. Notably, the

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[229] *Halsey* (n 59).

[230] Cortes, '*The Promotion of Civil and Commercial Mediation in the UK'* (n 45) p20.

[231] *Halsey* (n 59) at [16]; For a discussion of the *Halsey* guidelines, see Shipman, 'Court Approaches to ADR' (n 159).

[232] CPR Pt 44.

[233] Shipman, 'Court Approaches to ADR' (n 159) p195.

[234] Ibid.

[235] Shipman, 'Court Approaches to ADR' (n 159), Ahmed, 'Implied compulsory Mediation' (n 82).

CJC[236] noted that most of the above factors have never been deployed to in practice apart from merits factors and where that the ADR had no reasonable prospect of success had been discussed in subsequent case laws, which are examined next.

1.4.1.1 Merits of a case

According to the merits factor, a party to a dispute reasonably believes that his case is strong, he may deny to consider ADR without fear of being penalised later.[237] However, this merits factor in deciding whether a party's refusal to mediate was justifiable has been subject to substantial academic debate.[238] Because this factor is too broad and often used by the parties to justify their refusal to consider ADR hence it has been branded by academics as a restraining force in the 'continued development of ADR within the English civil justice system'.[239] In the case of *Hurst,*[240] Lightman J stated that a party's belief that he has a watertight case could not be used as a justification for refusal to consider mediation.[241] In *Halsey,* Lord Dyson referred to *Hurst* determination and potentially reversed the principle established in that case and held that a party's belief that he has a watertight case could be used as a justification for refusal to consider mediation.[242]

The contrasting views in the above two cases highlight the inconsistent approaches taken by the judges in encouraging litigating parties to consider ADR. Lightman J's approach in regard to merits factor was similar to the COA's determination in the case of *Dunnett*[243] where the defendant was penalised with costs, despite success at first instance and a strong belief in the prospects of success on appeal, because the court found that refusal to mediate amounted to non-co-operation by the defendant. However,

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[236] CJC Interim Report (n 2) para 5.48.

[237] *Halsey* (n 59) at [18] (Dyson LJ). *Swain Mason v Mills & Reeve* [2012] EWCA Civ 498; [2012] S.T.C. 1760 (CA (Civ Div)).

[238] Ahmed, 'Implied Compulsory Mediation' (n 82).

[239] Ahmed, 'The Merits Factor' (n 155).

[240] *Hurst v Leeming [*2001] EWHC 1051 (CH);2002 WL 1039525.

[241] Ibid [9].

[242] *Halsey* (n 59) at [16].

[243] *Dunnett* (n 76).

the COA in *Halsey* failed to deal with Lightman J's dictum in the light of the decision in *Dunnett*, by putting greater emphasis on the parties' belief in the merits of their respective cases instead of their obligation to seriously consider ADR to settle their dispute.[244]

Post *Halsey* case laws illustrate the contradictory application of this merits factor. For instance, in the case of *Reed Executive v Ree*[245] the court followed the *Halsey* and found that defendant's refusal to mediate based on his reasonable belief about the prospects of success of the appeal was reasonable.[246] However, this approach is contrary to the approach followed in *Dunnett* where despite success at first instance and a strong belief in the prospects of success on appeal was not found justified to refuse mediation. Brookes LJ emphasised on the party's duty towards the court in furthering the overriding objective[247] instead of the merit of the defence, which sent a clear message that regardless of their views, parties are required to carefully consider ADR. On the contrary, in *Reed* the court gave must weight to the party's reasonable belief in the merits of the case than the cooperation between the parties. Hence, it is argued the merits factor has not been helpful to define cases that are suitable for instead it has been applied by judges inconsistently. Importantly, the COA's recent judgment in *PGF II SA v OMFS Co Ltd*[248] cast further doubt on the merits factor where Briggs LJ emphasised on the parties' obligation to consider ADR seriously and that parties should seriously engage in the process when invited by the other party.

The above case laws illustrate how the court assessed the merits factor in different cases and provided inconsistent decisions, which is confusing for litigants, especially LIP.[249] Existing studies highlight that the "reasonable belief" test is weak and is not workable in practice as it can easily be met by the parties, and it undermines the importance of ADR.[250] As Masood Ahmed argued, 'the threshold set by the merits factor of

[244] Ahmed, 'The Mertis factor' (n 155) p656.

[245] *Reed Executive Plc v Reed Business Information Ltd* [2004] EWCA Civ 887; [2004] 1 W.L.R. 3026.

[246] Ibid at [46], also see Shipman, 'Court Approaches to ADR' (n 159) p198.

[247] CPR r1.3.

[248] *PGF II* (n 132).

[249] Shipman, 'Court Approaches to ADR' (n 159) 198.

[250] Ahmed, 'The Merits factor' (n 155).

reasonable belief in a watertight case is artificially low and can easily be met by most litigants who may escape costs penalties which would otherwise apply'.[251] Post *Halsey* case laws noted above raised a question about the viability of the merits factor in practice, and there is a call for reform of the merits factor so that the court can apply it consistently and fairly.[252]

1.4.1.2 Reasonable prospect of success

Another controversial and criticised factor devised in *Halsey* for opting out from ADR was the reasonable prospect success of a particular case. As noted above,[253] in *Hurst* Lightman J held that a party's believe that he has a watertight case cannot be used to justify refusal to mediate. Nonetheless, he accepted that a party may refuse mediation if there was no real prospect of success, and he also warned that a refusal would be a high-risk course to take because if the court finds that ADR had a realistic prospect of success but is not pursued, costs consequences may follow.[254]

This factor causes further difficulties for the party seeking costs order against the successful party to prove they have acted unreasonably, not on the successful party to prove that its refusal to mediate was reasonable.[255] Further, a party's stubbornness about their position would indicate that they would be less likely to accept a reasonable compromise and this would give a reasonable ground to the other party for believing that mediation has no reasonable prospect of success.[256] On this ground, the successful parties would be able to argue that their refusal to mediate was reasonable. Hence, it appears that where the successful has been implacable in refusing to mediate, it would not appear to be possible for their opponent to assert that mediation had a reasonable prospect of success. Further difficulties arise if the successful party relies on their reasonable belief about the merits on the case, then the unsuccessful party has no

[251] Ibid.

[252] Ibid.

[253] See subsection 1.4.1.1.

[254] *Hurst* (n 240) at [8].

[255] *Halsey* (n 59) at [9] (Dyson LJ).

[256] Ibid at [25].

grounds for asserting either that the refusal to mediate was unreasonable or that mediation had any prospects of success.[257]

This merits factor has already been proven controversial as discussed above, but with this option, the court seems to have reinforced the merits factor hence problematic. This option would allow a party with a strong case to refuse mediation with impunity, confident that he will avoid any costs consequences for failure to agree to the other party's invitation to undertake ADR.[258] In this aspect, the judgement in *Halsey* appears to be self-contradictory in that the court sought to explain that burden of proof on the unsuccessful was not 'an unduly onerous burden to discharge',[259] whereas the COA expressly stated, 'it may be difficult for the court to decide whether the mediation would have had a reasonable prospect of success'.[260] This statement of the court raises concern that if the court finds it difficult to ascertain whether in a particular case the mediation would have had a reasonable prospect of success, how a party would be able to argue and rely on this option.[261] Interestingly, the court in *Haley* fell short of providing any guidelines for determining reasonable prospect of success which makes this option more problematic in practice and less useful in deciding whether a particular case is suitable for ADR.

1.4.2 Critique of *Halsey* factors

From the above discussion, it can be argued while the COA in *Halsey* took the opportunity to devise some factors to help case management judges to decide whether a party's refusal to undertake ADR was unreasonable, in practice those had been proven to be less effective and controversial. Hence, there is an ongoing call for the *Halsey* factors to be reviewed, but nothing serious has been done until recently when the CJC

[257] Shipman, 'Court Approaches to ADR' (n 159) p205.

[258] Ibid.

[259] *Halsey* (n 59) at [28].

[260] Ibid [27].

[261] Shipman, 'Court Approaches to ADR' (n 159) p206.

ADR Working group took the opportunity to revisit the *Halsey* factors[262] and found that the *Halsey* guidelines are too broad, which led to its inconsistent interpretation.

1.4.2.1 The CJC ADR Working Group's criticism of *Halsey* factors

The CJC in the recent report called for the Halsey guidelines to be reviewed and narrowed down the situations in which a party's refusal to consider mediation would be reasonable.[263] The CJC took this opportunity and recommended five scenarios where parties' refusal to mediate can be justified where the party/s:

i. have already attempted mediation or other forms of ADR but it was not successful;
ii. already committed to an ADR in near-term;
iii. can persuade the court that there is a need to wait for any meaningful negotiations to take place and they confirm that they will commit to using ADR at that stage if the dispute has not settled otherwise;
iv. conduct is unreasonable or obsessive;
v. can persuade the court that there is a genuine test case which requires court's judgement on an issue of principle.[264]

This study acknowledges that the above factors are much clearer and narrower than *Halsey* factors helpful for the case management judges in deciding whether a party's decision to opt-out from ADR is justified for the purpose of costs sanction. There have been huge criticisms of *Halsey* factors over the last decade or so, but nothing serious has been done to review the factors devised in *Halsey* until now. Academics[265] have always emphasised that how important it is to devise some useful factors to identify cases that may find ADR useful otherwise those cases that are not suitable for ADR will add extra costs and time and undermine the ADR processes. As such, it is very

[262] CJC Final Report (n 2) para 9.21.

[263] Ibid.

[264] Ibid, para 8.28.

[265] See for example, Ahmed, 'the Merits factor' (n 155); Shipman, 'Court Approaches to ADR' (n 159) and R L Wissler, 'Mediation and Adjudication in the Small Claims Court: The Effects of Processes and Case Characteristics" (1995) 29(2) Law and Society Review 332-334.

important to clearly define and narrow the grounds for opting out of ADR which would be beneficial in terms of reducing satellite litigation on the issue.

Factor (i)- Previous unsuccessful attempts of ADR

This study finds scenario (i) is sensible in that where parties have already tried ADR unsuccessfully, there is little point in embarking on the ADR process again because it will add extra costs and time to the case. This study observed that ADR is not a panacea, and it would not be worthy of trying it repeatedly where it failed once. Therefore, where parties have already attempted ADR without success should be able to opt-out without fear of being penalised later. This study considers that this factor should be an opt-out option for the opt-out mediation pilot in the OCMC, which is discussed in chapter 5.[266]

Factor (ii) parties' commitment to an ADR process in near-term

In regard to scenario (ii), this study believes that it needs further clarification. For example, what would happen if a party does not honour his commitment later on and refuses to consider ADR at that point. Because if a party is allowed to opt-out by saying that he has already committed to an ADR process in near term, what would happen the party later does not undertake ADR. Hence, it would be better to warn the parties about the possible costs consequences for unreasonable refusal to ADR.

Factor (iii)- Time is required for meaningful negotiation to take place

Scenario (iii) seems sensible because if the parties can negotiate a deal between them and settle the matter, then there is no need to escalate the matter further. However, sometimes it takes time for a meaningful negotiation to take place, especially when parties are reluctant/delay to disclose information. There may be some occasions where

[266] See subsection 5.2.3.3.

this option could be misused one party is acting in bad faith and wants to delay the negotiation/mediation.

Evidence suggests that ADR is quicker than litigation, and parties are encouraged to undertake ADR to obtain a speedy resolution of the dispute. However, if ADR is suggested late or used by parties as a tactic to delay the process, the court may, in those circumstances, find a party's refusal to consider ADR unreasonable.[267] But the delay argument can be defeated if it can be shown that ADR does not delay/impose a short delay to the process. It is notable that, in practice, ADR is quicker than litigation as it is less likely to interfere with litigation progress even if it was unsuccessful.[268] With regard to the criticisms of Dyson LJ's judgment in *Halsey* mentioned above, in CJEU in *Alassini* while considering the right to access to justice, held that ADR merely imposes a short delay.[269] In encouraging more litigants to consider ADR, senior members of the judiciary highlighted the importance of an order for mediation which merely imposes a short delay to the process but do not interfere with parties' right to trial.[270] Indeed, if the parties agree to settle the dispute, they may request for a stay of the proceeding for a month for them to try to settle,[271] and this one month delay may not be considered as significant. Commentators argue that while delay argument may lose its force when ADR is suggested at an early stage, this consideration of delay can be justified for a number of reasons such as where the trial is delayed by ADR because it fails to meet spirit of overriding objective.[272]

However, there may be circumstances where a party may adopt the delay tactics with

[267] *Halsey* (n 59) at [22].

[268] Shipman, 'Court Approaches to ADR' (n 159) 202; see also *Cowl v Plymouth City Council* [2001] EWCA Civ 1935; [2002] 1 W.L.R. 803 at [1].

[269] Lightman J, 'Breaking Down the Barriers' *The Times Online* (London, 31 July 2007) <http://business.timesonline.co.uk/tol/business/law/article2166092> ; Ronán Feehily, 'Creeping compulsion to mediate, the Constitution and the Convention' (2018) 69 (2) NILQ 127–146.

[270] See subsection 2.3.3 of chapter 2.

[271] CPR r26.4 (1) & (2).

[272] Shipman, 'Court Approaches to ADR' (n 159) 202; *Nokia Corp v Interdigital Technology Corp* [2004] EWHC 2920 (Ch) (December 8, 2004) at [11].

view to exert pressure on the other party to withdraw or accept under settlement.[273] Existing studies[274] suggest that parties' legal representatives sometime use this delay tactics as a tactical weapon to thwart, rather than advance the objectives of the CPR.[275] Such delaying tactics are contrary to the spirit of the CPR and the overriding objective and should, if the information is available to the court following trial, be considered as an aspect of the conduct of the parties in deciding costs order. However, the problem with this approach is that due to the fact that such conduct is likely to be covered by "without prejudice" negotiation and may not come before the court.[276]

Factor (iv)- Parties' unreasonable or obsessive conduct

In regard to factor (iv) above, it is well evident that mediation is helpful when parties genuinely want to discuss their problem to find a solution to their problem. Therefore, whether there is a high level of animosity among the parties, mediation may not be helpful; instead, it may add extra costs and wasted time in the disposal of the case.[277] However, it is not unusual that parties will be cross with each other which is why the dispute arose, but this does not mean they cannot mediate their dispute, and the only avenue for remedy is the court. The robust and impartial performance of a skilled mediator may be helpful to reduce the animosity between the parties and help them to discuss their problems which may lead to a settlement.[278] Mediation may also be useful even where the trust between the parties has broken down.[279] However, if the animosity between the parties is so high that they cannot stand each other, then ADR may not be suitable.

Factor (v)- The court's judgement on an issue of principle is required

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[273] *Re Midland Linen Services Ltd; Chaudhry v Yap* [2004] EWHC 3380 (Ch); [2004] All E.R. (D) 406 (Oct.)*;* Also Shipman, 'Court Approaches to ADR' (n 159).

[274] Genn, 'Court-based ADR Initiatives' (n 25).

[275] Ibid, p60.

[276] *Reed* (n 245) at [34].

[277] *ADR Handbook* (n 8) p27.

[278] *Garritt-Critchley v Ronnan* [2014] EWHC 1774 (ch).

[279] *Wright v Michael Wright (Supplies) Ltd* [2013] EWCA Civ 234.

Factor (v) seems to emphasise on the need for court's determination in novel cases which would create a precedent on a point law, thus helping the development of common law. This study acknowledges that some cases need to be adjudicated in the court of law for the continuous development of law, but a balance must be struck. While it is desirable to get a judge's determination issue of principle, consideration must be given at whose expense? Where a particular case involves complex law, which needs interpretation by a judge, it may not be suitable for mediation or other ADR processes. Because the ADR process does not use legal principles as such cannot interpret the law and produces an outcome in accordance with the law. The court is the most suitable avenue for dealing with complex legal matters. Nonetheless, a case that involves legal complexity itself cannot be a deciding factor for going to the court as the complexity may lead to disproportionate costs.[280] The need for a decision by a judge in complex legal matters must be balanced against the interests of the parties, as the interests of a party may be better served through ADR.[281] Academics emphasised that complexity may arise from a number of factors, but that does not mean ADR is unsuitable and adjudication is inevitable.[282]

One of the key benefits of adjudication is that when a judge makes a decision on a case, it becomes a legal precedent that must be followed in subsequent similar cases.[283] ADR process does not use legal principles as such unable to create legal precedents because it focuses on interests instead of rights. The UK is a common law jurisdiction, and creating a precedent is very important for the development of common law, for instance, in a particular case where there is a need for interpretation of a standard provision in a contract[284] which can only be done by a judge, not a mediator. It is equally important to note that while the development of common law is essential, the interest of the parties to a dispute is equally important as such balance must be maintained. Notably, requiring a party, who wish to undertake ADR, to abandon that opportunity in favour of court litigation so that the court can determine a point of precedent or in order to satisfy the more general needs of a particular market at the expense of the party would, arguably,

[280] *Faidi v Elliot Corporation* [2012] EWCA Civ 287; *Oliver v Symons* [2012] EWCA Civ 267.

[281] *ADR Handbook* (n 8) p26.

[282] Ibid.

[283] Ibid p24.

[284] *McCook v Lobo* [2002]EWCA Civ 1760.

clash with the overriding objective of saving costs to the parties.[285] Notably, in some pre-*Halsey* cases, the courts have shown a preference of ADR over litigation where the particular case involved issues of construction or a unique point of law.[286] For example, in *Cable & Wireless,*[287] the court decided to uphold a contractual agreement to undertake ADR over litigation despite the case involved a point of construction. In doing so, Colman J. explained while the parties concerned decide to undergo ADR to resolve their dispute, the court should uphold that despite the fact that the court would, if litigated, determine a point of precedent. A similar approach was followed by the court in the case of *Paragon Finance*[288] where the claimant wanted the issues to be resolved at Higher courts. Equally, the Defendants' Solicitors regarded the case as a test case.[289] However, the judge invited the parties to negotiate because judge was expressly concerned at the disproportionate costs of the proceedings to the defendant compared to the relatively small sum at issue. The determinations of in these cases illustrated that, 'CPR approach to civil justice is not solely concerned with the legally correct outcome but rather with the result that will best enhance the particular business relationship or save expense for the vulnerable party, and, perhaps less explicitly, require fewer court resources'.[290]

A court determination in a complicated legal matter may be ideal in the eye of the law, but parties must consider the consequences (e.g., high costs, need to take a day off from work, possible breakdown of relationship etc.) of pursuing their case through the formal litigation which can be amicably solved through ADR. Besides it is noted that most of the cases settle and only a small percentage (around 3-4 percent) of cases reach the trial stage as such the argument that ADR restricts the development of common law is rather weak. This issue is further discussed in chapter 2.[291] Nonetheless a balance must be struck between the need for creating precedent and interests of the parties concerned. In any event while a legal professional or a case management judge may be in best

[285] Shipman, 'Court Approaches to ADR' (n 159) p196.

[286] Ibid.

[287] *Cable & Wireless Plc v IBM UK Ltd* [2002] EWHC 2059; [2002] 2 All E.R. Comm. 104.

[288] *Paragon Finance v Pender* [2003] EWHC 2834 (Ch); [2003] 2 All E.R. (D) 346(Nov.).

[289] Ibid at [44].

[290] Shipman, 'Court Approaches to ADR' (n 159) p196.

[291] See subsection 2.5.1.

position to define the "genuine test" in a particular case, arguably, it may well be beyond the understanding of ordinary litigants without legal advice.

The above factors can be used to define cases that are suitable for opt-out subject to the recommendation made by this study, and new factors can be devised from the continuous study in this area. This study recommends using the above factors as opt-out options in the opt-out mediation pilot at the stage 2 of the OCMC[292] and based on the results these factors could be further assessed. The CJC went further and suggested that factors such as complexity, the involvement of fraud, the chance of succeeding, high costs and merit of a case cannot be used to justify parties' refusal to mediation.[293] While it is a significant post-*Halsey* development, it is argued that while this guidance could be useful for the judges, the report falls short of clarifying how parties will be able to find out whether the refusal to ADR is reasonable or not without consulting their lawyer bearing in mind the number LIPs are on the rise which the report itself highlighted. It is important to note that some of the factors can only be determined upon assessment by legal professionals or upon attendance at a pre-issue information session akin to MIAM for example cases which fall under scenario (v) above. As such, it might be sensible to require the parties to attend at a screening session to decide whether the case is suitable for ADR or not.[294] But this study believes it would not be wise to introduce a mandatory system for all cases because ADR is not suitable for all cases and it may waste more money because currently parties are required to pay for MIAM unless they are eligible for legal aid which is limited. However, whether such step would be useful and economically sustainable requires in-depth analysis which is done in chapter 4 and 5 of this thesis.[295]

1.5 The place of ADR within civil justice

It is important to look at the journey of ADR to define its place within the justice system. How ADR has emerged and developed overtime is, therefore, important to look at before analysing and making recommendations for policy changes in regard to the

[292] see subsection 5.2.3.3 of chapter 5.

[293] CJC Final Report (n 2) [8.29].

[294] See subsection 4.3.3.6 of 4 further details.

[295] See subsections 4.3.3.6 and 5.2.4.2.

practice of ADR. Before discussing the developments of ADR in England and Wales, it is important to look at the development of ADR in the USA, which influenced the use of ADR in Europe.

1.5.1 ADR movement in the USA

This study considers the practice of ADR in the USA very briefly because the original impetus for ADR stemmed primarily from the USA.[296] It is observed that in the USA dissatisfaction with the costs, time, uncertainty and unsatisfactory outcomes of litigation had encouraged the creation of a movement supporting alternatives, i.e. ADR to litigation.[297] The success of ADR, in particular mediation in some states of the USA influenced the use of mediation in the wider world, including Europe. The USA is the pioneer in developing ADR models and benchmarks for legislatures and practitioners in Europe. Importantly, the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation[298] provides suggestions for the regulation of mediation that were followed by the majority of states in Europe.

Notably, mediation is the most commonly used ADR process in the USA's state and federal courts. The judicial endorsement of mediation process has played a major part in the growth of mediation.[299] Due to advantages of mediation, corporations in the USA have increasingly being attracted to the mediation instead of arbitrating their claims.[300] In the USA, the judges in case management stage actively encourage litigants to use ADR.[301] The Civil Justice Reform Act 1990 requires all federal district courts to

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[296] *ADR Principles and Practice* (n 3) p39.

[297] Mackie, *The ADR Practice Guide* (n 182).

[298] UNCITRAL Model Law on International Commercial Conciliation, A/RES/57/18, 19 November 2002.

[299] Genn, 36th F A Mann Lecture (n 56) para13; J Reynolds, 'Judicial Review: What Judges Write When They Write About Mediation' (2013) 5 PENN. ST. Y.B. ON ARB. & MEDIATION 111.

[300] T. Stipanowich and J. Lamare, 'Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1000 Corporations' (2014) 19 HARV. NEGOT. L. REV. 1.

[301] Scottish Civil Justice Council, Access to Justice Literature Review: Alternative Dispute Resolution in Scotland and other jurisdictions (2014).

encourage litigants to use ADR to resolve their disputes and introduce costs and delay reduction plans. Since 1998, there is an obligation on all district courts to require litigants to consider ADR in all civil cases as well as provide all parties with access to at least one ADR process.[302]

Since successful use of mediation process in the 1970s, ADR programmes in general, and mediation programmes specifically have gained popularity within a short time in the USA. Particularly, mediation in civil cases was originated from family law. California was the first state of the USA to initiate mediation for child custody and visitation disputes in 1981.[303] Now the federal government and nearly every state in the USA have adopted enabling legislation with a view to creating ADR systems for courts at all levels.[304] The successful and widespread use of ADR, in particular mediation in the USA in the 1980s did put a great impact on the civil justice climate in Europe, ultimately in England and Wales,[305] which is discussed next.

1.5.2 Development of ADR in English jurisdiction

Although arbitration and conciliation have a relatively long history in the development of alternatives to court for civil and commercial disputes,[306] the modern history of civil ADR in England and Wales effectively started in the early 1990s with the establishment of the Centre for Effective Dispute Resolution (CEDR) in 1990.[307] Hence, the concept of ADR is not new in the UK, but in civil disputes, ADR got serious attention following the Woolf Reform, which is examined next.

1.5.2.1 The Woolf Reform and beyond

It is undeniable the revolution of ADR in England and Wales is indebted to the Woolf

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[302] Alternative Dispute Resolution Act 1998.

[303] Hopt, *Mediation: Principles and Regulation* (n 179).

[304] Ibid.

[305] B Clark, 'Mediation and Scottish lawyers: past, present and future' (2009) 13 E.L.R. 252-277.

[306] *ADR Principles and Practice* (2nd edn) (n 6), pp49-60.

[307] Genn, *Judging Civil Justice* (n 51) 92.

Reform.[308] In 1995 Lord Woolf, in his Interim Report[309] on Access to Justice, stressed that court proceedings should be used as a last resort and parties should try to settle their cases as soon possible.[310] The report highlighted that ADR is cheaper and quicker than litigation and reduces pressure on the limited judicial resources. Lord Woolf's vision for the increased use of ADR reflected in the Civil Justice reforms of 1999 through the inclusion of ADR provision. The CPR requires judges to encourage parties to attempt to settle using ADR, and the judges can deprive a party of their legal costs if a party has behaved unreasonably in refusing to mediate.[311] More importantly, the overriding objective[312] put an obligation on the English to actively manage cases that includes encouraging litigants to consider ADR in suitable cases.[313] The importance of out of court settlements as opposed to resorting to the courts for remedies was emphasised through the introduction of the pre-action protocols which is another important part of the Woolf reform. The rationale behind introducing pre-action protocols was to encourage parties to agree to an early settlement by exchanging information with each other which will allow them to come to a suitable solution to their dispute rather than going to the court.[314] However, despite the inclusion of ADR into the CPR nearly two decades ago, the uptake of mediation is still low in England and Wales.[315]

1.5.2.2 Judicial approach to ADR

Following Woolf LJ's recommendations in 1996, policymakers took many measures to promote ADR, but the outcome was not that satisfactory as hoped. The Senior courts in England and Wales have shown their support for promoting ADR.[316] However, despite the continued encouragement from the judges and fear of costs sanction, parties still

[308] Woolf Final Report (n 81).

[309] Ibid.

[310] Woolf LJ, *Access to Justice: Interim Report* (Lord Chancellor's Department, 1995).

[311] CPR R1.4 (2) and CPR R26.4.

[312] CPR 1.3.

[313] CPR 1.4(2)(e), M Ahmed, 'Bridging the gap between ADR and robust adverse costs orders' (2015) 66(1) NILQ 71-92, 74.

[314] Woolf *Final Report* (n 81).

[315] Jackson Final Report (n 2), Ch.36, Briggs LJ Interim (n 25) and Final Reports (n 25), CJC Interim (n 2) and Final Report (n 2); MOJ Consultation on ADR 2021 (n 118).

[316] For example *Dunnett* (n 76).

refused to consider ADR as such the uptake of ADR remained low.[317] Hence, the judges started to take a tough stance against the parties who unreasonably refuse to consider ADR in suitable cases which can be seen from a series of court decisions. For example, in the case of *Dunnett v Railtrack*[318] the Railtrack Company was denied its legal costs because they failed to engage in mediation despite being encouraged by the court. In *Hurst v Leeming*[319] the court followed *Dunnett* and Lightman J rightly stated that a party believe that he/she has a watertight case cannot be used as justification for refusal to mediate.[320] Following the court's active encouragement backed by the threats of costs sanction, the use of ADR increased, but it was short-lived.[321]

In a further effort to promote ADR, an Automatic Referral to Mediation (ARM) project was introduced in 2004 in the Central London County Court on a pilot basis to channel with a view to channelling more suitable cases to mediation akin to mediation scheme operating in Canada.[322] The scheme was hugely successful in the beginning, and the settlement rate in March 2004 was 69 percent.[323] However, the increase in the take up of ADR was short-lived following the COA's landmark decision in the case of *Halsey*.[324] The COA in *Halsey*[325] softened the threat created in *Dunnett* by concluding that the court had no power to order ADR and parties should never be compelled to mediation because it clashes with the parties' right to a fair trial under Article 6 of ECHR.[326] Dyson LJ's decision in *Halsey* attracted huge criticisms from the judges and scholars, and subsequent case laws[327] have applied the *Halsey* factors in penalising parties who unreasonably refuse to consider ADR, but their approach was largely inconsistent, which is discussed above[328] and chapter 2.[329]

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[317] Girolamo, 'Rhetoric and Civil Justice' (n 44) 68.

[318] *Dunnett* (n 76).

[319] [2001] EWHC 1051 Ch.

[320] *Hurst* (n 240).

[321] CJC Interim Report (n 2) 33.

[322] Genn, Twisting Arms (n 33) 196.

[323] Ibid, 197.

[324] *Halsey* (n 59).

[325] Ibid.

[326] Ibid.

[327] See for example *PGF II* (n 132).

[328] See subsection 1.4.1.

Notably, the potential of the ADR process has been recognised by the senior judiciary for some time.[330] Lord Woolf's view about the potential of mediation has spread widely among judiciaries over the last two decades. For example, Lord Phillips highlighted the benefits of using ADR over litigation and expressed his support for promotion of ADR.[331] Sir Anthony Clarke MR recommended ADR and in particular mediation, become an integral part of the litigation culture.[332] His Lordship recognised mediation as an integral part of the English Civil Justice system and not simply ancillary to it.[333] In a similar tone, Gefforey Vos MR recommended ADR to be integrated into every stage of dispute resolution process.[334]

1.5.2.3 Civil justice reforms

Subsequent to Woolf Reform, there are other major civil justice reforms like Jackson LJ's report on Review of Civil Litigation Costs[335] highlighted the advantages of using ADR and emphasised on its use and recommended that judges should actively encourage parties to use ADR.[336] Similarly, Briggs LJ in his *Chancery Modernisation Review*[337] has recommended that the courts should actively encourage and facilitate dispute resolution by including ADR as part of that process.[338] This was echoed in the Briggs LJ's Final Report on Civil Court's Structure Review[339] and the CJC's report on ADR.[340] Interestingly, in their recent report,[341] the CJC suggested that compulsory ADR

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[329] See subsection 2.3.1.

[330] N Clift, 'The Phenomenon of Mediation: Judicial Perspectives and an Eye on the Future' (2010) 15 JIML 508-517.

[331] Phillips LJ, 'An English Viewpoint' (n 59).

[332] Clarke MR, 'The Future of Civil Mediation'(n 94) p3.

[333] Clarke MR, 'Mediation -An Integral Part of our Litigation Culture'(Littleton Chambers Annual Mediation Evening, Gray's Inn, 8 June 2009).

[334] G Vos, 'Speech at Hull University's Mediation Centre' (n 125).

[335] Jackson Final Report (n 2), Ch.36.

[336]Ibid para 6.3.

[337] Briggs LJ, *Chancery Modernisation Review* (n 153).

[338] Ahmed, 'Bridging the gap' (n 313).

[339] Briggs Final Report (n 25).

[340] CJC Final Report (n 2).

in certain circumstances does not clash with parties' right to access to justice, hence they can be lawfully compelled to undertake ADR. It is hoped that this finding by the CJC will help to settle the debate about the issue of compulsion to ADR which is further discussed in chapter 2.[342]

1.5.2.4 Wider academic discussion

The place of ADR within the English Civil Justice system has taken an important part of the academics' debate, and there have been a number of recent articles dealing with the promotion of ADR and its place in the civil justice system of England and Wales. In particular, the place of ADR has been emphasised and explored by Genn, Nolan-Haley and others[343] and the issue of compulsion was analysed extensively by Shirley Shipman, Debbie De Girolamo, Masood Ahmed, A.K.C. Koo, Gary Meggitt and others.[344]

Upon analysis, it appears that the place of ADR in the English civil justice system is one of and ad hoc nature and one that is not transparent.[345] Currently, attendance in the ADR process is largely voluntary as such parties are not required to undertake ADR.[346] But parties are penalised with costs sanction for unreasonable refusal to undertake ADR. Hence, the fear of costs sanction for unreasonable refusal to consider ADR and continuous pressure from the policymakers and judiciary, parties often feel pressurised to undertake ADR and settle.[347] In light of the costs consequences and power given to

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[341] CJC Compulsory ADR (n 141).

[342] See section 2.3.

[343] H Genn, 'What is Civil Justice For? Reform, ADR, and Access to Justice' (2012) 24 Yale J.L. & Human. 397; J Nolan-Haley, 'Is Europe Headed Down the Primrose Path with Mandatory Mediation?' (2012) 37 N.C.J. Int'l L. & Com. Reg. 981.

[344] Girolamo (n 44); M Ahmed, 'Implied compulsory mediation' (n 82); Shipman, 'Court approaches to ADR' (n 159); Shipman, 'Compulsory mediation: the elephant in the room' (2011) 30 (2) C.J.Q. 163-191; A.K.C. Koo, 'Ten years after Halsey' (2015) 34 C.J.Q. 77; G Meggitt, '*PGF II SA v OMFS Co* and compulsory mediation' (2014) 33 C.J.Q. 335.

[345] Girolamo (n 44)

[346] Briggs Final Report (n 25) Briggs LJ, Civil justice: My vision for the Online Court, *Law Society Gazette* (London, 16 May 2016).

[347] Shipman, 'Waiver: Canute Against the Tide' (2013) 32 (4) C.J.Q. 470-492; Genn, *Twisting Arms* (n 33).

the court to impose such sanctions by the CPR, some academics argue that ADR is already mandatory in the UK[348] and invited the government to make it express by enacting legislation.[349] In contrast, some academics argue that there is no mandatory ADR in the UK[350] while others are of the opinion that the issue of compulsory ADR is ongoing.[351] Some describe ADR as 'quasi-compulsory in this jurisdiction because of the CPR that emphasise the desire to encourage parties in dispute to co-operate and use ADR'.[352] In fact, there is a substantial debate regarding the issue of compulsion ongoing among academics which is discussed in chapter 2.[353]

Existing studies suggest that the government of England and Wales speaks favourably of ADR.[354] In an effort to channel more cases to ADR, in recent years, the policymakers in England and Wales have introduced some measures such as MIAM, Early Conciliation (EC) for employment dispute, Small Claims Mediation Service (SCMS), and sectorial mandatory ADR schemes for consumers. These are discussed in detail in chapters 3 and 4 of this thesis.

Following the above discussion, it can be argued while there is an ongoing push for the greater use of ADR since the Woolf reform, the scenario has not changed that much in practice as can be seen from a recent study conducted by the CJC.[355] The reasons for the low uptake are lack of awareness among litigants, lawyers, judges and ADR

[348] Ahmed, 'Implied compulsory mediation' (n 82); D Quek, 'Mandatory mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated mediation Program' (2010) 11 Cardozo J. Conf. R. 479.

[349] Girolamo (n 44).

[350] M Tully, 'There is an A in ADR but does anyone know what it means anymore?' (2009) 28 C.J.Q. 218; J. Ceno & P. Barrett, 'Part 36 and mediation: an offer to settle will not suffice — PGF II SA v (1) OMFS Co and (2) Bank of Scotland Plc' (2012) 78 Arbitration 401.

[351] Nolan-Haley, 'Is Europe Headed Down the Primrose Path with Mandatory mediation?' (2012) 37 N.C.J. Int'l L. & Com. Reg. 981, 1002–1003; Girolamo (n 44).

[352] S Prince, 'ADR could be described at best as quasi-compulsory in this jurisdiction because of the CPR that emphasise the desire to encourage parties in dispute to co-operate and use ADR'(2020) 16 (2) Int. J.L.C. 181-196.

[353] See subsection 2.3.

[354] Girolamo (n 44). Lord Faulks*, 'Mediation and Government'* (Keynote Speech, The Civil Mediation Conference, 22 May 2014*)* S. Hughes, 'Bold Reforms' (2014) 164 New Law Journal.

[355] CJC Interim and Final Reports (n 2).

practitioners,[356] fragmented information about ADR,[357] insufficient incentives for the parties and lack of clear procedural mechanisms. This is very important because the costs of litigation have increased significantly, which made it almost impossible for many litigants, especially LIPs to seek justice from the courts. This is why this study chose to examine the existing laws that refer disputants to ADR and seeks to find out the gaps and makes further recommendations.

1.6 Conclusion

This chapter observed that while the costs of litigation has reached a point that it is unaffordable for many litigants, ADR has the potential to provide remedies to parties quickly and at a lesser cost than litigation in appropriate cases. However, this chapter observed the usage of ADR is low in England and Wales.

ADR is largely a voluntary process in England and Wales. Nonetheless, litigants are now required to consider ADR before going to court existing sectorial regulations and case laws. This chapter noted that the government speaks favourably about ADR and had taken some steps to promote ADR. Despite the numerous measures to increase the uptake of ADR, it is significantly underused in England and Wales. Policymakers, legal practitioners and academics are looking for the reasons behind the low uptake of ADR and what can be done to channel more cases to mediation and other consensual ADR processes. Yet, judges and policymakers have not been able to clarify the position of ADR within the civil justice system, and its position is rather patchy, which stands in the way of its promotion.

The promotion of ADR is particularly important because the rising costs of litigation means many litigants cannot afford it. Furthermore, small claims cases comprise about 78 percent of cases that goes to the court and the costs of the courts in dealing with these cases is often disproportionate. This is contrary to the spirit of overriding objective which imposes a duty on the courts to deal with cases justly at proportionate

[356] See Jackson Final report (n 2) 361, CJC Final & Interim Reports (n 2), Briggs LJ Interim & Final Reports (n 25) etc.

[357] Jackson Final Report (n 2) 361.

costs.

Considering the advantages of ADR over litigation in resolving disputes and the fact that ADR is underused in England and Wales, the study considers that there is a need to raise the profile of ADR as opposed to the court. In doing so, this chapter acknowledged that ADR is not a panacea as it is not suitable for all types of cases. Therefore, this study seeks to promote ADR where appropriate instead of sending all cases to ADR because not all cases find ADR useful. Indeed, the government has shown interests in promoting ADR, which can be seen from their initiatives such as the MIAM for family disputes, ACAS Early Conciliation for employment disputes, mandatory sectoral consumer ADR and the new OCMC that have been introduced to increase the uptake of ADR and these are examined in chapters 3, 4 and 5 of this thesis. Before analysing these measures to increase the uptake of ADR in England and Wales, there is a need to identify the theoretical aspects that underpin the justification in the promotion of ADR, which is discussed in the next chapter.

Chapter 2: ADR and access to justice

2.1 Introduction

Chapter 1 of this thesis noted that despite the benefits of using ADR as opposed to the court, the uptake of ADR is relatively low in the UK.[358] It is also noted that despite being more advantageous than litigation, ADR is not suitable for all cases.[359] It is interesting to see that despite the ongoing argument whether ADR provides justice in the traditional way, policymakers in England and Wales are in favour of promoting ADR[360] and this chapter looks at the justification for that.[361] In the UK, academics are divided in their opinions about the promotion of ADR. Access to justice is at the centre of academic debate when it comes to the promotion of ADR, which is examined in this chapter.[362] Critics also emphasise the need for the court's determinations in developing the common law and point out that ADR restricts the development of common law.[363]

Some commentators argue for a more robust approach, i.e., using compulsion to force parties to engage in ADR. However, the judiciary and academics are divided in their opinion about the issue of using compulsion to undertake ADR, and the debate continues.[364] Existing studies suggest that there is a fundamental ongoing debate among academics and judges about compulsory mediation because there is a concern that using compulsion to force parties to mediate may clash with the parties' right under Article 6 of ECHR.[365] Hence, the chapter seeks to shed light on this ongoing debate by analysing the contrasting views.

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[358] See subsection 1.5.2 of Chapter 1; see also Jackson Final Report (n 2); CJC Interim Report and Final Report (n 2).

[359] See section 1.4 of chapter 1 above.

[360] Genn, 'What is Civil Justice For?' (n 343) p409.

[361] Briggs Final Report (n 25).

[362] Shipman,'Compulsory Mediation' (n 344) 165.

[363] Genn, *Judging Civil Justice* (n 51); Edwards 'Closer Collaboration' (n 121) p679.

[364] See section 2.3 below.

[365] *Halsey* (n 59).

Thus this chapter critically analyses the scholarly articles on ADR to identify the socio-legal aspects that underpin the justification in the promotion of ADR. This chapter examines the evolution in the legal theory developed by Fiss, Menkel Meadow, Genn and others, on the issue of whether ADR is capable of delivering justice to the parties. Accordingly, it discusses the theoretical background of ADR in the context of its place in the civil justice system in England and Wales. Thus, this chapter critically analyses the current academic debate about the promotion of ADR and looks for the best way forward to promote ADR in appropriate cases. While doing so, this chapter looks at the most debated argument among academics, i.e. whether ADR should be mandatory and possible clash with the parties' right to access to the court. At the same time, this chapter investigates why there is a need to raise the profile of ADR, while there are other mechanisms such as the pre-action protocols, judicial case management and the duty of the court to further the overriding objective that encourages early settlement and whether they are effective.

2.2 Justification for the promotion of ADR

It is of great importance to examine the factors that underpin the promotion of ADR before recommending its greater promotion. Critics argue that there is already a functioning civil justice system in the UK, and there are existing mechanisms (e.g., pre-action protocols, judicial case management, the duty of the court to further the overriding objective in accordance with the CPR) that promote early settlements as such there is no proper justification for raising the profile of ADR. However, as we shall see, recent civil justice reform reports[366] noted that the courts are not functioning properly, and other existing procedural mechanisms designed to promote early settlements are not that effective due to the complexity and high costs associated with it. The court system in England and Wales plays an important role in promoting ADR and diverting civil cases to ADR. Litigants are encouraged to consider settlements in pre-litigation and litigation stages in England and Wales through different mechanisms as described below.

[366] See CJC Interim Report (n 2) and Final Reports (n 2); Briggs Interim and Final Reports (n 25).

2.2.1 Pre-litigation state

Pre-action protocols (PAPs)

In England and Wales, before the parties lodge their disputes to the court, under the CPR pre-action protocols,[367] parties are expected to exchange information with each other to get an idea of each other's position and negotiate to achieve an early but well-informed pre-issue settlement to their dispute via ADR and prevent the dispute from escalating further.[368] These processes incur most costs to the parties because of the lengthy exchange of information and documents between the solicitors.[369] Jackson LJ identified the problem of front-loading of costs in his final report on *Review of Civil Litigation Costs*.[370] Commentators argue that while pre-action conduct has commendable objective, it often stands in the way of settlement because of the need to 'frontload' costs rather than to facilitate it.[371]

The CJC, in their recent report,[372] found that there are two major problems with the current operation of the PAPs; firstly, the wording of the PAPs in regard to ADR is significantly inconsistent and not clear. Secondly, the enforcement of PAPs obligation is not clear. The CJC ADR group further identified that PAPs simply might not work with LIPs and, in low value cases. It is noted that about 78 percent of cases that come to the court are low value (valued under £10,000). Similarly, Briggs LJ noted that LIPs cannot comply efficiently with the pre-action protocols on their own.[373] As a result, it has become difficult for LIPs with no legal advice to navigate and comply with the

[367] The Pre-Action Protocols are accessible at https://www.justice.gov.uk/courts/procedure-rules/civil/protocol.

[368] Woolf LJ Final Report (n 81) Ch.10.

[369] M Ahmed, 'A Critical View of Stage 1) (n 107).

[370]Jackson Final Report (n 2).

[371] M Ahmed, 'The pre-action protocols are a significant procedural aspect of the English civil justice system but reform is required: Jet2 Holidays Ltd v Hughes [2019] EWCA Civ 1858' (2020) 39 C.J.Q. 193-202, p5; *Higginson Securities (Developments) Ltd, Spiritualist National Union Trust v Kenneth Hodson* [2012] EWHC 1052 (TCC); [2012] B.L.R. 321.

[372] CJC Interim Report (n 2).

[373] Briggs Interim report (n 25).

PAPs.[374] On the other hand, legal representation requires funding that had been severely reduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).[375] Thus, it can be argued that pre-action protocols are overly prescriptive and can result in disproportionate costs being incurred.[376] And, it is simply not possible for LIPs with no legal advice to understand, select the appropriate protocols for their claim and comply its terms.

Part 36 of CPR (a "Part 36 offer)

An offer to settle under Part 36 of CPR (a "Part 36 offer)[377] is also in operation in England and Wales to encourage early settlement of disputes outside the court. Part 36 offer is made in a prescribed form which encourages parties to settle their disputes early, and it can be used by both parties. There are costs and other consequences like higher interest on the costs that a party will face if it refuses a reasonable offer to settle.[378] For example, where the outcome of the trial is less advantageous for the claimant than a defendant's Part 36 offer or the judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer, then the court will order, unless it considers it unjust to do so, that the party who refused the offer is entitled to costs including any recoverable pre-action costs from the date the relevant period[379] expired. The costs will be awarded on an indemnity basis;[380] interest on those costs of up to 10 percent above base rate and this when the claimant made the offer; otherwise, it is on a standard basis. The fear of being penalised encourages parties to think seriously about accepting or declining a settlement offer.

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[374] CJC Interim Report (n 2) and Final Report (n 2).

[375] A Moore and S Brookes, 'MIAMs: a worthy idea, failing in delivery' (2018) 1 P.C.B. 32-39; M Fouzder, Mediation decline may be due to legal aid cuts, government admits, *The Law Society Gazette* (London, 30 June 2017).

[376] Ahmed, 'The pre-action protocols' (n 371) p7.

[377] CPR pt36.

[378] CPR 36.17((1)(b) and (4); *Telefonica UK Ltd v OFCOM* [2020] EWCA Civ 1374.

[379] The specified period (minimum 21 days) during which the part 36 remains open is known as the "Relevant Period".

[380] Indemnity costs is where the losing party has been ordered to pay a higher costs contribution to the winner than is standard. See CPR 44.4(2) and CPR 44.4(3).

However, the law in this mechanism is complex, especially the consequences of declining an offer to settle and requires clear understanding when making a decision to accept or reject an offer made by the other party.[381] Given the possible consequences a decision to accept or refuse a CPR 36 settlement offer, it is crucial that the process of Part 36 Offer and its consequences are explained properly in clear-cut language.[382] Unfortunately, inconsistent application and interpretation of this crucial tool in different case laws[383] over the years have increased the complexity, and reduced predictability of the outcome, which is confusing to the lawyers, let alone LIPs. Hence, detailed knowledge of the case laws is now required to interpret when an offer is considered as part-36 and the consequence of settlement offers which are beyond the understanding of most ordinary citizens.[384] This is further complicated by the inconsistent interpretation of this rule in different cases laws.[385]

Notably, the difficulties associated with the interpretation and application of Part 36 offers to settle led the policymaker to introduce amendments[386] to simplify the process, but uncertainty still remains, which can be seen from a significant body of case laws.[387] Undoubtedly, the complexity surrounding part 36 offers to settle is well beyond the understanding of LIPs, as can be seen from the above discussion. As such, LIPs will require help from their lawyers, which will require funds and many litigants cannot

[381] A Zuckerman, 'CPR 36 offers' (2005) C.J.Q. 167-184

[382] Ibid.

[383] See *Flynn v Scougall* [2004] EWCA Civ 873; [2005] C.P. Rep. 15; [2004] 3 All E.R. 609; *Scammell v Dicker* [2001] 1 W.L.R. 631 (CA); *Crouch v King's Healthcare NHS Trust* [2004] EWCA Civ 1332; [2005] 1 All E.R. 207; *Capital Bank Plc v Stickland* [2004] EWCA Civ 1677; *Garner v Cleggs* [1983] 1 W.L.R. 862; *Painting v University of Oxford* [2005] EWCA Civ 161

[384] Zuckerman (n 381).

[385] See for example *Gibbon v Manchester City Council* [2010] EWCA Civ 726; [2010] 1 W.L.R. 2081; [2010] 6 WLUK 639 (CA (Civ Div), *Carver v BAA Plc* [2008] EWCA Civ 412; [2009] 1 W.L.R. 113; [2008] 4 WLUK 551 (CA (Civ Div)); *Dutton v Minards* [2015] EWCA Civ 984; *Ho v Adelekun* [2020] EWCA Civ 517 and Zuckerman (n 381).

[386] See for example Civil Procedure (amendment No. 3) Rules 2006 (SI 2006/3435) and Civil Procedure (Amendment No. 8) Rules 2014 (SI 2014/3299).

[387] J Sorabji, 'W(h)ither Carver?: CPR 36, the law of contract and certainty in *Gibbon v Manchester City Council*' (2011) 30 (2) C.J.Q. 124-132; D Chalk, 'Costs: Part 36 offers and late acceptance' (2011) 30(2) C.J.Q. 133-135; *Mitchell v James* [2002] EWCA Civ 997; *C v D* [2011] EWCA Civ 646; *Essex CC v UBB Waste (Essex) Ltd* [2020] EWHC 2387 (TCC).

afford that. However, due to limited access to legal aid, especially in civil cases, it can be argued that part 36 offer may not be that useful in settling disputes because a party need legal advice to understand what pt36 offer is, when to offer it, determine whether a Pt36 offer should be accepted and work out the consequences of declining a pt36 offer.

2.2.2 Post-issue encouragement of ADR

When the parties fail to settle or do not consider settlement options, e.g. mediation and resort to formal litigation, parties are again encouraged to settle their disputes using ADR. In fact, once a claim is issued and a defence is filed, the parties are required to complete and file an allocation questionnaire in accordance with the case management under Part 26 of CPR. In the questionnaire form,[388] all the parties are required to state whether they want to try to settle their dispute at this stage. This justification process works as a reminder to the parties of the importance of settling their disputes out of court.

If the parties agree to settle the dispute, they may request for a stay of the proceeding for a month for them to try to settle.[389] If the parties do not agree to attempt to settle, they need to explain the reasons. Also, the parties are asked to state whether they have complied with the relevant pre-action protocol; if not, the reason for that. These questions and the need for explanation remind the parties of the need for settlement and thus help in diverting more cases to mediation. Undoubtedly, most LIPs may not have the required knowledge to understand the questions on the allocation form and how to answer them. To answer these questions correctly, litigants will require significant help from their lawyers, and they will need funds for that, which is limited, as described above.

Importantly, Part-1 of Overriding Objectives of CPR requires the English courts to actively manage cases that includes encouraging litigants to use ADR in suitable cases, facilitate such process and help the litigants to settle their case.[390] The judges have a

[388] The form can be accessed at https://www.moneyclaimsuk.co.uk/PDFForms/N150.pdf.

[389] CPR r26.4 (1) & (2).

[390] CPR r1.4 (1),(2)(e)(f).

duty to actively encouraging litigants to settle their disputes. In practice, people trust judges and active encouragement from the judges to consider ADR attract litigants towards settling early. Besides, the courts are given the power to order costs sanction against a party who unreasonably refuses to participate in ADR.[391] However, these provisions are in place since the CPR came into effect in 1999, but after all these years, the low uptake of ADR raise doubt about the effectiveness of these mechanisms.

This study recognises that while the existing mechanisms (CPR) discussed above promotes negotiation and mediation, but these are not enough, as found by the CJC.[392] Especially the PAPs do not work well in lower value cases as these are mostly dealt with by LIPs. Conversely, ADR is particularly beneficial in lower value cases as it helps parties to resolve their disputes at proportionate costs as such ADR is promoted which is examined next.

2.3 Using compulsion to consider ADR and access to justice

ADR is largely voluntary in England and Wales which is partly responsible for the low uptake of ADR. Thus, there is a call for using compulsion to encourage parties to undertake ADR. However, there is a concern that compulsory ADR will breach parties' rights to access to courts under Article 6 of the ECHR, which is subject to substantial academic debate in England and Wales which is examined below.

2.3.1 *Halsey* and subsequent case laws

In the case of *Halsey*,[393] Dyson LJ opined that the court may encourage parties to mediate and penalise them for unreasonable refusal to consider mediation but can never compel them to mediate.[394] His Lordship emphasised that the encouragement can be robust, but parties cannot be compelled to consider ADR.[395] Lord Dyson's views in *Halsey* have sparked a public debate about compulsory mediation, and judges are

[391] CPR rr.44.

[392] CJC ADR Report (n 2).

[393] *Halsey* (n 59).

[394] Ibid at [9].

[395] Ibid at [10].

divided in their opinions about the accuracy of his lordship's comments[396] which is discussed later in this section.

Notably, in pre-*Halsey* cases[397] judges showed vigorous support of ADR invoking costs sanction.[398] Following *Halsey*, the trend among the judiciary started to change and 'courts became reticent in their opinions and used the *Halsey* edicts to temper their views.'[399] Nonetheless, it is observed that following *Halsey*, judges have been inconsistent and contradictory in their approach to using compulsion to force parties to undertake ADR.[400] For instance, in *Wright v Michael* [401] Alan Ward raised doubt about the contention in *Halsey* that requiring parties to consider ADR would be "an unacceptable obstruction" to the parties' right of access to the court and called for a review of the rules in *Halsey.*

In *Mann v Mann*[402] Mostyn J recognised that while a court cannot compel a party to consider ADR, an order such as an "Ungley" order that specifically mentions that parties could be penalised with costs sanctions in the event of an unreasonable refusal to participate in the ADR will not amount to unlawful compulsion.[403] In *Bradley v Heslin*[404] the court took the view in relation to boundary disputes and held that directing parties to take all reasonable steps to resolve the dispute by mediation before preparing for a trial should not be regarded as a bar to the right of access to justice.[405] Recently, in *PGF II S A v OMFS Company 1 Ltd*[406] the COA expanded the factors laid down in *Halsey* and held that even silence to an invitation to mediate is unreasonable.[407]

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[396] Girolamo (n 44).

[397] See subsection 1.4.1 for a discussion on these cases.

[398] See for example see *Dunnett* (n 76) ; *Hurst* (n 240).

[399] Girolamo (n 44) 167.

[400] M Ahmed and F Arslan 'Compelling parties to judicial early neutral evaluation but a missed opportunity for mediation: Lomax v Lomax [2019] EWCA Civ 1467' (2020) C.J.Q. 39(1), 1-11.

[401] [2013] C.P. Rep. 32.

[402] [2014] EWHC 537 (Fam).

[403] Ibid at paras [16]-[17], [36].

[404] [2014] EWHC 3267 (Ch).

[405] Ibid [24].

[406] *PGF II* (n 132).

[407] Ibid.

Furthermore, in the case of *Lomax v Lomax*,[408] the COA considered the *Halsey* principles and indirectly cast doubt on the principles by saying that 'the court's engagement with mediation has progressed significantly since *Halsey* was decided'.[409] In this case, the court recognised for the first time that the courts do have the power to compel unwilling parties to engage in Early Neutral Evaluation (ENE). Most importantly, the issue of whether compelling unwilling parties to consider ENE clashes with Article 6 rights was also considered, and the COA held that it does not because the parties are merely getting an expert (in this case the judge) opinion and at liberty to choose not to be bound by the judge's evaluation and they can resort to the court for a determination by all means. Notably, in *McParland v Whitehead*,[410] the then Chancellor, Geoffrey Vos considered the impact of *Lomax* and indicated that a court may make an order for compulsory mediation.[411] As such, there is a call for extending the reasoning of *Lomax* to other ADRs, especially mediation.[412] One important finding from most of the judgements in English courts in regard to compulsory ADR is that they were influenced to a large extent by the decisions in various EU case laws, which are discussed next.

2.3.2 Judgements in the European Case laws

Lord Dyson's comments in regard to compulsory ADR was largely followed from the principle established by the European Court of Human Rights (ECtHR) in *Deweer v Belgium*.[413] In *Deweer*, the applicant, a Belgian butcher, was accused of breaching of trading regulations and faced prosecution. Mr Deweer was given two options either he pays the fine or face prosecution and immediate closure of his shop until judgment was given on the case. He decided to pay the fine by way of settlement, but he sued the Belgian authorities based on the allegation that he was denied a fair trial which contravened Article 6. The ECHR held that since the fine was paid in circumstances of

[408] *Lomax* (n 86).

[409] Ibid, [27].

[410] [2020] Bus LR 699.

[411] Ibid [42].

[412] Ibid.

[413] ECHR 27 Feb 1980.

constraint and under protest, it violated the applicant's right to a fair trial endured under Article 6(1). Although, *Deweer* was concerned with parties' right to a fair trial under Article 6 and, it was fact-specific, and it did not address the issue of using compulsion to encourage parties to consider ADR in general.

The issue of compulsion came before the CJEU in the case of *Alassini*[414] where CJEU had the opportunity to address the important question of whether compulsory ADR breached a party's right to access to courts. In this case, customers of two telecoms companies brought an action for breach of contract under the EU Directive on the Provision of Electronic Communications Network.[415] Under Italian law, a party is required to attempt to settle the matter before bringing an action at the court. The Italian court referred the matter to the CJEU regarding the compatibility of Italian law, with the Article 6 and the Universal Services Directive[416] and the CJEU said no. Because the measure was proportionate[417] and it pursued legitimate objectives, i.e., to provide quicker and less expensive resolution of the dispute which had wider general interest.[418] This decision of the CJEU clearly shows that parties can be compelled to consider ADR provided that the measure in question pursues a legitimate objective and is proportionate.

More recently in another Italian case *Menini v Banco Popolare Società Cooperativ*,[419] the CJEU further clarified whether Italian law-making legal proceedings conditional on attempting to ADR breaches parties' rights to access to justice under Article 47 of the Charter of Fundamental Rights of the European Union. The CJEU stated in order to be mandatory mediation to be compatible with the principle of access to justice, the parties cannot be forced to settle, mediation process should not cause a substantial delay and costs to the case. The judgements of the CJEU in *Alassini* and *Menini* illustrate that requiring parties to consider ADR as a pre-condition to litigation does not necessarily

[414] *Alassini* (n 97).

[415] Directive 2002/22 on universal services and users' rights relating to electronic communications network and services (Universal Services Directive) [2002] OJ L108/51.

[416] *Alassini* (n 97) at [21].

[417] Ibid at [65].

[418] Ibid at [63].

[419] *Menini* (n 98).

clash with their rights to access to justice provided that parties are not prevented from accessing the courts.

2.3.3 Judicial commentary on *Halsey* and compulsory ADR

Commentators argue that *Halsey* in regard to court's power to compel the litigants to engage in mediation on the ground that it would violate right to access to courts in flawed. For instance, Lightman J suggested that Dyson LJ's comment on Article 6 point was wrong and unreasonable[420] because, unlike an arbitration order which places a permanent stay on the proceedings, a mediation order simply imposes a short delay allowing the parties to settle.[421] On the other hand, some members of the judiciary, whilst advocating for the greater use of ADR, raised concerns about forcing parties to go for ADR is 'indeed likely' to clash with parties' rights under Article 6.[422] For example, Lord Phillips explained, 'if you say unless you attempt mediation you cannot continue with your court action…the European Court of Human Rights at Strasbourg might well say that that he had been denied his right to a trial in contravention of Article 6'.[423] Conversely, in a speech to the Civil Mediation Council National Conference, Sir Anthony Clarke MR suggested that Dyson LJ was wrong in stating that mandatory mediation may clash with parties' Article 6 rights and argued that the court retains a jurisdiction to require parties to enter into mediation.[424]

Following the huge criticism of his view expressed in *Halsey* and the decision of *Alassini*, even Dyson LJ seemed to have changed his view about ordering litigants to consider mediation and its impact on Article 6 of the ECHR, which he discussed in *Halsey.*[425] In his speech at Belfast Mediation Conference, his Lordship opined that 'in

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[420] Lightman J, 'Mediation: An Approximation to Justice' (2007) 73 Arbitration 400.

[421] Ibid.

[422] Lord Phillips, 'ADR: an English viewpoint' (n 59).

[423] Ibid.

[424] Clarke MR, 'The Future of Civil Mediation'(n 94) paras [7]-[10].

[425] Dyson LJ, 'Halsey 10 years on – the decision revisited: keynote speech' (Belfast Mediation Conference, May 9, 2014); See also H Dundas, 'Court-Compelled mediation and the European Convention on Human Rights article 6' (2010) 76 Arbitration 343; J. Davies and E. Szyszczak, 'ADR: Effective Protection of Consumer Rights' (2010) 35 E.L Rev. 695.

and of itself compulsory mediation does not breach Art. 6, but that compulsory mediation is more effective when it is voluntary'.[426] Jackson LJ, in his final report on Review of Civil Litigation Costs, stated that while parties can be encouraged to engage in mediation and the encouragement can be robust coupled with costs sanction, but parties should never be compelled to mediate.[427] His Lordship's view had reinforced the decision of Dyson LJ in *Halsey* and seems to create a paradoxical approach towards using compulsion to force parties to consider ADR. This reluctance of using compulsion was echoed in subsequent reviews of civil justice.[428] Lord Neuberger expressed a similar opinion in the Keynote address at the Civil Mediation Conference 2015.[429] In reality, there is strong resistance among the judiciary and policymakers to make mediation mandatory.

2.3.4 A critical assessment

Commentators argue parties do not waive their rights to access to court by entering ADR, and they are under no obligation to stick with the process until the end and settle as such there is no question of violation of Article 6.[430] However, this is subject to debate and depends on the parties' understanding of what process they are entering into and what are the consequences of settling in ADR on their rights to access to courts later on. It can be seen from the decision of the CJEU that the right of access to courts under Article 6 is not an absolute right and can be restricted.[431] Notably, the recent decision in *Lomax* where the COA held for the first time that the judges do have the power to compel parties to go for ENE may encourage policymakers, academics and judiciaries to rethink their position on compulsion to undertake ADR.

[426] Dyson, '*Halsey* 10 Years On' (n 425).

[427] Jackson Final Report (n 2).

[428] See Briggs, *Chancery Modernisation Review* (n 153); Briggs Interim Report (n 25); CJC Final Report (n 2).

[429] Neuberger, 'A View from on High' (n 96).

[430] Mackie, *The ADR Practice Guide* (n 182) ch 10.

[431] *Deweer* (n 413).

Commentators such as Girolamo[432] and Ahmed[433] referred to the paradoxical view of the judiciary regarding using compulsion to encourage parties to undertake ADR and called for a reform and invited the judiciary to appreciate that compulsory ADR does not restrict parties' rights to access to the courts. Ahmed further argued compulsory ADR does not prevent litigants from going to court, it delays a process a bit and the delay caused is still significantly lower than the time takes to get a decision by a judge.[434] Conveniently, consensual ADRs such as mediation, negotiation and conciliation are non-adjudicative in nature which allows parties to explore these options whether or not a settlement is possible. In addition, if settlement is not possible, parties can resort to the court.[435]

Commentators argue that ADR is already impliedly mandatory in the UK by referring to the court's power to restrict successful parties' cost recovery for unreasonable refusal to consider ADR.[436] Notably, ADR order in the Commercial Court requires the parties to engage in ADR and also state reasons for a unsuccessful ADR.[437] There are other mandatory mechanisms introduced by the policymakers such as MIAM, an FDR requirement in family disputes; ACAS EC notification in employment disputes, RTA Small Claims Protocol; localised small claims Dispute Resolution Hearing (DRH) akin to ENE where participation is mandatory and West Midlands Employment Tribunal pilot.[438] As the CJC Working Party on ADR rightly stated, 'If compulsory ADR represents a constitutional rubicon then it does seem to have been crossed a number of times already'.[439]

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[432] Girolamo (n 44) p173.

[433] B Billingsley and M Ahmed, 'Evolution, revolution & culture shift: A critical analysis of compulsory ADR in England and Canada'(2016) 45 Common law World Review 186, 30.

[434] T. Allen, *Mediation Law and Civil Practice* (Bloomsbury Professional 2013) 206–7.

[435] Billingsley, 'Evolution, revolution & culture shift' (n 433) p30; Feehily, 'Creeping compulsion to mediate' (n 269) p145.

[436] Ahmed, 'Implied compulsory mediation' (n 82).

[437] Rule D8.7 (d) and Appendix 3 of Admiralty and Commercial Courts Guide 2017.

[438] Since July 2020, a pilot ADR scheme has been operating for employment cases listed for trial lasting more than 6 days.

[439] CJC Interim Report (n 2) para 8.5.8.

It can be noted that courts and tribunals routinely make orders to the parties to comply such as give disclosure, [440] provide further information and parties are required to comply with such orders. In the event, a party fails to adhere to the order by the courts, the defaulting party is penalised by the court such as striking out.[441] Therefore, it is argued that there are elements of compulsion in the UK, and there should be no problem with further compulsory instruments in appropriate circumstances. Masood Ahmed referred to the costs consequences articulated in the CPR[442] and stated that mediation is impliedly mandatory in the UK, but there is no express legislation to the same effect.[443] His view has been supported by Girolamo who invited the government to develop legislation to the same effect.[444]

Interestingly, Dyson LJ who was the vocal critic of using compulsion to mediate, has softened his view regarding a possible link between the compulsion to mediate and breach of Article 6 following the CJEU decision so as some other senior members of the judiciary that can be seen from the recent judgement of COA in *Lomax*.[445] Conversely, some commentators such as Hazel Genn vigorously oppose the use of compulsion to encourage parties to undertake ADR because, she argued, compulsion frustrates settlement rates.[446] Her assessment was based on the significant increase in take-up of voluntary mediation with a low settlement rate following the decision of *Dunnett*.[447] However, Genn's finding on low settlement rates was challenged by the CJC[448] because this was not based on empirical evidence of failure. Indeed, the CJC Working Party acknowledged the difficulty in measuring the effect of compulsory ADR on settlement rates but found that a large number of unwilling parties who attended mediation 'they are in fact drawn into the process, become engaged and frequently

[440] CPR pt31.

[441] CPR 3.4 (c).

[442] CPR pt44.3-44.5.

[443] Ahmed, 'Implied Compulsory Mediation' (n 82); Billingsley 'Evolution, revolution and culture shift' (n 433).

[444] Girolamo (n 44).

[445] Ahmed, Implied compulsory (n 82).

[446] Genn, *Twisting Arms* (n 33) p V.

[447] Ibid.

[448] CJC Compulsory ADR (n 141) para 81.

settle'.[449] This finding is also supported by Tony Allen who argued despite being forced into ADR, parties often settle.[450] The success of the FDR[451] in family courts and DRH[452] pilot operating in certain courts support the above claim that despite being compelled to enter into ADR, parties' motives seem to vary when they attend the process which often results in successful outcome.

In a significant departure from the precedent established in the case of *Halsey* which found parties could not be compelled to engage in ADR, the latest report[453] by the CJC concluded that mandatory ADR in appropriate circumstances is compatible with Article 6 of the ECHR, and therefore, parties can be lawfully compelled to participate in ADR. The CJC also made it clear that mandatory mediation would be desirable in the right circumstances. In coming to this conclusion, the CJC referred to the exiting compulsory mechanisms that are already operating in the UK (as noted above) and other jurisdictions such as Italy, Greece, Ontario and Australia, whereby mediation has been made mandatory without any question of clash with the parties' right to access to courts. The CJC made three important observations:

a) Participation in ADR occasions can be compulsory if it is free and efficient.
b) In suitable cases litigants can be compelled to attend at ENE, FDR and DRH hearings if these processes seem appropriate for the case concerned and can be properly resourced within the court system.
c) The free or low-cost introductory stage in the online process can be made compulsory provided they are shorter and cheaper formats.[454]

An important observation from the CJC report is that compulsory ADR will not be controversial if the process is efficient and does not cost the parties. This proposal does not sit comfortably with the MIAM requirement which is funded by the parties unless

[449] CJC Interim Report (n 2) para7.22.

[450] T Allen, 'Dunnett lives on: First thoughts on *Halsey v Milton Keynes NHS Trust'* (2019) https://www.cedr.com/dunnett-lives-on-first-thoughts-on-halsey-v-milton-keynes-nhs-trust/ .

[451] See section 4.3.2.3 of chapter 4.

[452] See section 5.2.7.1 of chapter 5.

[453] CJC, *Compulsory ADR* (n 141).

[454] Ibid, para 118.

eligible for legal aid. This proposal also means that privately funded ADR will be out of this regime, unless they are publicly funded, which may not be possible. Because, if ADR is made compulsory and parties are required to fund, the fees may not proportionate in many low-value cases.[455] One option to be to address this issue would be to continue to develop fixed costs mediation schemes for use in low-value claims.[456] In other jurisdictions such as in Italy the costs of initial information meeting is very low but full mediation requires a fee.[457] In Ontario, roster of approved mediators conduct mediation at set rates.[458] In England and Wales, the CMC provides a fixed-fee mediation service, which could be worth looking into.[459] Until a suitable fixed fee ADR scheme for use in low-value cases is established, it may not be useful to make ADR mandatory which are privately funded.

The CJC suggested that requiring parties to consider ADR before proceeding is issued might not be a wise step to make 'as requiring parties to put significant effort into ADR could be disproportionate in those cases which are in truth going to be undefended'.[460] Indeed, this study acknowledges that ADR is not panacea and introducing blanket compulsion to ADR is likely to be ineffective and will add extra costs and delay to the process which is undesirable. Also, putting extra effort and spending money on a case where the other party is not going to defend may also prove costly for the claimants. In this regard, the CJC recommended requiring parties to engage in some form of ADR (e.g., attendance at an information session or settlement discussion online) before embarking on litigation.[461]

For example, in RTA cases where liability is admitted, parties are required to attempt settlement through the online portal before they initiate court proceedings, and it has

[455] Ibid.

[456] Ibid, para 97.

[457] There is a small administrative fee for the initial mediation session (40 Euros for claims below value of 250,000 Euros, and 80 Euros above).

[458] Public Information Notice - Ontario Mandatory Mediation Program - Ministry of the Attorney General (gov.on.ca).

[459] https://civilmediation.org/fixed-fee-scheme/.

[460] CJC, *Compulsory ADR* (n 141) para 107.

[461] Ibid, paras 94-107.

been proven a highly successful mechanism. The CJC recommended to adopt a similar approach in other cases which are, or will be, managed via an online portal. This conclusion supports this study's proposal[462] for stage 1 of the OCMC to facilitate parties to negotiate with the other party by providing template letters (akin to pre-action protocol) and once the other party shows a willingness to settle, the without prejudice settlement tool (currently comes after issuing a claim) should be offered before the issue of the claim. This issue is further considered in chapter 5 of this thesis.[463] In light of the recent report by the CJC, it can be argued that using compulsion to a limited extent (e.g. attend an ADR information session) does not necessarily infringe their rights under Article 6 because merely requiring parties to attend an information session does not mean they have to undertake ADR or settle, and they can resort to the court anytime.[464] There appears to be confusion between the using compulsion to initially engage in the ADR process and the voluntary nature of continued participation.[465] Hence, it can be argued that using compulsion to ensure participation in the ADR, not to force parties to settle perverse voluntariness of the process and does not prevent parties from accessing courts.

2.3.5 Costs sanction for unreasonable refusal to undertake ADR

It can be seen from the above discussion that there are two diverse schools of thought regarding the issue of using compulsion to force parties to enter into mediation, and the debate continues. While there is less support for mandatory ADR among judiciary and academics, there is strong support in favour of using costs sanction against the parties who unreasonably refuses to consider mediation and in favour of the promotion of mediation.[466] Typically, in civil proceedings, the losing party will not only pay their own costs but also the costs of the successful party which is known as "cost follow the event". However, the right to the recovery of costs in civil proceedings in England and

[462] see subsection 5.2.2.3 of chapter 5.

[463] Ibid.

[464] T Allen, *Mediation Law and Civil Practice* (Bloomsbury Professional 2013) 206–7.

[465] Ibid.

[466] Jackson Final Report (n 2); CJC Interim Report (n 2) and Final Report (n 2); *PGF II* (n 132).*Thakkar v Patel* [2017] EWCA Civ 117; Catherine Newman QC in *Burgess v Penny* [2019] EWHC 2034 (Ch).

Wales is not automatic and it's a discretionary power of the courts.[467] While using its discretion, the court may take into account of the successful party's behaviour during the whole litigation process and may decide not to make a usual costs award by restricting the amount of costs that the winning party may recover from the losing party which is commonly known as 'adverse costs order'. When deciding the adverse costs order, the court will consider a number of factors including but not limited to the conduct of all the parties before and during the proceedings, in particular any efforts to resolve the dispute concerned.[468]

Although the CPR came into force in 1999, it was not until *Dunnett v Railtrack*[469] such order for costs were made by the Court of Appeal. In *Dunnett*, the COA did not make a usual costs award and deprived the successful defendant of a costs award because the defendant acted unreasonably in refusing the appellant's good faith suggestion to mediate the dispute. In this case, the court adopted a favourable approach to ADR and highlighted the need for the court to use its power under CPR to penalise parties who are found to be unreasonable in refusing to consider ADR processes however the court missed the opportunity to articulate a guideline on how to define unreasonableness. Following the judgement in *Dunnett*, there was an upward spike in the usage of voluntary mediation between 2002-2003 and this has highlighted the effect of costs sanction in increasing take-up of mediation.[470] However, the approach of the judiciary in subsequent cases regarding the endorsement of ADR and using costs sanction to penalise parties for unreasonable refusal to mediate has been mostly inconsistent, contradictory and confusing.[471] This was illustrated in the controversial decision in *Halsey* as noted above.[472] The inconsistency in regard to application of costs sanction seems to be down to the criteria devised in *Halsey* which are broad and too generous as identified in the CJC ADR report.[473] For instance, the Court of Appeal's conflicting

[467] Senior Courts Act 1981, s 51 and CPR 44.3(1).

[468] CPR rule 44.2 (4) (a), 44.2(5)(a) and 44.4 (3) (ii).

[469] [2002] 2 ALL ER 850.

[470] Genn, *Twisting Arms* (n 33); CJC Interim Report (n 2).

[471] Ahmed, 'Implied Compulsory Mediation' (n 82).

[472] See subsection 2.3.1.

[473] See section 1.4.2 of chapter 1 for detailed discussion of these factors.

decisions in *Thakkar v Patel*[474] and *Gore v Naheed.*[475] In the former case, the defendant's failure to engage constructively with the claimant's invitation to arrange a mediation was considered unreasonable and was penalised . In sharp contrast, in *Gore* the court defendants were not penalised in costs for refusing to engage with mediation on the ground that they were entitled to seek determination from the court. Thus, there has been a call for an urgent review of the *Halsey* principles for a long time and recently, the CJC ADR Working Group[476] recommended for a review of *Halsey* principles as discussed in chapter 1.[477]

In *Halsey* Dyson LJ expressed a paradoxical view in saying that the court does not have the power to compel the parties to mediate as it violates parties' rights Article 6; however, it was permissible that the courts can use costs sanction penalise parties for unreasonable refusal to consider ADR. This approach was considered permissible in *Mann v Mann*[478] and *Bradley v Heslin.*[479] The problem with this approach is that using costs sanction may mean parties are impliedly forced to consider ADR and, in some cases, use of adverse costs order may render the successful outcome illusory or prevent the parties from successfully conduct their claim, which may conflict with parties Article 6(1) rights. For instance, Shirley Shipman argued:

> In relation to the imposition of financial penalties there may be some difficulty. If the financial restriction effectively prevents an individual from bringing or defending his or her claim or renders any successful outcome illusory, it must be considered at least highly possible that the ECtHR would find that this conflicts with an individual's right of access to court.[480]

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[474] [2017] EWCA Civ 117. For further analysis see M. Ahmed, 'Mediation: the need for a united, clear and consistent judicial voice: *Thakkar v Patel* [2017] EWCA Civ 117; *Gore v Naheed* [2017] EWCA Civ 369', C.J.Q. 2018, 37(1), 13-19.

[475] [2017] EWCA Civ 369.

[476] CJC Final Report (n 2).

[477] See subsection 1.4.2.1 of chapter 1.

[478] [2014] EWHC 537 (Fam); [2014] 1 W.L.R. 2807.

[479] [2014] EWHC 3267 (Ch).

[480] Shipman, 'Compulsory mediation (n 344) 191.

The above statement reveals a stark warning where a party is successful in their court action, but due to their unreasonable refusal to mediate the dispute, the party receives an adverse costs award that could constitute a denial of their right of access to the court. This claim could be defeated if it can be shown that the party waived their right by going to ADR.[481] It is well established that the right of access to court is not absolute, and the ECtHR has confirmed on numerous occasions that Article 6 does not prevent a party from waiving their right to a fair trial of their own free will, either expressly or tacitly.[482]

Commentators[483] argue that the costs of litigation in this country are such that it can be considered as an impediment to the courts. Parties may feel pressurised to avoid litigation and use out of court settlement options, but 'the possibility of an adverse costs award increases that pressure'.[484] While lack of funding may force parties to avoid litigation that can be considered as an impediment to access to courts,[485] the pressure to avoid litigation and consider ADR increases the pressure due to the fear of being penalised with an adverse costs order. Although costs are not awarded automatically in English jurisdiction but are awarded where it is considered by the court that parties have acted unreasonable in refusing to consider ADR. However, it is noted that the application of costs sanctions has been inconsistent among the judiciary, which is confusing for litigants, especially LIPs, and makes it harder for LIPs to decide whether to undertake ADR or refuse to consider ADR and proceed to trial with fear of being penalised with costs sanctions. Hence, commentators argue that 'The most significant pressure on an individual to undertake a mediation process is the threat of adverse costs'[486] and in certain circumstances, its application can be considered as a constraint

[481] Shipman, 'Waiver' (n 347).

[482] R Stone, *Textbook on Civil Liberties and Human Rights* (10th edn, OUP 2013) 184; See also Shipman, 'Waiver' (n 347) p476.

[483] S Shipman, 'Defamation and Legal Aid in the European Court of Human Rights' (2005) 24 Civil Justice Q 23 and S Shipman, 'Steel and Morris v United Kingdom: Legal Aid in the European Court of Human Rights' (2006) 25 C.J.Q. 5.

[484] S Shipman, 'Alternative dispute resolution, the threat of adverse costs, and the right of access to court' in Déirdre Dwyer (eds), *The Civil Procedure Rules Ten Years On* (OUP 2009).

[485] *Steel & Morris v United Kingdom* [2005] E.M.L.R. 15 at [59]-[62]. See Shipman, 'Steel & Morris' (n 483) and Shipman, 'Defamation and Legal Aid' (n 483).

[486] Shipman, 'Waiver' (n 347) p491.

and can be argued that parties' waiver of their rights to access to court is tainted.[487] It can be noted that much of the academic discussion centred around the effect of *Deweer* where it was found, discussed above, that applicant's waiver of rights to access to courts had been constrained which was a violation of Art.6(1).

Since the *Deweer* case, the concept of the margin of appreciation has been introduced by the ECtHR has introduced in dealing with Article 6 (1) cases.[488] The term "margin of appreciation" is doctrine developed by the Strasbourg authorities and it refers to the discretion national authorities are allowed to exercise by that the Strasbourg authorities when it takes legislative, administrative or judicial action in the area of a Convention right.[489] In the case of *Osman v UK*,[490] the ECtHR explained the right to access to court is not absolute and can be limited by members using their discretion granted under margin of appreciation doctrine.[491] It has been suggested:

> …in further developing the doctrine of waiver…the ECtHR should recognise that the threat of adverse costs and other strong methods of encouragement, such as court orders to mediate, amount to pressure such that any waiver of the right of access to court is tainted by constraint'.[492]

However, it can be argued in accordance with the margin of appreciation that in order to ensure the general or efficient functioning of civil justice, some tough measures are necessary. The discretion under the CPR given to the courts to penalise only those who unreasonably refuse to consider ADR, and this can be justifiable because it pursues a legitimate aim, i.e. encourages parties to consider out of court settlements seriously, which would mean the suitable cases would settle early saving costs to the parties and costs to the courts which is necessary for the efficient functioning of the civil justice

[487] Ibid; Feehily, 'Creeping compulsion to mediate' (n 269).

[488] *Osman v UK* (1998) EHRR 10, at [147].

[489] S Greer, The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights (Council of Europe publishing , 2000) p. 5.

[490] *Osman* (n 488) at [147].

[491] Ibid.

[492] Shipman, 'Waiver' (n 347).

system.[493] This would also mean that only those cases will come to court that requires the attention of the court means reduced pressure on the court's resources and proper allocation of resources to all cases come to court. Nonetheless, the parties right to access to court will not be hampered because if they do not wish to settle at ADR, they can always resort to the court. Arguably, in these circumstances, the aim of using costs sanction is likely to be considered as a legitimate aim by the ECtHR.[494] Conversely, the ECtHR may find otherwise where the aim of the measure in question is to prevent parties from accessing the courts to seek redress because of the high costs associated. However, the approach of the ECtHR taken in different case laws mentioned above indicate that a proportionate restrictive measure that likely to pursue legitimate aim.[495] Financial constraints especially costs sanction puts pressure on disputants to consider ADR, and ECtHR is particularly concerned with financial constraints that may prevent disputants from bringing or defending claims in the courts, as can be seen from the decision of *Deweer*.[496] Arguably, costs sanction is not a direct financial constraint, and the threat of adverse costs may, in appropriate cases, be used to encourage reluctant parties to enter and engage in ADR processes, including mediation.[497] This has been supported by academics like Shirley Shipman who opined that adverse costs may be used to encourage reluctant litigants to consider ADR, in particular mediation.[498]

The CJC, in their recent report where they addressed the issue of compulsion to force parties to consider ADR and use of costs sanction who refused the order of the court and highlighted the importance of sanctions in making sure parties do comply with the mandatory requirements because 'a voluntary obligation is not a legal obligation'[499] and it is not attractive.[500] Now that it is accepted by the CJC that parties in suitable circumstances can be lawfully compelled to consider ADR and they recommended

[493] *Ashingdane v UK Series* (1985) 7 EHRR 528; See also Shipman, 'Waiver' (n 347) 491 and Shipman, 'Compulsory Mediation' (n 344).

[494] See Shipman, 'Waiver' (n 347) 491; S. Shipman, 'Compulsory Mediation' (n 344) 181–2.

[495] Ibid.

[496] See subsection 2.3.1.2 above; also see Feehily, 'Creeping compulsion to mediate' (n 269), Shipman, 'Waiver' (n 347) 491.

[497] Ibid.

[498] Ibid.

[499] CJC, *Compulsory ADR* (n 141) para 62.

[500] Ibid, para 63.

possible sanctions, including strike-out a claim and impose costs sanction preceded by an "unless" order in appropriate cases.[501]

This study acknowledges that there are valid arguments that the fear of costs sanction especially its inconsistent application by the judiciary, may confuse litigants, especially LIPs and they may feel pressured to enter into ADR and accept under the settlement.[502] Notably, the thin line between robust encouragement and compulsion is difficult to draw in practice, and with the background threat of sanctions in different forms, including costs sanction, there is a risk that encouragement can look more like coercion.[503] This is more complicated for LIPs as they may not know the consequence of refusing to undertake ADR and when it would be considered as unreasonable and this is why the judges are reluctant to penalise LIPs with costs sanctions when they are found to be acted unreasonably in refusing to undertake ADR. Nonetheless, outside the ADR sphere, judges seem to take robust approach in penalising parties with sanctions in different forms including costs sanction for unreasonable behaviour before or during the litigation regardless of whether the relevant party is represented or LIP. For instance, Lord Briggs *Barton v Wright Hassall LLP*[504] explained 'there cannot fairly be one attitude to compliance with rules for represented parties and another for litigants in person'.[505] In a similar spirit, recently, in the case of *Sir Henry Royce Memorial Foundation v Hardy,*[506] HHJ Paul Matthews found the conduct of the defendant who was not represented in dealing with the other party was unreasonable and ordered the losing defendant (LIP) to pay 60 percent of the claimant costs upfront, with the remainder going for detailed assessment.[507]

The message from the above judgements is clear; the rules should be applied rigorously whether parties concerned are legally represented or not however, judges should be careful when considering sanctioning LIPs as they may not appreciate the potential of

[501] Ibid, para 115.

[502] Genn, *Twisting Arms* (n 33), Shipman, 'Waiver' (n 347).

[503] Feehily, 'Creeping compulsion to mediate' (n 269).

[504] [2018] 1 WLR 1119, [42].

[505] Ibid.

[506] [2021] EWHC 817 (Ch).

[507] Ibid at [21]-[22].

ADR, the unpredictability of a trial and the impact of costs sanction. Also, LIPs are more emotionally involved in a case than a represented litigant who benefits from legal advice. It is undeniable, lack of education and awareness of ADR put the LIPs in a vulnerable position against the parties who are represented. Furthermore, limited funding means that they are deprived of legal advice which could be helpful to inform them about the benefits of ADR, how it works in practice, the effect of agreeing to ADR settlement agreement (binding once agreed) and the consequences of escalating the matter further down the court. However, it is argued without the credible threats of costs sanction for unreasonable refusal in appropriate cases to consider ADR 'is the sound of one hand clapping'.[508] Thus, the authoritative force of the courts in the form of costs sanction in appropriate cases is needed to make litigants seriously think about ADR, but at the same time, it is equally important to take steps to safeguard the interest of the litigants so that there are not forced to accept understatements and waive their right to access to courts under constraint. It would be the job of the lawyer (when represented, in case of LIPs pro-bono services), mediators and the judges to educate parties about the advantages of settling early through ADR and the effect of agreeing to settle early.[509]

While represented parties may not be in a disadvantageous position as their lawyers are in a better position to explain the legal effect, it is unlikely that LIPs will be in the same position. In this regard, judges, lawyers and mediators should play an active role in educating parties about ADR.[510] Hence, this study suggests that proportionate costs sanctions on LIPs in certain circumstances can only be justified such as where they have refused an invitation to go to mediation made by the court as indicated in *Dunnett* or even if it is made by the other party in clear terms and informing about the risk of costs sanction if the court finds that the LIP has acted unreasonably. Also, costs sanction can also be justified where the successful party who refused to consider ADR beforehand is a repeat player because they are already aware of the process and consequences of unreasonably refusing to consider the process. Judges are in the best position to consider whether a litigant acted unreasonably in refusing to consider ADR and should apply their discretion consistently in appropriate cases. A balance must be struck when

[508] H Genn, *Judging Civil Justice* (n 51) p125.

[509] Shipman, 'Waiver' (n 347).

[510] Ahmed, *'Bridging the gap'* (n 313) 92.

imposing costs sanction because while the encouragement must be stronger,[511] and at the same time, it must not be so strong as to amount to coercion that may amount to a breach of parties' Article 6 rights.[512] It is not possible to devise an exhaustive list of safeguards that may protect the interest of litigants, but in some circumstances, the imposition of costs sanction could be justified such as:

a) Whether the party has been made aware of the possible costs sanction in clear and unequivocal terms either by his lawyer, mediator or the judge;
b) Whether the party has refused to comply with a clear invitation from a judge to consider mediation such as the Dunnett type cases;
c) Whether the party has been invited by the other party and was informed about costs consequences at court in the event of unreasonable refusal to mediate;
d) Whether the party is already familiar with mediation process and possible costs sanction through previous experience e.g., attended a mediation process before;
e) Whether the party has acted in good faith.

2.4 Policy considerations in the promotion of ADR

While some academics[513] praise ADR for its key benefits over litigation and support its promotion, there are some academics[514] who strongly oppose the promotion of ADR. Commentators argue that the primary function of the court is to uphold the right of the parties ensured by the law, whereas the function of ADR is to satisfy the interest of the concerned parties. Hence, the debate is centred around the justice issue. Yet, ADR is increasingly being promoted to in England and Wales by the judiciary and courts. This section will thus examine the policy considerations in the promotion of ADR.

[511] Genn, *Twisting Arms* (n 33) piii.

[512] Feehily, 'Creeping compulsion to mediate' (n 269) p146.

[513] Meadow, 'Whose Dispute Is It Anyway?' (n 45); Cappelletti, 'World-Wide Access-to-Justice Movement' (n 45); Allen,'Acritique of the 2008 Hamlyn Part II' (n 116).

[514] Fiss (n 45); Genn, *Judging Civil Justice* (n 51).

2.5 Arguments against promotion of ADR

The critics of ADR mainly oppose the promotion of ADR on the following grounds: (1) ADR restricts the development of the law; (2) incapable of delivering substantive justice; and (3) it can lead to coerced settlements.[515]

2.5.1 ADR restricts the development of the common law

Critics refer to the contribution of courts' determinations in the development of common law in common law jurisdictions like the UK.[516] Adjudication by judges creates precedents[517] that help to develop the common law. Even though the cases that are decided by the county courts do not form legal precedents, but the determination of the judges in the county courts can be used as guidance in future cases.[518] Conversely, ADR process is more concerned with the parties' private interest (interest-based approach) rather than their rights guaranteed (rights-based approach) by the rule of law.[519] Usually, the protection of confidentiality in ADR prevents any outcomes of the process to be used in subsequent similar cases. Also, ADR is facilitated by a third party (the mediator) who has no legal authority like the judges. The mediator helps the parties to come to a solution suitable to their needs rather than ensuring their rights in accordance with the existing law. Commentators, therefore, argue that ADR is beneficial for the parties involved, not for society as a whole.[520]

Critics emphasise that the increased use of ADR process, which does not use legal principles will eventually lead to the vanishing of trials which is essential for the legal development in common law jurisdictions.[521] Thus, if there were a significant drop in

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[515] Ibid.

[516] Ibid.

[517] See subsection 1.4 of chapter-1 above.

[518] Genn, *Judging Civil Justice* (n 51) p86.

[519] Ibid.

[520] Ibid.

[521] Ibid, H Kritzer, 'Disappearing Trials? A Comparative Perspective' (2004) 1 (3) Journal of Empirical Legal research 735–754.

trials, it would inevitably impact the future development of common law[522] which is not desired. The recent report by the CJC addressed this issue and explained while the courts are struggling with the caseload, concerns in regard to sending too many cases for settlement do not make sense.[523]

This study recognises there is a valid argument that there are some cases where there is a genuine social need for an authoritative interpretation of the law which only the judges can deliver as opposed to mediators who do not have such authority.[524] However, one obvious question will need to be addressed, at whose expense the case will be litigated? Is it the State (seems unlikely unless publicly funded which is limited in civil disputes) or the parties? It would seem unfair on a party who wanted to mediate but had to forgo his chance in favour of creating precedent on a point of law at his own expense.[525] This will likely undermine the spirit of the overriding objective, which require dealing with cases justly and at proportionate costs. Hence, a balance must be struck between the need for the development of law and the need of the parties.[526]

It is equally important to note that the common law was more relevant when legislation was very scarce and imprecise, but the same cannot be said now. The court has the power conferred by the constitution to interpret the existing law, which helps to develop the common law, but at the present time, the court is not the only means of resolving disputes.[527] In reality, a party who is seeking to establish a precedent may end up regretting that decision if the decision goes against him, and in fact, no party wants that. The risk of creating an adverse precedent is an important matter, especially for government bodies and insurers, because if the court finds against them, then it might open floodgates for new claims on the same point.[528]

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[522] Ibid.

[523] CJC, *Compulsory ADR* (n 141) para84.

[524] Fiss (n 45) p1087.

[525] *Cable & Wireless* (n 287), *Paragon Finance* (n 288).

[526] See subsection 1.4.1.1 of chapter 1.

[527] Cortes, 'Making Mediation an Integral part' (n 62).

[528] Allen, 'A critique of the 2008 Hamlyn Part II' (n 116).

It is important to note that in the last two decades, negotiated settlement rates have increased (over 90 percent) most of which were undefended (e.g. enforcement of debt) cases that do not need mediation which indicates a drop in the number of cases that go to trial and produce precedents.[529] Arguably, that did not prevent the development of common law, and still, the courts are creating a number of authoritative decisions in different cases each year, and common law is still developing.[530] It should be bear in mind that compulsion to ADR is only applicable to undertake ADR not to settle which leaves the door of the courts open as such preserving the voluntary nature of the ADR as highlighted in the previous section of this chapter. This study observes that not all cases are suitable for ADR,[531] and some cases will eventually go to trial if the parties fail to settle in ADR, and this will not stop.[532]

More importantly, if mediators feel that there is an important issue that concerns public interest, they can refer the parties to take their case to court for determination. It should be noted that the Court of Appeal, which is the leading precedent maker in the UK, routinely encourages parties to consider ADR, in particular mediation when grants leave to remain.[533] In practice, after granting leave to appeal, the COA send a letter along with a response form[534] to both parties asking them to consider mediation. And this always happens despite that the COA only considers appeals on the point of law. Therefore, it can be argued promoting ADR in appropriate cases does not hinder the development of common law.

2.5.2 ADR does not provide substantive justice

[529] Ibid.

[530] CJC Compulsory ADR (n 141) para 84.

[531] See section 1.4 of chapter 1 above.

[532] Clarke,'Mediation - An Integral Part of our Litigation Culture'(n 333).

[533] Cortes, 'Making Mediation an Integral' (n 62); also The Technology and Construction Court Guide section 7 (March 2015).

[534] The form can be accessed at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/711635/form-56b-eng.pdf>.

As discussed in the introductory chapter,[535] the main concern of the critics is that ADR cannot deliver justice as ensured under the rule of law.[536] It can be noted that equality before the law can only be ensured if everyone has equal access to the law.[537] Critics stressed that only the court could ensure parties equality before the law, not ADR.[538] According to the critics, ADR cannot ensure access to the courts because ADR is non-court based and parties are required to focus on problem-solving during ADR and surrender their legal rights to reach a suitable solution to their dispute.[539] Neuberger LJ explained ADR is complementary to adjudication and is a part of the civil justice system, but it is not similar to trial as it does not deliver substantive justice.[540] The type of justice offered by ADR is an individualised justice.[541] It appears from the existing literature that the concept of justice in ADR is not similar to justice in adjudication.[542]

Critics argue that ADR does not have authority like judges, and they are not concerned about substantive justice; instead, they are there to help the parties to solve their dispute.[543] It is well established that mediators cannot impose a settlement decision on the parties. Hence critics argue that the successful outcome of an ADR process is, in fact, a settlement that the parties can live with not beneficial to the whole society.[544] As Genn argued, 'the outcome of mediation is not about *just* settlement, it is *just about settlement*.'[545]

Commentators criticise the proponents of ADR because they use the stress and unpredictability of the adjudication process to divert parties from the court to ADR and

[535] See point (iv).

[536]Fiss (n 45).

[537] Genn, *Judging Civil Justice* (n 51) p114.

[538] Ibid, p115.

[539] Ibid, p116.

[540] Neuberger, 'Has Mediation Had Its Day?' (n 205); Neuberger, 'Equity, ADR, Arbitration And The Law' (n 57) paras 39, 41–44.

[541] Ibid.

[542] J.M. Nolan-Haley, 'Court mediation and the search for justice through law' (1996) WULK, 49.

[543] Fiss (n 45); Genn, *Judging Civil Justice* (n 51).

[544] Ibid.

[545] Ibid, p117.

encourage the parties to settle their matter out of court.[546] They object that proponents use the fear of litigation to force parties to compromise in order to be spared from the assumed misery and uncertainty of the adjudication process. However, critics argue what the parties do not realise that 'the same thing that ordinary settlement offers and the same inability to imagine adjudication process that could be less miserable'.[547] Critics are concerned that the anti-litigation narrative will undermine the civil court system and the rule of law.[548] Also, cases settle in the shadow of the law and without the background threat of a functional civil court system, parties would not settle.[549]

According to Lord Phillips CJ, when parties want to establish their legal rights, mediation cannot be of any help and parties must resort to the court which is equipped with the power to establish the legal rights of the litigants.[550] It is important to note that the courts allocate rights according to the substantive law but in ADR, parties use their sense of justice to settle. Critics emphasise that 'a well-functioning system of civil justice is a pre-condition of not only democracy but also of a community's economic and social well-being'.[551]

However, if we look at the current state of the English civil justice system, the system is too adversarial for LIPs and the high costs associated with it means many litigants cannot afford litigation. It is evident that the policymakers are cutting funding from civil courts and investing more in the criminal justice system and there is no sign that they would change their course. Hence, ineffective/non-accessible courts make ADR a more appealing cost-effective option (as long as both parties are willing to cooperate).

2.5.3 Undue pressure to settle

Another argument advanced by the critics is that the flexibility and informality in the ADR process increase the power of the strong party over the weaker party, especially

[546] Winkelmann, 'ADR and The Civil Justice System' (n 56) para8.

[547] Genn, *Judging Civil Justice* (n 51) p117.

[548] Winkelmann, 'ADR and The Civil Justice System' (n 56) para8.

[549] Ibid para 5.

[550] Phillips LJ, 'An English Viewpoint' (n 59).

[551] Winkelmann, 'ADR and The Civil Justice System' (n 56).

when the weaker party does not have legal representation.[552] Owen Fiss branded ADR as 'a highly problematic technique for streamlining dockets'.[553] He went on to say, 'settlement is for me the civil analogue of plea bargaining: consent is often coerced'.[554] Existing studies suggest that power imbalances and undue pressure to settle in ADR process may affect the outcome in three ways.[555] Firstly, the party with less access to financial resources may be unable to get proper legal advice regarding his position as such unable to predict the outcome of the litigation, and this affects his position in the bargaining process.[556] Secondly, wealthy parties may take advantage of their position over the poorer parties. For instance, the weaker parties may need the remedies urgently, and the richer parties may use this opportunity to exploit the poorer parties by forcing them to accept a lesser amount than the sum they would get in the court. Thirdly, the stronger party may take advantage of their access to financial resources to fight in the court and put undue pressure on the poorer party to settle.[557] As such, it is argued by the critics that ADR is not better than the litigation as claimed by the pro-mediation academics because only the court can make sure that the parties are on equal footing and have equal access to justice.[558]

It is well established the increasing costs of litigation means the court is unaffordable for many litigants. Hence, in the present climate of austerity, the argument that only the court can make sure equal access to justice seems misplaced. More importantly, the adverbial nature means LIPs are often in a disadvantaged position as they may not know how best to put forward their arguments. Hence, the argument that the court can ensure equal footing is not always accurate as the parties with legal representation are in a better position than the LIPs which also influence the outcome of the court. Conveniently, mediators and parties can work together to minimise power imbalances.[559]

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[552] Genn, *Judging Civil Justice* (n 51) 90.

[553] Fiss (n 45) 1075.

[554] Ibid.

[555] Ibid.

[556] Ibid.

[557] Ibid, 1076.

[558] Genn *Judging Civil Justice* (n 51); Fiss (n 45).

[559] Allen, 'A critique of the 2008 Hamlyn Part II' (n 116).

The voluntary nature (in terms of settlement for the purpose of this study) of the ADR process means parties are free to walk out of the ADR process at any time. This may not always be possible for LIPs who do not know their rights and whether to accept or deny settlement offers as discussed above.[560] In this regard, if there is any indication that parties are being forced to accept something, their lawyers (if represented) should resist it and advise their clients accordingly.[561] Where parties are unrepresented, then they should consider seeking *pro bono* advice before agreeing to what they believe may be an under-settlement. Also, chapter 4[562] notes that in some sectors, there are existing safeguards, such as in the family mediation, where a mediated settlement is subject to the approval of the court.[563] Indeed, consumer ADR in general, and the ombudsman in particular, offer the paradigmatic example in the use of consensual ADR in asymmetric relationships where there is a significant imbalance of power between the parties (which is also present in other sectors, e.g. employment and family). Consequently, ADR has important and unique features to address the notably third neutral parties adopt a more evaluative role, there is usually some level of triage, and cases can proceed to an adjudicative stage (akin to court-annexed mediations schemes).

2.6 Arguments in favour

Proponents of ADR advocate its promotion because of its key benefits, e.g., confidential, flexible, quicker and cheaper over litigation. The arguments include but not limited to: (1) ADR provides a greater range of solutions to the parties' disputes than courts; (2) mediation may offer deeper and richer access to justice in appropriate cases, and (3) it is often cheaper and quicker.[564]

[560] See subsection 2.3.5.

[561] Ibid.

[562] See subsection 4.3.3.3.

[563] Ibid.

[564] Wissler, 'Court-Connected Mediation' (n 205); J. Ceno, 'Compulsory mediation: Civil justice, human rights and proportionality' (2014) 6 I.J.L.B.E. 288.

2.6.1 ADR permits a broader range of possible solutions than courts

The flexible nature of the ADR process enables parties to get a settlement in a wide range of disputes, and it can provide a variety of solutions that are not available to the court such as an apology.[565] Typically, ADR is beneficial both parties because the outcome of ADR can often include elements that are not traditional remedies such as an apology, an explanation and preservation of existing business relationship.[566] In practice, in some cases, an apology is all that a party wants[567] or keeping the existing relationship or repair the damaged relationship is far more important to the parties than the monetary value of the claim, e.g. family and commercial disputes. Even where the ADR process fails, parties still benefit from it, e.g., issues are narrowed means shorter trials.[568]

However, it is important to note that in practice, settlement through ADR in most civil and commercial disputes involves simply a transfer of money and 'depend upon the courts for the enforcement of the solutions'.[569] According to Hazel Genn, 'only a small minority of settlements are in any way creative or provide something different from what would be available in court'.[570] Besides, to settle through ADR, the parties need to discount or compromise part of the full value of their claims which clearly illustrates that there is a price to pay in terms of substantive justice for early settlement.[571] This compromise can be justified as long as the parties who enter into the settlement are aware of these consequences, as discussed above.[572] Notably, rarely claimants succeed on every aspect of the claim or obtain the full amount of money requested in the claim when they go through the whole litigation process. Also, they have to go through a

[565] Genn, *Judging Civil Justice* (n 51) 82.

[566] T Allen, 'Judging civil justice: a critique of the 2008 Hamlyn Lectures given by Professor Dame Hazel Genn QC: Part I' [2012] https://www.cedr.com/articles/?item=Judging-civil-justice-a-critique-of-the-2008-Hamlyn-Lectures-given-by-Professor-Dame-Hazel-Genn-QC-Part-I.

[567] *Dunnett* (n 76) at [14].

[568] Winkelmann, 'ADR and The Civil Justice System' (n 56).

[569] Ibid.

[570] Genn, *Judging Civil Justice* (n 51) p113.

[571] Ibid.

[572] see subsection 2.3.5.

lengthy and stressful litigation process. The possible costs consequences at the trial is always a worry for the litigants as in civil disputes "cost follow the event" rule means the losing party may be ordered to pay part or full costs of the winning party. Hence, litigants may have to spend a lot of money and time to get a remedy from the court, which many litigants cannot afford. Arguably, some compromise at ADR may well be justified considering the possible consequences of escalating the matter further down the court.

2.6.2 ADR in suitable cases provide deeper and richer access to justice

ADR critics argue that it cannot provide justice as ADR follows an interest-based approach as opposed to a rights-based approach in courts, as discussed under subsection 2.5.2 above. Arguably, the increasing costs of litigation act as a constraint to access to justice. Besides, it can also be argued that complex court procedures and unpredicted outcomes act as hindrances for access to justice for ordinary litigants, especially LIPs. Moreover, by nature the civil justice system is adversarial that focuses on past problems instead of future solutions. Notably, the court mainly offers financial compensation. These practical disadvantages might hinder access to perceived justice. In contrast, facilitative and interest-based ADR can potentially increase access to justice by providing a range of alternative processes better suited to the dispute in question to ordinary citizens who are practically excluded from the complex and expensive court process. Thus, the outcome of ADR is more satisfactory in suitable cases than courts because ADR provides a range of remedies and solutions that are not available at the courts.[573]

Furthermore, critics argue, legal justice cannot be done in ADR due to power imbalances in the bargaining process, i.e. stronger party takes advantage of the weaker party.[574] They argue that there is no possibility of power imbalances in the adjudication process if both parties have legal representation, but if they do not, neutral judges can easily correct them in order to ensure justice.[575] To counter this argument, the

[573] Nylund (n 13).

[574] Fiss (n 45).

[575] Ibid, p1077.

proponents of ADR argue that the same can be said in regard to settlement through ADR as in ADR, a neutral third party, i.e. the mediator, facilitates the process and can reduce the effect of power imbalance by controlling the flow of private information of the parties involved.[576] Also, parties with legal representation can play an important role during the ADR process by minimising the power imbalances because they are in a position to explain better the consequences of escalating the matter further to the formal litigation.

Undeniably, sometimes power imbalances in adjudication also influence the outcome as discussed above under subsection 2.5.3 above.[577] In ADR, on the other hand, parties' face to face meeting with each other in the presence of a neutral third creates a different atmosphere for settlement.[578] It can be noted that settlement is the goal of both ADR and the courts. But the justice issue is what all the fuss is about. Arguably, ADR increases access to justice by offering a range of dispute resolution processes as discussed in the introductory chapter.[579] Commentators highlight the main goal of ADR is to:

> … make "justice" more accessible by offering processes better suited for types of cases or party needs that are currently underserved or unmet and by including a wider definition of justice than the narrow distributive, strictly legal view taken in traditional legal processes.[580]

Similarly, Hazel Genn opined that 'a well-functioning civil justice system should offer a choice of dispute resolution methods'.[581] Geoffrey Vos MR also argued for justice systems to offer a range of dispute resolutions, including ADRs better suited to the disputes which will enhance access to justice.[582] Hence it is argued that by offering a of range dispute resolutions, ADR increases access to justice.

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[576] J. Brown & I. Ayres, 'Economic Rationales for Mediation' (1994) 80 VA.L. REV.323.

[577] T. Allen, 'A critique of the 2008 Hamlyn Lectures: Part II' (n 116).

[578] Ibid.

[579] See section (iv).

[580] Nylund (n 13)

[581] Genn, *Judging Civil Justice* (n 51).

[582] G. Vos, Keynote Speech (n 125); see also MOJ consultation 2021 (n 118) 6.

Menkel Meadow emphasised, 'given sometimes vast disparities of resources in the formal litigation area, it seems odd to argue that adjudication is a better democratic leveller'.[583] Indeed, sometimes in the litigation process, private resources rather than justice that control the case representation, mobilisation of proof which results in victory. At the present time, due to the high costs of litigation and limited funding options, parties with less access to resources are often denied access to legal advice and become LIPs.[584] ADR provides the parties with the perfect opportunities to tell their deeply personal and private stories directly to the other party in the presence of the mediator serves both healing and justice functions that are poorly served by overly formal and lawyer dominated litigation.[585]

Arguably, participants in ADR procedures and their satisfaction with procedures leads to satisfaction with the substantive outcome. Hence, ADR offers procedural justice by giving the participants an opportunity to freely discuss their problems with a view to coming to a suitable resolution to their problems.[586] Commentators argue that 'it is certainly true that community mediation can help to achieve social justice and a wider vision'.[587] In practice 'mediation makes an important contribution to the civil justice system, if not to "justice" in the sense of precedental principled decision-making'.[588] It is argued that ADR is more democratic than formal litigation because it ensures more participation of the parties in the actual dispute resolution process than formal litigation, which is dominated by professionals.[589] In practice, ADR process is more accessible than court-room trials because it ensures parties' full participation in the process.[590]

Arguably, ADR process is far richer and participatory than conventional adversarial adjudication because it permits parties' direct participation, direct conversation, a confrontation which give the parties an opportunity to choose how to resolve their

[583] Meadow, 'Whose Dispute Is It Anyway?' (n 45) 2688.

[584] Ibid.

[585] Ibid.

[586] Hyman, 'If portia were a mediator' (n 74).

[587] T. Allen, 'A critique of the 2008 Hamlyn Lectures: Part I' (n 566).

[588] Allen, 'A critique of the 2008 Hamlyn Lectures: Part II' (n 116).

[589] Menkel-Meadow, 'Whose Dispute Is It Anyway? (n 45) p2689.

[590] Allen, 'A critique of the 2008 Hamlyn Lectures: Part I'(n 566).

dispute and set up a goal.[591] The same cannot be said about litigation as the judges decide the outcome based on the parties' or their representatives' arguments, and arguably, this put LIPs in a vulnerable position. Conversely, ADR provides the parties with an opportunity to resolve their disputes through direct communication between them as opposed to adversarial formal litigation.[592] Hence, commentators argue that 'any arguments for adjudication over settlement must explain why placing the disputing apparatus in the hands of professionals, over the disputants is more democratic?'.[593]

Based on the above, it can be easily argued that in suitable cases ADR may provide greater access to justice than formal litigation.[594] To counter the argument mediation is a compromise and cannot ensure justice, it is argued that this compromise in ADR process 'may actually represent a moral commitment to equality, accuracy in justice, and peaceful coexistence of conflicting interests'.[595] It is important to note that settlement through ADR is based on the non-legal principle which is not bad in the face of unaffordable and lengthy litigation. In fact, in some disputes, these non-legal principles are more effective to resolve disputes than legal principles. Because existing rules and regulations may not always be appropriate in a particular case as such ADR can be regarded as a "principled" supplement to the civil justice system.[596]

As discussed in the previous section, in some cases, mediation can offer a better solution to the parties than the court. ADR process may provide more access to justice by allowing the parties to resolve their disputes in their own way and also by providing a range of solutions to their dispute like an apology,[597] as discussed above.[598] In addition, ADR increases access to justice by preventing cases from resorting to litigation which in effect saves parties' time and money, saves taxpayers' money,

[591] Meadow, 'Whose Dispute Is It Anyway? (n 45*)* p2689.

[592] Bush &Folger, *The Promise of Mediation* (n 73).

[593] Meadow, 'Whose Dispute Is It Anyway?' (n 45).

[594] Ibid, p2691.

[595] Ibid.

[596] Ibid, p2692.

[597]Brooke LJ in *Dunnett* (n 76) para 14.

[598] See subsection 2.6.2.

reduces caseloads from the court and reduces delay.[599] However, this is not true in all cases because if an ADR is tried unsuccessfully, it drives the costs up and adds extra delay, as discussed in the next section.

2.6.3 Time and cost benefits

ADR is praised mostly because of its time and costs benefits over litigation.[600] The high costs and delay in litigation came to highlight with the publication of Lord Woolf's Access to Justice Report.[601] His Lordship suggested that seeking justice through the courts is very time-consuming, stressful, unpredictable and expensive, and he recommended using ADR, in particular mediation, to resolve parties' disputes.[602]

Even though only a small percentage (about three percent)[603] of cases reach the trial stage and most disputes settle before reaching the trial stage, promoting early settlement through ADR has extra cost benefits.[604] It can be argued that mediation is cost-effective and can speed up the process if used at the right time[605] which will eventually save time and cost of the parties. Because most of the costs occur in the early stages (front-loading of costs) of the litigation process, e.g., contacting the solicitors of the other party, exchanging letters and complying with pre-action protocols.[606] Indeed, in most cases, by the time the parties agree to settle, substantial costs have already been incurred. Commentators like Shirley Shipman helpfully explained ADR has the potential to save costs to the parties if it is used at an earlier stage than on the eve of the trial.[607]

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[599] H Genn, *Judging Civil Justice*, (n 51) p82.

[600] Woolf *Interim Report* (n 310) *and Final Report* (n 81); Jackson Final Report (n 2) p355.

[601] Ibid.

[602] H Genn, *Judging Civil Justice* (n 51) p96.

[603] MOJ Consultation 2021 (n 118) p7.

[604] Ibid.

[605] Neuberger, 'Has Mediation Had Its Day? (n 205); Jackson Final Report (n 2), T. Allen, 'Saving Loss Costs by Mediation' [2000].
< https://www.cedr.com/articles/?item=Saving-Loss-Costs-by-Mediation>.

[606]Jackson Final Report (n 2) para5.2.

[607] Shipman, 'Court Approaches to ADR' (n 159) p201.

ADR not only saves costs to the parties, but it also saves public expense by preventing parties from going to court.[608] There are not much accurate data to analyse how much parties save in ADR cases, and the last available data is dated back to 2007 when the Legal Services Commission published their report on legal aid and mediation.[609] According to the report, the average costs of legal aid in non-mediated cases greater than mediated cases which represents a significant savings in costs (equivalent to a saving of £930 per case).[610] The report has also revealed that there would have been a significant savings (about £10 million yearly) if 14 percent of the cases that proceeded to court had been resolved through mediation.[611] The Department of Constitutional Affair (DCA) ran three different small claims mediation schemes in three county courts, Exeter, Reading and Manchester, from June 2005 to May 2006.[612] Evaluations[613] of these schemes reveals that district judges spent a significant amount of time in hearings and reading file [614] which is not the case if cases settle at mediation.[615] Even where the cases do not settle at mediation, mediation helps the parties to narrowed down their issues, they gain information about each other's position which ultimately reduces time at trial if the cases end up at the court.[616]

Data on the duration of cases are difficult to find from the traditional court systems. Data from Civil Justice Statistics Quarterly during the period of January to March 2021 shows that in small claim cases it took an average of 51.5 weeks from issue until the trial which is about 12 weeks longer than the same period in 2020.[617] Whereas most disputes are resolved through ADR on the same day within a short period of time (one-hour time slot in the Small Claim Mediation Service). The costs savings of ADR is also

[608] R. Bush, J. Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (Jossey Bass, 2005), p 87; Jackson Final Report (n 2) pp.355-356; Allen, 'Saving Loss Costs by Mediation' (n 605)

[609] Legal Services Commission, *Legal aid and mediation for people involved in family breakdown* (HC 256, Session 2006-2007, 2 March 2007).

[610] Ibid, p4.

[611] Ibid.

[612] See section (iii) of chapter 1.

[613] Ibid.

[614] Ibid.

[615] Prince, 'An Evaluation of the Small Claims Dispute' (n 34).

[616] Ibid, p18.

[617] Civil Justice Statistics Quarterly: January to March 2021 Tables.

substantial, as can be seen from the latest audit report of the CEDR where they estimated that £4.6 billion would be saved by commercial mediation this year.[618] It is argued that 'the availability of such savings represents a considerable incentive'[619] for the parties to consider ADR than going to courts. Additionally, settling cases through mediation not only save costs of legal aid, but it also helps reducing caseload from the courts which allows the court to focus on the cases that need attention of the judges.[620]

It should be bear in mind that in some cases, ADR can be time-consuming and costly if the parties start mediation at a later stage or fail to settle. Failed ADR is likely to add extra costs to resolve the case if the case goes to the court,[621] which would be included in the front-loading of costs.[622] Moreover, ADR is not always cheaper, and the costs of preparation and ADR process in some cases may be higher which in effect preclude parties from access to court when they runs out of funds.[623] However, this is not always the case. An ADR process may fail in part but may be able to narrow the issues to be tried in court, thus saving the court's time. It can be argued that cases that do not settle in ADR and end up in court, it is still worth trying because the issues are narrowed, and parties' positions are identified with the help of a neutral mediator. Mediation process works as a filter by removing the cases capable of settlement from the busy court system, thus saves the court's time and saves taxpayers' money and only sends those cases to court that needs the attention of a judge and are worth trying.[624] At the same time, it provides parties with remedies suitable to their needs quickly at less costs.

2.7 Conclusion

This chapter noted from the existing literature that despite the pros and cons of ADR, it has great potential of saving costs, providing a range of remedies, preserving continuing and future relationships for the parties in appropriate cases. This study thus argues that

[618] CEDR Ninth Annual Audit Report (2021) 31.

[619] Allen, 'Saving Loss Costs by Mediation' (n 605).

[620] Legal Services Commission report, *A Report on Legal aid* (n 609) p8.

[621] Cortes, *The Promotion of Civil and Commercial Mediation in the UK* (n 45) p1.

[622] Jackson Final Report (n 2)[5.2].

[623] Shirley, 'Compulsory mediation' (n 344) 173

[624] Allen, 'A critique of the 2008 Hamlyn Part II' (n 116).

in the face of strained resources, growing caseloads, reduced administrative support, increased numbers of LIPs who cannot afford legal representation and limited funding options, it is crucial to offer a range of dispute resolution processes better suited to the disputes which will increase access to justice. In increasing uptake of these processes, this study sided with the CJC's finding that in certain circumstances, parties can be compelled to consider ADR. However, this study does not support blanket coercion to ADR as it is acknowledged it would not be useful to divert all cases to ADR as not all cases are suitable for ADR, as discussed in chapter 1. In addition, ADR is not always cheap and efficient because if the parties fail to settle, it will add extra costs and time. Therefore, some cases need to be adjudicated by the courts where ADR is not any help due to the nature of the dispute. It would be a good start requiring parties to attend an ADR information session and can be piloted in the OCMC at stage 2, which is discussed in chapter 5.[625] Consequently, a balance must be struck between channelling appropriate civil disputes to ADR and the court. Importantly, the government in England and Wales has already taken some steps to divert more appropriate cases to ADR, which are examined in the next chapter.

[625] See subsection 5.2.4.2.

Chapter 3: An analysis of sectoral Consumer ADR schemes

3.1 Introduction

Chapter-2 observed that the promotion of ADR is subject to long academic debate where commentators advanced arguments for and against the promotion of ADR. The important finding of chapter- 2 is that policy considerations weigh in favour of promoting ADR in suitable cases. Hence policymakers and judiciaries are increasingly encouraging parties to use ADR.[626] English law encourages litigants to resolve disputes through different mechanisms during a dispute cycle. In consumer disputes, parties are encouraged to consider settlements as soon as any dispute arises.

It is acknowledged that there are more than 100 schemes operating in different consumer sectors, which is beyond the scope of this study. Instead, this study considers the ombudsmen model which is the most common in these schemes and employs ADR (particularly mediation) technique to resolve consumer disputes. Hence, consumer ADR is a very important and distinctive part of consensual ADR. Indeed, consumer ADR in general, and the ombudsman in particular, offer the paradigmatic example in the use of consensual ADR in asymmetric relationships where there is a significant imbalance of power between the parties (which is also present in other sectors, e.g., employment and family). Consequently, it has important and unique features, notably third neutral parties adopt a more evaluative role, there is usually some level of triage, and cases can proceed to an adjudicative stage (akin to court-annexed mediations schemes).

There is a vast number of disputes (roughly 173 million per year)[627] that arise every year between consumer and business (C2B), and the courts in England and Wales do

[626] R. Jackson *Final Report'* (n 2). CJC Interim (n 2) and Final Report (n 2); *Halsey* (n 59) and *PGF II* (n 132).

[627] Consumer Action Monitor (Ombudsman Services, 2018); see also Citizens Advice, Consumer detriment: Counting the cost of consumer problems (Oxford Economics, September 2016) p 3 https://www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/Final_ConsumerDetriment_OE.pdf .

not have the resources to deal with such a volume of claims.[628] And most of these are small value cases, and sometimes a disproportionate amount of courts resources is spent on these cases, which often contravenes the CPR overriding objective. On the other hand, consumer ADR schemes offer resolution of disputes free of costs to the consumers. Arguably, it resembles the "multi-door courthouse"[629] concept by Professor Sander as it offers triage, ADR and adjudication; hence consumer ADR is considered as a substitute to the court.[630]

Consumer ADR in regulated sectors is more developed than any other recent initiatives taken by the government in England and Wales[631] as it settles around half a million claims each year between consumers and traders (C2B).[632] Consumer ADRs offer ADR techniques to consumers once a dispute arises before they resort to the court for remedy. In regulated sectors, it is mandatory for the traders to be part of the relevant ADR schemes. The ADR schemes operating in different sectors provide a range of dispute resolution methods, mainly the ombudsman model, to solve the disputes between the traders and the consumers.[633] Although consumer ADR is not classic mediation, the majority of ADR schemes (e.g. ombudsman model) rely on mediation techniques where parties are encouraged to reach an amicable solution in advance to an adjudicative process.[634] The ombudsman model comprises three stages: triage, mediation/conciliation and decision.

Thus, this study examines the consumer ADR schemes to find out the effectiveness of these schemes. In doing so, this chapter seeks to identify how far these schemes have been successful in resolving disputes out of court, and these could be extended to non-

[628] C Hodges, *Delivering Dispute Resolution : A Holistic Review of Models in England and Wales* (Bloomsbury Publishing Plc, 2019).

[629] F Sander, 'Varieties of Dispute Resolution' National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice 7–9 April 1976 Pound Conference (1976) 79 FRD 111.

[630] Hodges, *Delivering Dispute Resolution* (n 628).

[631] Hopt, *Mediation: Principles and Regulation* (n 179) p409.

[632] CJC Interim Report (n 2).

[633] Cortes, 'The Promotion of Civil and Commercial Mediation in the UK'(n 45).

[634] Hodges, *Delivering Dispute Resolution* (n 628).

regulated sectors of consumer disputes where large number of consumers disputes arise but are unmet.

3.2 Consumer ADR Schemes

Existing studies suggest that consumers in the UK experience about 173 million problems per year, affecting 57 percent of people in the UK, yet only 27 percent of these problems were came to the attention of the Consumer ADR providers.[635] It is evident that courts are unable to provide easily accessible, efficient and effective pathways for consumer complaints or legal claims.[636] Hence, in England and Wales, consumers are signposted to ADR as soon as a dispute arises, and the mechanisms have seen some success.

One significant development in the consumer ADR landscape is the ombudsman model. The ombudsman model has become a very popular tool to resolve C2B disputes within a short period of time, and it is the most used model in consumer sectors in England and Wales.[637] The Ombudsmen model typically provides advice and triage to consumers at the initial contact stage with a view to resolve a consumer issue swiftly.[638] This model is attractive because it provides continuous settlement opportunities through different stages, already occupies important sectors and are likely to expand, offer specialisation and make decisions on a helpful basis.

In England and Wales, there are a number of sectors where participation in ADR has been made mandatory by regulation, namely in financial services,[639] energy,[640] estate agents,[641] gambling, legal services,[642] pensions,[643] postal services,[644] letting agents,

[635] Consumer Action Monitor (n 627).

[636] Hodges, *Delivering Dispute Resolution* (n 628) p225.

[637] Ibid.

[638] J Beqiraj, S Garahan and K Shuttleworth, *Ombudsman schemes and effective access to justice: A study of international trends and practices* (International Bar Association, 2018), p 27. https://binghamcentre.biicl.org/documents/25_2021_access_to_justice_ombudsman_report_2018_full.pdf

[639] Financial Ombudsman Services can be found at https://www.financial-ombudsman.org.uk/.

[640] Ombudsman Services: Energy can be found at https://www.ombudsman-services.org/sectors/energy.

[641] The Property Ombudsman can be found https://www.tpos.co.uk/.

[642] Legal ombudsman can be found at https://www.legalombudsman.org.uk/.

telecommunications,[645] water services,[646] railway services,[647] and higher education.[648] However, in non-regulated sectors such as traditional retail,[649] home improvements and second-hand car sales where participation in ADR is voluntary for traders.[650] Usually, ADR service in non-regulated sectors is provided by trade associations, such as ABTA,[651] who often deal with the cases themselves or refer them to external providers.[652] In some consumer sectors there are several voluntary ADR schemes operating which provides the traders with the flexibility to choose the independent scheme they like.[653]

3.3 Consumer ADR process

As noted above Ombudsman model is the most sued method in consumer ADR schemes in regulated sectors which uses a pyramid structure- triage followed by mediation and, finally, a decision by an ombudsman.[654] Typically, in consumer ADR, a case handler handles the complaints by the consumers. At the initial stage, consumer complaints go through a filtering process whereby a case handler assesses the merit of the complaints and advise the consumers accordingly.[655] This diagnosis stage[656] or

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[643] The Pension Ombudsman can be found at <https://www.pensions-ombudsman.org.uk/>

[644] POSTRS, Provided by CEDR Disputes Group and regulated by OFCOM.

[645] Ombudsman Services: Communications and CISAS can be found at < https://www.ofcom.org.uk/phones-telecoms-and-internet/advice-for-consumers/problems/adr-schemes> .

[646] Consumer Council for Water (CCWater) CCW and WATRS.

[647] Rail Ombudsman can be found at < https://www.railombudsman.org/>.

[648] Office of the Independent Adjudicator can be found at < https://www.oiahe.org.uk/>.

[649] Established as Consumer Dispute Resolution Limited in 2015. In 2017 the body resigned from the Ombudsman Association (OA), following which, under the Companies Acts, it is unable to use the title 'Ombudsman'.

[650] Ibid.

[651] See https://www.abta.com/.

[652] BEIS 'Implementing the Alternative Dispute Resolution Directive and Online Dispute Resolution Regulation – Impact Assessment'(2014) 10.

[653] Ibid, p16.

[654] Hodges, *Delivering Dispute Resolution* (n 628).

[655] Ibid, 24. C Hodges, 'Consumer Ombudsmen: Better Regulation and Dispute Resolution' (2014) 15(1) ERA Forum 593-608.

[656] Cortes, 'The Promotion of Civil and Commercial Mediation in the UK' (n 45).

triage weeds out unmeritorious, frivolous or vexatious claims. If the case is admissible, then a mediation or conciliation process is initiated, and most of the consumer complaints are resolved at this stage by the case handler acting as a facilitator.[657] If any dispute cannot be solved at this stage, the case handler issues reasoned recommendations, otherwise commonly known as "provisional assessment", on the unresolved issues for the parties who can comment on it, before the case handler issues the decision which the parties can accept or refuse.[658] This stage is similar to an early neutral evaluation (ENE), but unlike in ENE, parties may be invited by the case handler to comment on this preliminary recommendation before the case handler issues the decision. If one of the parties is unsatisfied with the decision or refuse to accept it, then the matter is then referred to the ombudsman for a decision. Once a decision is made by the ombudsman, it is binding on the traders but not on the consumers.[659] The decision of the ombudsman is only binding on the consumers if it is accepted by them, which gives the consumers flexibility either to accept the decision or go to the court for redress, thus preserving the voluntariness of ADR.

As mentioned above, many ADR schemes are operating in different sectors of consumer disputes. In the UK and in the EU after the ADR Directive, individual ADR schemes are often overseen by sectoral regulators. For example, Financial Services is regulated by the Financial Service Authority;[660] Telecommunication and Postal service is regulated by OFCOM;[661] Energy is regulated by OFGEM;[662] Gambling is regulated by the Gambling Commission;[663] the National Trading Standards Estate Agency Team regulates Estate agents;[664] Higher Education is regulated by the OIA,[665] and Legal Services is regulated by the Legal Services Board.[666]

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[657] Ibid.

[658] Ibid.

[659] Ibid, CJC Interim Report (n 2) p15.

[660] See http://www.fsa.gov.uk/.

[661] See https://www.ofcom.org.uk/.

[662] See https://www.ofgem.gov.uk/.

[663] See http://www.gamblingcommission.gov.uk/Home.aspx.

[664] See http://www.nationaltradingstandards.uk/work-areas/estate-agency-team/.

[665] See http://www.oiahe.org.uk/.

[666] See http://www.legalservicesboard.org.uk/.

A recent development in consumer disputes had been the Directive on ADR for Consumer Disputes (2013/11/EU) which required traders and for the sale of goods to publish the details of their preferred ADR provider.[667] Traders were required to inform the consumers about certified ADR schemes they operate in their sector, but there is no obligation to use such a process to resolve any dispute unless a sectorial law so requires such as in financial, energy, telecommunications sectors, etc. discussed above.[668] However, the UK is no longer a member state of the European Union following its departure from the Union recently. Notably, this exit from the EU has not had much impact on the practice of consumer ADR operating in the UK apart from losing access to the EU ODR platform and no longer required to deal with EU cases. As ADR regulations and culture have already been well established in the UK, only some changes to UK legislation were required such, the UK secretary of state is now responsible for publishing of the list of ADR entities in the UK and there is no requirement for the list to be sent to the EC.[669]

3.4 Assessments

It is widely accepted that courts take too long to resolve small claims, even in the Small Claims Track which is accounted for the most consumer claims reaching the court. A 2018 survey[670] by Department for Business, Energy & Industrial Strategy (BEIS), confirmed that consumer ADR processes were quicker and cheaper than courts and sums involved in ADR processes tended to be lower than those in courts. According to the Government, the costs of ADR is between one eighth and one thirds of the costs of litigation.[671] According to the EC estimate, most disputes settle within 90 days in ADR.[672]

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[667] CJC Interim Report (n 2) 16.

[668] Art. 13(3) of the Directive 2013/11/EU.

[669] E. Duhs and I. Rao, *View larger image Retained EU Law: A Practical Guide* (The Law Society, 2021).

[670] BEIS, 'Resolving Consumer Disputes. Alternative Dispute Resolution and the Court System. Final Report (2018).

[671] BEIS, 'Implementing the Alternative Dispute Resolution Directive and Online Dispute Resolution Regulation – Impact Assessment'(2014) 10.

[672] Ibid.

The Ombudsman model is highly attractive to consumers because it acknowledges the imbalance of power and the fact that the business is a repeat player, and most importantly, consumers preserve their right to go to court if they wish. At the same time, this model is also beneficial for the businesses ADR providers often offer advice and guidance which help them to improve their practice.[673] Existing studies recognised the effectiveness of the consumer ADR schemes but suggested that the ADR system could be more effective, which is discussed next.[674]

3.4.1 The success of sectoral Consumer ADR Schemes

Characteristically all the consumer ADRs and Ombudsman models are intended to encourage an initial step of direct contact between consumer and trader so as to solve problems quickly and without further escalation or costs. Usually, consumer businesses of any size operate customer care and complaint mechanisms which are designed to resolve consumers' complaints as soon as it arises. Due to the scope of this study, it is not possible to examine all the ADR schemes (147 in 2017)[675] that are operating in different consumer sectors. Instead, looking at the statistics on some leading consumer ombudsmen (e.g., FOS) will illustrate the effectiveness of the consumer ombudsman model. The FOS is a good example that has been very successful in attracting high numbers of consumer complaints that it had to tackle human resource challenges.

It can be noted that FOS deals with the highest number of consumer complaints than any other consumer ADR system in Europe.[676] The FOS saw the highest demand for

[673] BEIS, *Modernising consumer markets: Consumer Green Paper* (CM9595, 2018).

[674] BEIS, 'Resolving Consumer Disputes: Final Report' (April 2018), L Conway, Alternative Dispute Resolution (ADR) and consumer disputes: Briefing paper (2017), Citizens Advice, 'Understanding Consumer Experiences of Complaint Handling' (2016); M Lewis, W. Barnes and K Good, '*Sharper teeth: the consumer need for ombudsman reform'* (MoneySavingsExpert 2017) available at <https://images6.moneysavingexpert.com/images/documents/MSE-Sharper_teeth_interactive.pdf> and GOV.UK, 'Helping Consumers Get a Better Deal' (2016).

[675] C. Gill and others, 'Confusion, gaps, and overlaps. A consumer perspective on alternative dispute resolution between consumers and businesses' (Queen Margaret University and University of Westminster, 2017).

[676] Ibid.

their service for five years in the period of 2019/2020 and it resolved around 23,000 more complaints than they took on to investigate.[677] However, the timescale for resolving disputes has increased slightly, 23 percent of all complaints were resolved in 45 days or fewer compared to 37 percent in 2018/19. This could be down to the impact of the Covid-19 pandemic, as in the pre-pandemic years, their efficiency in dealing with complaints were rising steadily.[678] Nonetheless, the timeframe is still less than the average time it takes to get a remedy from the courts. The average time between the issue and trial in small claims tracks rose to 51.5 weeks in 2021, up from 45 weeks in 2020.[679] Other ADR schemes have also shown good performance in resolving consumer disputes, but results are mixed.

The growth and number of cases that resort to consumer ADR schemes are significant when compared with the number of small claims adjudicated in the County Court Small Claims Track because claims of small value should represent the vast majority of problems experienced by consumers[680] and small businesses, yet the number is counter-intuitively tiny.[681] It can be noted when consumers do not have access to any consumer ADR, they can resort to the court for redress. Notably, the number of cases allocated to the Small Claims Track has been consistently falling since 2000.[682] Similarly, A decrease in number of cases being allocated to all tracks in particular small claims track was observed that represents most of the consumer claims.[683] Hence, it is fair to say that the number of cases disposing of through county court small claim has not changed much, whereas the number of consumer cases disposing of through consumer ADR (in

[677] FOS Annual Report and Accounts 2019-20.

[678] Ibid, p26.

[679] Civil Justice Statistics Quarterly: January to March 2021 Tables.

[680] Office of Fair Trading , Consumer detriment: Assessing the frequency and impact of consumer problems with goods and services (OFT992, 2008); Prince, *An Evaluation of the Small Claims Dispute Resolution Pilot* (n 34) p14.

[681] Hodges, *Delivering Dispute Resolution* (n 628) p228; C Hodges, 'Delivering Redress Through Alternative Dispute Resolution and Regulation' in W.H. Van Boom and G Wanger (eds), *Mass Torts in Europe: Cases and Reflections* (De Gruyter, 2014) para 20; Hodges, ' Consumer Ombudsman: Better Regulation' (n 655).

[682] See Civil Justice Statistics Quarterly: January to March 2021 Tables.

[683] Ibid.

regulated sectors) is much higher than the courts.[684] Consumer ADR is free for the consumers, and the decisions are not binding on the consumers unless they accept it, which leaves the door of the court open for them if they decide not to settle.

3.4.2 Confusing Consumer ADR landscape

Despite being highly developed in regulated sectors and successful, the current status of consumer ADR is rather complicated for consumers with the existence of different types of private and statutory ADR systems in different sectors.[685] In 2017 there were 147 Consumer ADR schemes, covering a wide range of sectors, which commentators described as giving a landscape that was too confusing for consumers.[686] This is further complicated by the presence of more than one competing ADR schemes in one single sector[687] as in the communication sector there are two competing ADR schemes (i.e. Ombudsman Services: Communications and CISAS) that are operating to provide redress to the consumers. This is beneficial for the traders but detrimental for the consumers[688] because it is the traders who choose which ADR entity they want to be with, not the consumers and the competition between ADR entities in one sector results in the compromise of procedural standards.[689] The competition between existing ADR schemes may lead to competitive prices for the consumers, but this may lead to a compromise in the procedural standards. Also, the existence of different ADR entities and the liberty of the traders to choose pave the way for the traders for forum shopping,[690] which eventually compromises the procedural standards.

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[684] FOS annual report and accounts 2019/2020.

[685] Gill (n 675); BEIS, *Green paper* (n 673) paras144-152; R. Kirkham, 'Regulating ADR: Lessons from the UK' in P Cortés, *The New Regulatory Framework for Consumer Dispute Resolution* (OUP, 2017) pp. 319-320; Citizens Advice, 'Confusion, gaps and overlaps' (2017) and Lewis, *Sharper teeth'* (n 674).

[686] Gill (n 675).

[687] Ibid.

[688] BEIS Green Paper (n 673) paras 144–152.

[689] Hodges, *Delivering Dispute Resolution* (n 628) p243.

[690] P Cortés, 'The Impact of EU Law in the ADR Landscape in Italy, Spain and the UK: Time for Change or Missed Opportunity?' (2015) 16(2) ERA Forum 125–147.

3.4.3 Lack of coverage in some consumer sectors

Currently, consumer ADR, as it stands, is not fully comprehensive in coverage, and the existence and extent of the ADR schemes in non-regulated sectors are little known among the consumers. Moreover, coverage of consumer ADR schemes (of whatever type) is not universal across all trade sectors, and it is confusing for consumers to attempt to find or use an ADR or Ombudsman scheme where traders do not respond. According to the Green Paper-2018 of the government, voluntariness, lack of awareness and procedural complexity are responsible for the low take-up of ADR in non-regulated sectors.[691] The paper notes that the consumer ombudsman received 5,600 complaints in 2017 from consumer sectors where participation in ADR is voluntary, but businesses agreed to participate in only 6 percent of cases.[692] As such, not all consumer sectors are benefitting from the success of some ADR schemes because they do not cover all sectors such as second-hand car sales and home improvements.[693] In these unregulated sectors, traders are not required to be covered by a certified ADR entity; instead, there is voluntary ADRs operating in those sectors. However, traders usually refuse to participate which leaves the parties with no option but to issue proceedings at the court.[694]

3.4.4 Lack of awareness and data on consumer ADR

Existing studies[695] suggest that there is still a lack of knowledge about the existence of consumer ADR schemes among consumers, and in order to channel more consumer

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[691] BEIS Green paper (n 673).

[692] Ibid.

[693] Cortes, 'The Impact of EU Law' (n 690).

[694] P Cortés, 'The New Regulatory Framework for Consumer Alternative Dispute Resolution' in Pablo Cortés, *The New Regulatory Framework for Consumer Dispute Resolution* (OUP 2016); CJC Interim Report (n 2).

[695] CJC Interim Report (n 2) and Final reports (n 2). Resolving Consumer Disputes (n 674), p49; K. Slater and G. Higginson 'Understand Consumer Experiences of Complaint Handling' (2016) available https://www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/Understanding%20consumer%20experiences%20of%20complaint%20handling_DJS%20report%20final_June2016%20(2)%20(1).pdf.

disputes to consumer ADR schemes, a cultural change is needed. Existing studies suggest that there is low levels of awareness of ADR among consumers; i.e. in regulated sectors only 28 percent and 16 percent of consumers in non-regulated sectors are aware of ADR schemes.[696] Notably, the awareness level in different sectors varies significantly such the existence of Financial Ombudsman Service is known to 59 percent of consumers whereas the existence of Ombudsman Services: Communications is known to only 20 percent pf consumers.[697]

There is also a lack of education about ADR among professionals and the judiciary.[698] Typically, parties trust the courts with their disputes because the existence of the courts is well known to the parties. Similarly, if parties can be made aware of the benefits ADR has to offer, then parties are likely to be eager to use ADR. Another significant barrier to the progress of consumer ADR schemes is the lack of data on its performance across all sectors. Collecting data on the performance of the different ADR schemes is very important as it helps to identify the best practices which can be used to inform the policy changes in other sectors. Due to the fact that multiple competent authority model is operating in the UK and there is not a single authority to collect and collate the data, it is difficult to identify best practices of ADR.[699]

3.5 Further initiatives to improve the current practice

From the above discussion, it is clear that despite being highly developed in regulated sectors in the UK, there are some sectors such as retail in general not covered by an ADR scheme; instead, there are some generic ADRs that are not that much effective as the traders are unwilling to use it. More importantly, there is no unification or a single framework of its operation which makes it difficult to collect data and take steps for its improvement. Instead, consumer ADR operates on a sectoral basis which is sometimes very confusing.[700] The following initiatives should be taken to address the current problems that exist in the practice of consumer ADRs in the UK:

[696] Slater (n 695).

[697] Which? Response to Ofcom's review of alternative dispute resolution schemes (2017).

[698] CJC Final Report (n 2).

[699] Kirkham (n 685).

[700] Hodges and others, *Consumer ADR in Europe* (Hart Publishing Ltd, 2012)

3.5.1 Creation of an umbrella body with a single ADR entity per sector to simplify consumer ADR landscape

This study notes that the presence of more than one entity per sector creates confusion for the consumers. Although it provides benefits for the traders who choose which entity, they want to be part of, consumers are not usually benefitted from it as discussed in the previous section. In order to prevent confusion and overlaps in consumer ADR schemes, there should be a single ADR entity per sector, avoiding competition and forum shopping, and consumer ADR entities should be monitored by one single competent authority as described below. The ombudsman model is the ideal model to be introduced in every sector comprising triage, mediation and decision stage.

An umbrella body for consumer ADRs should be introduced to maintain the standards and make it easier for the consumers to choose the appropriate ADR scheme for their dispute. Currently, multiple competent authority model is in use in the UK, which makes it difficult to maintain regulatory standards across all sectors. While the benefit of having sector-specific competent authorities is that they understand the needs of their industry, it leads to a difference in ADR standards depending on the sector and its competent authority. The government's 2014 consultation paper[701] on ADR for consumer disputes found that the majority of the participants who responded supported the creation of an umbrella body overseeing standards of all the sectoral ADR schemes; however, no serious step has been taken to date. The tasks of the single competent body will be to monitor all the consumer ADR entities, regulate minimum procedural standards for all the consumer ADR entities and devise a common approach for resolving consumer disputes. This creation of an umbrella would simplify the process, harmonise standards and increase the value of the process. This is likely to increase the standards of service by different ADR entities, which will eventually increase the trust of the consumers in ADRs, and it will help to channel more cases to ADR. In this regard, the Scottish government has taken steps to introduce a unified competent

[701] BEIS, Alternative dispute resolution for consumers (2014).

authority, "Consumer Scotland",[702] and a new bill was passed in 2020.[703] The body will help in setting appropriate standards for Ombudsmen and other consumer ADR schemes that are in operation in Scotland.[704] Notably, in order to provide simple accessibility for consumers, rather than a multiplicity of diverse sources of assistance, the Government of England and Wales consolidated consumer advice for pensions, debt, money and consumer protection into the single financial guidance body.[705] And, this principle should be applied across the consumer spectrum, which will make it easier for the consumer to gather information about the pathways consumer ADR provides and how best to resolve their disputes. It is expected that if the consumers are aware of the benefits of consumer ADRs, the uptake of ADR is likely to increase.[706]

3.5.2 Creation of an ODR portal to centralise access

There is a need for creating a single website for consumer ADRs with the option to collect data on the performance of consumer ADR schemes operating in different sectors. This centralised access through an online platform will enable consumers and traders from different sectors to access all the relevant ADR schemes operating in different sectors. Though different ADR schemes have their own websites, there is no single website for consumer ADRs. Before exiting the EU, UK consumers had access to the single EU ODR platform[707] but no longer. Notably, a free online platform has been established by the EU Regulation 524/2013 (Online Dispute Resolution Regulation) which facilitates settlement negotiation between traders and consumers in EU member in regard to online sales or service contracts and helps parties to access ADR providers in the EU. Before exiting the EU block, the CJC recommended that the UK government should seek an agreement with the EU to access the EU ODR platform after withdrawal from the EU otherwise, the UK will need to create an independent

[702] Hill Report, Report of the Working Group on Consumer and Competition Policy for Scotland (Scottish Government, Edinburgh, October 2015) 24.

[703] Consumer Scotland Act 2020.

[704] Ibid.

[705] Financial Guidance and Claims Act 2018, Pt 1.

[706] Ibid.

[707] The platform can be accessed at <https://ec.europa.eu/consumers/odr/main/?event=main.home2.show>.

portal.[708] Unfortunately, the regulation was revoked by the Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018, but no alternative platform is yet to be created. Hence this study recommends creating an online platform for consumers in England and Wales. The online platform will contain information about what consumer ADR is, how it works, who can provide ADR services and their contact details (links to the ADR provider), fees (if applicable) and what steps one has to follow, which will guide and support consumers along the whole journey of consumer ADR. Such websites are developed in some other jurisdictions with a good reputation in ADR, such as Belgium, and lessons can be learned from them. Ideas can be taken from Belmed,[709] which is an abbreviation for Belgian Mediation, a digital portal (platform) on ADR and ODR, which provides information about ADR and at the same time provide online dispute resolution to consumers and enterprises.[710] The information stage provides a guide on how to settle a dispute in an amicable way using ADR, templates of letters and an outline of all the existing ADR entities in Belgium.

Most importantly, the new website should have data collection embedded in it. The design of the data collection system must be user friendly. In this regard, Geoffrey Vos MR's proposal for a new online funnel with a data collection tool embedded in it seems a good idea if it can be implemented. Lessons can be learned from the EU Justice Scoreboard.[711] The scoreboard collects data on efficiency, quality and independence of justice systems, including promotion of ADR. This platform helps Member States to share information and evaluate their performance on ADR, which helps them to improve the effectiveness of their justice systems nationally. The scoreboard helps to promote mediation through tailor-made publicity (brochures, information sessions etc.), collect and publish data on the evaluation of the effectiveness of ADR methods.[712] A

[708] CJC Final Report (n 2) para 5.12.

[709] The portal can be accessed at https://economie.fgov.be/en/themes/online/belmed-online-mediation.

[710] S Voet, The Implementation of the Consumer ADR Directive in Belgium' in Pablo Cortes(eds), *The New Regulatory Framework for Consumer Dispute Resolution* (OUP 2016).

[711] See https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/eu-justice-scoreboard_en.

[712] Report on the implementation of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (the 'Mediation Directive') (2016/2066(INI)) (27.6.2017).

good example of such a system is the Resolver platform[713] which provides the basis of a national portal for complaints that directs consumers first to the relevant traders and then to relevant consumer ADRs/Ombudsmen. Notably, the system is able also to integrate advice and assistance to businesses on swift responses to individual complaints and to assemble data from various sources (traders, Resolver and Ombudsmen) that are fed back to inform actions and behaviour. Resolver's decision to become a not-for-profit entity opens the door to it becoming the de facto single national consumer portal, if integrated with Citizens Advice.[714] As this portal is up and running and free to use, there is no need for extra funding. However, the portal, as it currently stands, collects data on a voluntary basis. Importantly, the portal should have public oversight to cover all economic sectors and designed in a way so that mediators, judges and ADR operators can easily access it and put the above information and the requirement to put information should be mandatory. In this regard, the incremental use of technology and certification processes is likely to facilitate the collection of this data.

However, making the information mandatory alone may not be enough to ensure that businesses will feed information into the system and what is needed to incentivise the process. This has not worked before as the requirement on the traders to publish the details of their preferred ADR provider under Directive on ADR for Consumer Disputes (2013/11/EU) Consumer Disputes (2013/11/EU) was largely ignored by the traders.[715] Hence, the mere requirement to provide information may not be that effective, and there should be some incentives for the traders to comply with it. For instance, the advisory function provides provide by the ombudsmen will attract more businesses to feedback information into the system. This advisory function is also an integral part of the Resolver Platform which attracts the traders to co-operate.[716] The data collected by the proposed platform will help to evaluate the consumer ADRs operating in all sectors and what is lacking which will help to take further appropriate steps to promote ADR. More importantly, these data will help researchers to understand how ADR is doing and make recommendations based on the findings which will help to channel more appropriate

[713] The portal can be accessed at https://www.resolver.co.uk/.

[714] Hodges, *Delivering Dispute Resolution* (n 628) p 246.

[715] CJC Interim Report (n 2) para 4.8.

[716] See https://www.resolvergroup.com/.

civil cases to ADR. It is argued that simplifying the consumer complaints maze would make the single biggest impact on the accessibility of the consumer complaints system.

3.5.3 Fully comprehensive in coverage to maximise the benefits

It is recommended that consumer ADR should be made fully comprehensive in coverage. It is noted that in some sectors, ADR is not regulated and voluntary, and most traders decline to be part of it.[717] As such, there have been increasing calls for the consumer information and redress landscape to be rationalised. A Report All-Party Parliamentary Group on Consumer Protection recommended that there should be mandatory Ombudsman membership for traders in all consumer sectors, and this was endorsed by the committee.[718] Commentators argue that 'The landscape needs rationalising and gaps should be filled, adopting the Ombudsman model as standard and mandatory'.[719] However, creating a mandatory system would not be economically viable for some businesses, e.g. small shops, as they will have to pay annual membership fees whether they use the scheme or not. This is further discussed below.

Establish a residual ADR entity

Another option to deal with the sectors that are not covered by existing ADR Schemes would be to establish a residual ADR entity. A residual ADR entity is an entity which deals with any disputes between consumer and traders where there are no existing competent ADR schemes competent to deal with such disputes. Basically, residual ADR entity fill the gaps in ADR coverage to deal with any disputes in relation to which there is no existing ADR entity in place to deal with such disputes.[720] Lessons can be learned from other countries such as Sweden and Belgium, where a residual ADR entity has been set up to deal with the consumer claims that are not covered by existing ADR

[717] BEIS, *Green Paper* (n 673).

[718] J Ludlow, Report from the Ombudsman Inquiry (All-Party Parliamentary Group on Consumer Protection, January 2019) available at < https://images6.moneysavingexpert.com/images/documents/Ombudsman%20report.pdf>

[719] Hodges, *Delivering Dispute Resolution* (n 628) p247.

[720] BEIS, Impact assessment (n 671).

schemes.[721] For instance, in Belgium an umbrella Consumer Ombudsman Service was established that act as a residual entity as well as coordinates between the existing consumer dispute resolution services (telecom, postal services, railways, energy, financial services and insurance).[722] The system is designed conveniently to provide information about ADR, divert parties to the relevant competent ADR body, and an ADR body that act as residual entity when there is no competent entity to deal with the particular dispute.[723]

This study recommends to establish a residual entity In England and Wales to deal with the consumer disputes where there is no existing competent ADR body to deal with such disputes. The creation of a single certified ADR provider will make it easier for the consumer and traders to resolve their disputes as businesses will need to engage with one competent entity if they wish to do.[724] The new OCMC can play the role of the residual entity.[725]

The scheme should not be compulsory for all businesses as the costs implications on some businesses would be high because these schemes are paid for by the traders hence for some businesses (small shops) the costs would be disproportionate.[726] But this would mean that it would be the trader's decision whether to use it or not. Existing studies[727] suggest that in non-regulated sectors where participation is voluntary for businesses, take-up has been low (six percent).[728] Thus, leaving these sectors as they are may not resolve the problem (i.e., low uptake). One option would be to make the scheme mandatory in some sectors where the number of consumer complaints is very high, but consumers needs are largely unmet such as home improvements and second-

[721] Cortes, 'Filling the gaps' (n 107).

[722] A. Biard, Towards High-Quality Consumer ADR: The Belgian Experience (August 1, 2019). in: L. Cadiet, B. Hess, M. Requejo Isidro (eds.), *Privatising Dispute Resolution - Trends and Limits* (Nomos 2019) pp.79-103.

[723] Ibid.

[724] BEIS *Impact Assessment* (n 671).

[725] Hodges, *Delivering Dispute Resolution* (n 628).

[726] BEIS, *Modernising consumer markets: Consumer Green Paper* (CM9595, 2018); BEIS, *Impact Assessment* (n 671).

[727] Consumer Green paper 2018 (n 673).

[728] Ibid para 145.

hand car sales.[729] This study argues that it would be effective to incentivise the residual ADR scheme to encourage businesses to use the scheme rather than making the scheme mandatory for all businesses which will not be justified and proportionate action to take. For example, in Finland, it is voluntary for traders to participate in ADR procedures with three certified consumer ADR entities and recommendations derived from the procedures are non-binding. Despite this, the compliance with the recommendations is satisfactory (between 80 percent and 100).[730]

Funding for the Residual ADR Scheme

Another important factor to consider is how the scheme would be funded. As noted above, consumer ADR in regulated sectors is attractive to consumers because it is free for the consumers and is funded by the traders. This may not be the case in regard to residual ADR scheme because, unlike the ADR schemes in regulated sectors where the traders pay annual membership fees, there will not be an annual fee for general ADR schemes operating under the residual entity as such arrangements must be made to fund the programme. One option would be to require the traders to pay for the service, but it is unlikely to work as the traders may not be willing to use it. For instance, in Germany participation in procedures before the General Consumer Conciliation Body ('Allgemeine Verbraucherschlichtungsstelle') is voluntary for traders but participation in such procedures is very low (17 percent) partly because it is not free of charge for traders.[731] However, the free of charge option is not economically viable as it will require a substantial amount of public money, which may not be possible. Another viable option would be to require the parties and traders to split the costs of using the service. The fee for parties must not be higher than what is required under the small claim regime.[732] However, this may deter the parties from using the residual entity and resort to court. To incentivise the parties, there should be a refund option for the consumers only (the fee paid for the service) if the parties succeed in their claim. But

[729] Ibid para 155; BEIS, Impact Assessment (n 671).

[730] European Commission, 'Report from the Commission to the European Parliament, the Council and the European economic and Social committee' (Brussels 2019), 11-12. COM(2019) 425 final.

[731] Ibid, p12.

[732] Cortes (ed), *The New Regulatory Framework* (n 694) p456.

the government will have to bear the costs of the start-up cost of the residual entity until it is up-and-running and becomes self-sufficient, and it would be worth considering the costs savings to the court system and taxpayer in the long run. It is noted that the government has pledged funding for the digitisation of the justice system which includes the new OCMC for civil disputes. If the OCMC is designed to perform as the residual entity, then the extra fund may not be needed. Hence, this study strongly urges the government to take on board the findings of this study and run a pilot of the residual entity in the OCMC.

Incentivising the scheme

It can be noted that, unlike existing mandatory ADR schemes, the decision of the residual ADR entity will not be binding upon the traders and traders may not comply with the decisions of the residual entity. Typically, businesses benefit from feedbacks received because good reviews enhance their reputation and critical reviews provide them with the opportunity to improve. Some consumer ADR providers offer advice and guidance as to how to improve their services.[733] For instance, in ombudsman model, ombudsmen provide feedback which help to improve businesses' performance as well as to comply with the law which could be beneficial for traders and potentially incentivise them to engage with residual ADR entity voluntarily. Additionally, using blacklists for traders who refuse to comply with the decisions of the residual entity could be useful to encourage businesses to adhere to the decision by the residual entity. In order to ensure that traders do adhere to the decision by the residual ADR entity, the Swedish authority has introduced blacklists[734] for the traders who refuse to comply with the decisions made by the residual ADR entity.[735] Though most of the traders usually comply with the recommendations, the threat of publishing in the consumer magazine called "Råd & Rön" has increased the rate of compliance even further.[736] Similarly, In Estonia, the Consumer Disputes Board's ('Tarbijavaidluste Komisjon') determination is

[733] Consumer Green paper 2018 (n 673).

[734] See http://www.radron.se/svarta-listan/.

[735] Cortes, 'Filling the gaps' (n 107).

[736] CSIS, Consumer dispute resolution – implementing the directive (Swiss Re/CMS Research Programme on Civil Justice Systems Third Oxford Consumer ADR Conference, 30-31 October 2014), p 6. Available at <https://www.law.ox.ac.uk/sites/files/oxlaw/conference_report.pdf>.

not binding on the traders, but if the traders do not comply with it trader's name is blacklisted ('naming and shaming').[737] The publication of blacklists should include the name of the traders but only the initials of the consumers so that their personal data could be protected.[738] This technique could be used as a powerful tool to encourage traders to consider early settlements which will likely to channel more cases to ADR. However, this approach should be used carefully as frequent and incorrect use of this technique could drive traders away in non-regulated sectors, and traders may simply decline to attend the process. Finally, there should be provisions for penalising (costs sanction) a trader who refuse to consider a residual entity and subsequently loses at the trial.[739] As chapter 2 found that in suitable cases, costs sanction can be used to encourage parties to consider ADR and the aim here is to settle a vast number of consumer disputes that are suitable for ADR out of court which will ensure effective and efficient functions of the court hence legitimate.

3.5.4 Raising awareness among consumers and professionals

Some steps should be taken to educate parties about the existence and how consumer ADRs work. The UK government has already taken some measures to provide information and advice to the consumers about their rights in the event of any dispute arises and where to seek redress. For instance, a helpdesk has been set up by the UK government in accordance with the Directive on Consumer ADR[740] managed by Citizen Advice Bureau[741] that helps the consumer by providing information via telephone and online on how to use ADR and identify ADR entities.[742] However, these initiatives seem inadequate in practice, as can be seen from the awareness level illustrated above under subsection 3.4.4. Therefore, more needs to be done to raise awareness of

[737] EC Evaluation Report (2020) p12.

[738] P Cortés and T Cole, 'The Practice and Legitimacy of Online Arbitration in The European Union" in M. Piers and C. Aschauer (eds), *The Brave New World of Arbitration* (CUP, 2017).

[739] Cortes, 'Filling the gaps' (n 107).

[740] Alternative Dispute Resolution for Consumer Disputes Regulations 2015.

[741] See https://www.citizensadvice.org.uk/consumer/get-more-help/if-you-need-more-help-about-a-consumer-issue/.

[742] Cortes, 'The Promotion of Civil and Commercial Mediation in the UK' (n 45) p7.

Consumer ADRs operating in different Consumer sectors.[743] Hopefully, the creation of the ODR platform enriched with information on consumer ADR recommended above[744] is likely to improve awareness. However, this alone may not be enough, and further measures need to be taken which are explained below.

The CJC ADR Working group recommended that 'the promotion of understanding of ADR has to be a part of initiatives that must be pursued in schools (where peer mediation is achieving great things), factories, clubs, pubs and offices everywhere'.[745] ADR ideas should be included in the law schools, law faculties, and education on ADR should be a compulsory part of law degrees. This will help to increase public legal education which is important for raising awareness of ADR.

As noted in chapter 1[746] the "The Jackson ADR Handbook" has been helpful as judges and practitioners often refer to it, but it is not helpful for litigants who are unlikely to buy or read it. Notably, organisations like CMC regularly arranges conferences on ADR, in particular mediation, but nothing serious has happened, which is evidenced from the low awareness of ADR among lawyers and the judicial community as identified in the recent civil justice reform reports.[747]

Thus, there is a need for cultural change among lawyers and judges in terms of their perception of ADR, training and education on ADR. Because the education of judges and lawyers about the ADR processes, how they work in practice, and their advantages is really important in educating and referring litigants to ADR. Hence, education about ADR should also be an integral part of the training of Professional Bodies such as Solicitors Regulation Authority (SRA), Bar Standard Board (BSB) and The Chartered Institute of Legal Executives (CILEX). Lawyers should be required to inform their clients about ADR, time and cost budget for mediation and litigation. Also, awareness of ADR should also be part of Continuous Professional Development (CPD) training.

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[743] CJC Final Report (n 2) para 6.6.

[744] See subsection 3.5.2 above.

[745] CJC Final Report (n 2) [6.6].

[746] See subsection 1.5.2.

[747] Jackson Final Report (n 2), CJC Interim (n 2) and Final Report (n 2).

Given that ADR is being embedded into the court process, it would also be helpful in delivering training to judges and lawyers who lack firsthand experience of mediation especially those qualified long ago[748] and experienced mediators should play an active part in this regard. This will enable lawyers and judges to encourage and signpost more parties to ADR schemes. This study welcomes the establishment of the new Judicial ADR Liaison Committee following the recommendation of the CJC Working Group in 2018.[749] The Committee sits periodically and advises on the encouragement of the use of ADR; the awareness of ADR; the availability of ADR; and the adaptability of ADR in relation to new developments in the civil justice system and their up-to-date report on the practice of ADR has been helpful for this study.

In order for the judges to identify and refer parties to ADR, a cultural change is needed about the ADR process. Apart from CPD requirements, to provide practical experience knowledge on how ADR works, one option would be to provide training to judges on ADR methods at county courts with existing backlog such as the Birmingham County Court Centre on a pilot basis.[750] Judges then should be required to advise on ADR for a period of six months. The data from the pilot should be analysed to find the effect of training of judges on the uptake of ADR, mediation in general. This is of course subject to the project being funded, and the government should seriously look into it given the possible future savings of diverting more cases to ADR. The experience with Financial Dispute Hearing (DRH)[751] and DRH[752] show that judge-led ADR are highly successful. The minutes from the recent Judicial ADR Liaison Committee meeting[753] stated that judges in certain courts such business and property courts, technology and construction, circuit commercial, chancery (property, trusts, probate and insolvency) are required to at continuing education course that includes a mandatory module on ADR. However,

[748] Minutes of the Judicial ADR Liaison Committee (The Royal Courts of Justice, London, 20th January 2020) accessible at https://www.judiciary.uk/wp-content/uploads/2020/07/2-SUMMARY-MINUTES-Jan-2020-Judicial-ADR-Liaison-Committee.pdf.

[749] CJC Final Report (n 2) para 9.1.

[750] The CJC in their recent report on resolution of small claim noted that Birmingham County Court Centre has a huge backlog of cases despite the success of Dispute Resolution Hearing (DRH).

[751] See 4.3.2.3 of chapter 4 for details.

[752] See subsection 5.2.7.1 of chapter 5.

[753] Judicial ADR Liaison Committee (n 748).

this is not the case for county court judges (CCJ) and district judges (DJ).[754] Hence, it would be better to extend this requirement to CCJ and DJs.

Once parties are in the ADR, it should be the job of the neutral third party to educate parties about ADR. In this regard, all mediator training, accreditation and code of conduct should specifically set out mediator's duties to educate parties about ADR.[755] Currently, such duties are not clearly set out in many mediator codes of conduct in England and Wales as such it is crucial to incorporate the requirement to educate parties about ADR. Lessons can be learned from code of conduct from mediation in other jurisdiction such as the European Code of Conduct for Mediators,[756] that sets out mediators duties [757] that can be adopted by individual mediators and mediation service providers. A number of UK ADR organisations such as Civil Mediation Council[758] has already endorsed and adopted the EU Model Code of Conduct for Mediators and recommended individual mediator to embrace the same.[759] But, the mediator' duty to educate about ADR obligations is apparently absent from the code of conduct.[760] This is surprising in light of the continuous call for integration of ADR within the civil justice systems.[761] As such, the ADR organisations should review their code of conduct and include a section explaining explicitly the mediator's duty to explain to the parties their ADR obligations and its advantages over litigation.

After the UK's departure from the EU, the provisions of the ADR Directive (as amended by the Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018) have been implemented in the UK by the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015. Under the

[754] Ibid.

[755] Ahmed 'A Critical View of Stage 1' (n 107) p19.

[756] European Code of Conduct for Mediators at https://ec.europa.eu/civiljustice/adr/adr_ec_co de_conduct_en.pdf.

[757] Sections 2 and 3 of the European Code of Conduct for Mediators at https://ec.europa.eu/civiljustice/adr/adr_ec_co de_conduct_en.pdf.

[758] The Civil Mediation Council Individual Registration Scheme, paras 2.2(b) and 2.3b.

[759] Ibid.

[760] M Ahmed, 'Critical Reflections on the Proposal for a Mediation Act for Scotland' (2020) MLR 1–23.

[761] For example, Germany, Italy, France, and the Netherlands.

regulations, the UK traders (in regulated sectors) are still required to publish the name and address of the ADR entity they are part of and signpost parties to the relevant ADR body by providing links. It is noted that information requirement was largely ignored by traders before.[762] Thus, it must be ensured that Traders comply with the information requirement and punish those who do not comply with it. In addition, consumer ADR could be more accessible if some apps can be developed for smartphones and tablets. Interestingly, the government's 2018 green paper noted that the user of ADR in consumer disputes are mostly older and educated.[763] Hence, developing some user-friendly mobile apps are likely to encourage more younger consumer to know about the consumer ADR and use it to resolve their disputes. Most importantly, this study notes that the new OCMC can be an easily accessible online platform for wider public legal education which is discussed in the next chapter.[764]

It is hoped that once parties are educated about ADR, the power asymmetry that arises can be minimised. It can be noted that the way the ombudsman model is designed, there is less chance of power asymmetries as the case handler adopt a hybrid approach (facilitative and evaluative) which helps parties to understand their respective position. This approach should be followed in all consumer sectors. Also, parties should be explained the terms of the agreement and that they can get legal advice if they are unsure about the terms of the settlement and its effect on them. Notably, the ADR directive on ADR provides sufficient safeguards for consumers. Article 9 (2) (b) of the Directive specifically provides that before agreeing to a settlement, parties should be informed that they are at liberty to accept or reject it, participation in the ADR process does not prevent them from accessing the court, but if they agree to the settlement, they will lose the right and more importantly, there is a cooling-off period before agreeing to the proposal.[765] Although the Directive is no longer applicable to the UK following Brexit, this particular section has not been amended[766] as such ADR providers and mediators should follow the approach when conducting consumer ADR.

[762] CJC Interim report (n 2).

[763] BEIS,'Resolving Consumer Disputes: Final Report (n 674)

[764] see subsection 5.2.2.1 of chapter 5.

[765] Article 9 of Directive 2013/11/EU.

[766] See https://www.legislation.gov.uk/eudr/2013/11.

3.6 Conclusion

Consumer ADR in the regulated sector is highly developed and boosts resolving a vast number of consumers claims each year. Despite the success in regulated sectors, the overall scenario of consumer ADR is somewhat different due to the fact that in non-regulated sectors the uptake of voluntary ADR is very low which force consumer either to abandon their claim or go through the expensive and lengthy court process. Indeed, majority of consumer disputes are of low value, which makes ADR a more appropriate avenue for remedy than the adversarial court process.

This chapter noted that in non-regulated sectors, parties are not required to attend ADR, so the traders opt-out as such consumer needs is largely unmet in those scenarios. This chapter argued that extending mandatory ADR schemes is not an economically viable option for many small businesses as the scheme is funded by traders. One option would be to gradually extend the mandatory scheme to sectors where there is high demand for ADR and consumers needs are largely unmet such as home improvement and second-hand car sales, and the list may continue to extend according to demand. However, while sectorial adherence could be useful for a particular sector, it would be insufficient as a whole and would confuse consumers. Hence, this study recommends for the introduction of a residual entity to cover the non-regulated consumer sectors which will fill the huge gap in consumer redress. The scheme should not be compulsory for all businesses. The scheme should be self-sufficient once up and running with provision for the trader or both parties to share the costs, but the start-up costs should be borne by the government. In order ensure to adherence, the entity should incorporate incentives, and at the same time, the court should penalise the trader who refuses to take part in the residual entity and subsequently loses the court case. The scheme should run on a pilot basis for one year covering limited sectors, and based on the results, the scheme could cover all unregulated consumer sectors.

This chapter observed that multiple competent authority model is in use in England and Wales, which makes it difficult to maintain regulatory standards across all sectors. While the benefit of having sector-specific competent authorities is that they understand the needs of their industry, it leads to a difference in ADR standards depending on the sector and its competent authority. Thus, an umbrella body for consumer ADRs should

be introduced to maintain the standards and make it easier for the consumers to choose the appropriate ADR scheme for their dispute.

Finally, creating centralised access online for all consumers is needed to simplify the consumer redress process. This centralised point of entry would allow consumers from different sectors to raise a complaint easily and be direct to the relevant specialised ADR scheme. In this way, the consumer ADR landscape could be transformed to provide appropriate redress options to the consumers.

Chapter 4: Analysis of the institutionalisation of ADR in family, employment and other civil disputes

4.1 Introduction

Chapter 3 examined the consumer ADR schemes and found consumers are signposted to ADR as soon as disputes arise. There are other recent initiatives introduced by the government to increase the take up of ADR such as the Mediation Information & Assessment Meeting (MIAM), ACAS Early Conciliation (EC) and Small Claim Mediation Service (SCMS). This study examines these initiatives (including consumer ADR schemes discussed in chapter 3) because they are the most significant in terms of volumes and contributing much to channel more cases to ADR.

Early Conciliation offered by ACAS is being used in England and Wales to resolve employment disputes between employees and their employers. It is a mandatory pre-action requirement for the claimants in employment disputes to notify ACAS in the first instance before they can lodge a claim to the Employment Tribunal (ET).[767] Similarly, to channel family disputes to mediation, a pre-issue process called MIAM was introduced in 2011 for family disputes on a voluntary basis but subsequently been made compulsory.[768]

ADR is also promoted in the UK even after parties resort to formal litigation through SCMS which is a court-annexed mediation programme. This service is provided by trained mediators appointed by HM Courts and Tribunals Service (HMCTS) for claims valued up to £10,000 free of costs to the parties. This service is different from traditional face-to-face mediation and generally carried out over the phone by well-trained civil servants. Having started its journey in 2007, the SCMS is now being used nationwide.

[767] M. Downer and others, 'Evaluation of Acas Early Conciliation' (2015) 11.

[768] S. 18 of the Employment Tribunals Act 1996 as amended by the Enterprise and Regulatory Reform Act 2013. For the online notification see <www.acas.org.uk/earlyconciliation>.

This chapter examines the above initiatives introduced to refer more civil cases to ADR because these are the most significant ones in terms of diverting suitable civil cases to ADR. This chapter examines these mechanisms to find out how far these initiatives have been successful in channelling civil cases to ADR and whether there are any shortcomings. This chapter looks to identify best practices and whether those can be extended to other areas of civil disputes. In doing so, this study looks at different models of ADR operating in different stages of the dispute cycle to identify what factors underpin the design of a particular dispute resolution model and drive its success. The particular focus of this chapter would be to analyse the statutory instruments that underpin the use of consensual ADR in resolving civil disputes, which is the main focus of this study.

4.2 Early Conciliation for Employment Disputes

Mediation technique is being used to resolve employment disputes in England and Wales by ACAS since 1984.[769] ACAS is an independent body empowered by the statute to deal with employment disputes.[770] Studies show that ADR provides employees with a range of outcomes such as e.g. an apology, job reference, new behaviour and/or financial settlement than those are available at ET which is important considering the importance ongoing relationship between employees and their employers.[771] On 6 May 2014, the UK government made it mandatory for the claimants to notify ACAS in the first instance before they can lodge a claim to the ET.[772]

4.2.1 The ACAS Early Conciliation process

ACAS is empowered to offer conciliation in employment disputes.[773] Following receipt of a notification from the claimant, an EC Support Officer contacts the claimant to get

[769] See http://www.acas.org.uk/index.aspx?articleid=1461.

[770] Employment Rights (Dispute Resolution) Act 1998.

[771] M. Gibbons, Better Dispute Resolution: A review of employment dispute resolution in Great Britain (2007) Available at <https://www.effectivedisputesolutions.co.uk/wp-content/uploads/2014/09/mgibbons-review.pdf> .

[772] Downer 'Evaluation of Acas Early Conciliation' (n 767).

[773] See section 18 of the Employment Tribunal Act 1996 and The Employment Act 2008.

preliminary information, and if the claimant agrees, a conciliator is allocated within two days who then contacts both parties about the dispute. If both parties agree, the conciliator tries to resolve the matter within one month. The EC process generally takes place over the telephone and email is sometimes also used. Only a very small proportion are face to face meetings. If face to face meetings is held, these may be conducted by way of separate confidential meetings with each party, the conciliator adopting a peripatetic role, moving between the separate rooms accommodating each of the parties, trying to establish common ground and to narrow the issue between the parties. There may be joint meetings, though in situations of high tension, these would be avoided if they were felt to be counterproductive.

In the event of a settlement, the terms of the agreement are recorded on ACAS form (known as a COT3), which become a legally binding contract. If a settlement is not reached, the claimant is issued with a certificate to that effect which can be used to issue a claim at the court. Where no agreement is reached or if one or both of the parties are unwilling participate, ACAS issued the claimant with an early conciliation certificate which can be used to issue claim at ET.

4.2.2 Assessments

The EC service appears to be effective and well regarded. The most attractive selling point of EC is that it is free of costs for the parties, and the process is very quick.[774] After making notification to ACAS mandatory in May 2014, the take-up of EC notification has increased significantly, but the number of actual EC taking place remained low.

4.2.2.1 Take up of EC in employment disputes

According to the recent report,[775] ACAS received 140k notifications during 2019-2020, an increase of 5 percent on the previous year. Besides, the pre-issue settlement fell to 26

[774] Ibid.

[775] ACAS, Annual Report (2019-2020).

percent, a reduction of 8 percent on the previous year.[776] At the same time, the number of cases converted to conciliation decreased by three percent to 69,214 from the same period in 2018- 2019. This could be down to the abolition of the Tribunal fees by the Supreme court in the case of *Unison*,[777] as discussed below.

The latest evaluation report[778] of ACAS EC provides some interesting insights into people's perception of ADR. The report found that a large number of (41 percent) claimant-side participants mentioned the main reason for participating in EC were to reach a resolution which is greater than the number witnessed in 2015.[779] This shows a positive sentiment of EC participants towards ADR. Another interesting finding of the study is that two-thirds of claimant side participant mentioned that ACAS was an important factor in deciding not to resort to ET.[780] It is apparent that the intervention by ACAS conciliation saves court's time by reducing the number of cases reach courts.

ACAS EC is cost-effective for both the employers and employees. Existing studies report that businesses save about £3,700 and employees save on average nearly £1,300 compared to ET claim when they resolve their disputes via early conciliation.[781] Moreover, the government's 2011 research paper[782] highlighted that resolving an employment dispute via EC costs £1,200 on average if parties act quickly compared to £3,800 for business, and £1,500 for a claimant when they resolve in the ET. Additionally, resolving a dispute through EC is quicker that ET as it take at least 26 weeks for the ET to reach a determination where early conciliation is often takes a day to complete.

[776] Ibid, p24.

[777] [2017] UKSC 51.

[778] ACAS, Annual Report (2019-2020).

[779] ACAS Evaluation 2015.

[780] ACAS Evaluation 2020 (n 775) p 8.

[781] L Dickens, 'The Role of Conciliation in the Employment Tribunal system' (2012) < https://warwick.ac.uk/fac/soc/wbs/research/irru/publications/recentconf/ld_-_conciliation_in_ets.pdf>

[782] BIS, Resolving Workplace Disputes: A Consultation (2011) p18.

From the above statistics, it is fair to say that EC has achieved quite high settlements rates, but in practice, the scenario is quite complicated than it seems which is highlighted below.[783]

4.2.2.2 The impact of the Employment Tribunal Fees

It is difficult to measure the success of the EC because the Tribunal fees increased significantly in 2013 which resulted in a very substantial reduction in ET applications.[784] The ET and the Employment Appeal Tribunal (EAT) Fees Order 2013 (SI 2013/1893) introduced fees for issuing claims and appeals for claimants and appellants unless they qualified for fee remission.

It is observed that the fee regime did not achieve that much success as identified by the Supreme court in *R. (on the application of Unison) v Lord Chancellor.*[785] The introduction of fees saw a significant decline in ET cases (68 percent) in the year till June 2013.[786] One probable reason could be the employers have access to resources that give them ultimate power to deny an invitation to consider EC and go for ET which they can afford easily. However, the trend has changed dramatically since the Supreme court, in a recent judgement in the case of *Unison*[787] abolished the ET fees for employment disputes.[788] The court held that ET fees was disproportionate and prevented parties from seeking remedies from the court as such contradicts with parties' right to access to justice ensured under the rule of law and Article 6 of ECHR.[789] It was held that if the employees are deterred from access to courts because of ET fees, then the employers with access to resources can take advantage of poor employees and pressurise settlement. Importantly, the court in *Unison* did not declare the imposition of

[783] Ibid.

[784] CJC Interim Report (n 2) 40.

[785] [2017] UKSC 51.

[786] Comparing the average quarterly receipts in the year to June 2013 with the average quarterly receipts in the period from October 2013 to June 2017.

[787] [2017] UKSC 51.

[788] M Walters, 'ACAS reports spike in employment tribunal claims,' *The Law Society Gazette* (London, 18 July 2018).

[789] Ibid.

fees itself unlawful rather, the level of fees that was found to be disproportionate hence unlawful. One important finding was that the court recognised that conciliation could be a valuable alternative in some circumstances.[790]

It can be noted one of the reasons for the introduction of fees was to encourage the earlier settlement of disputes. However, evidence shows[791] that while the take up of ACAS conciliation increased significantly following the introduction of ET fees, the settlement rate did not.[792] The decision to abolish tribunal fees was welcomed by employees which resulted in an increased number of cases in the ET, and at the same time, the number of cases going for ACAS EC has also increased.[793] Surprisingly, since the ET fees were declared illegal in 2017, the number of employees thinking of resorting to ET has increased by 30 percent in any given week.[794] Equally, ACAS annual report 2018[795] illustrates that the number of people giving the notification has increased from 1700 to 2200 per week (29.4 percent). Notably, the overall notifications to ACAS have increased by 19 percent (17,000) compared to the same period in 2017.[796] Also, the number of people went to ET rose by 39 percent (7000).[797] However, the settlement rate through ACAS has not increased that much as hoped by the policymakers.

4.2.2.3 Lack of awareness of EC service

Under the current regime, a claimant is only required to notify the ACAS not to attend the EC process. Once notification is done, a Support Officer takes some reasonable steps to contact the parties, and if no contact is made for some reasons, e.g., the parties are not contactable, parties do not respond to calls etc. a certificate is issued which

[790] *Unison* (n 69) at [92].

[791] MOJ, *Review of the introduction of fees in the Employment Tribunals* (Cm 9373, 2017).

[792] *Unison* (n 69) at [59].

[793] Cortes, 'Making Mediation an Integral of The Civil Justice System' (n 62).

[794] Max Walters (n 788).

[795] ACAS Annual Report (2017-2018) p7.

[796] Ibid.

[797] Ibid.

means the parties are deprived of the vital information regarding EC process which could have influenced the parties to agree to consider EC.

ACAS survey data suggest while the awareness of the EC service has increased among older employees since 2015,[798] such awareness is still low among younger claimants, some employers in smaller companies and some representatives. The same pattern is observed in consumer disputes discussed in the previous chapter. Therefore, ACAS recommended availability of greater levels of support for these groups.[799]

4.2.2.4 The impact of power asymmetry in EC process

Inherently, the employee is generally in an inferior position in employment environment which turn into power imbalance when a legal dispute arises between the employee and employer. Power asymmetry arises in employment disputes for a number of reasons such as the nature of the employment relationship, employers being in a financially stronger position,[800] and employer being a repeat player.[801] At present, there is no obligation on the prospective defendant to notify ACAS and attend the EC even if the claimant agrees. This flexibility allows the employers to deny the invitation EC and go for ET as they can afford legal representation, but in most cases, employees cannot which put them in a disadvantaged position. This is one of the main reasons for employers to deny invitations to engage in the EC process.[802] Another important finding of the latest report of the ACAS is that while most parties were positive about the case officer's communication about how EC works, they were less satisfied with the

[798] ACAS Evaluation (2020) p12.

[799] Ibid.

[800] Fiss (n 45) 1076.

[801] O Gazal-Ayal and R Perry, 'Imbalances of Power in ADR: The Impact of Representation and Dispute Resolution Method on Case Outcomes' (2014) 39 Law & Social Inquiry 795; M Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9:1 Law and Society Review 95-160; R Zimmerman, 'Medical Contrition: Doctors' New Tool to Fight Lawsuits: Saying "I'm Sorry." *The Wall Street Journal* (New York, 18 May 2004), A1; M Etienne and J Robbennolt,. 'Apologies and Plea Bargaining' (2007) 91 Marquette Law Review 295–322.

[802] ACAS Avaluation 2020, p 12.

information regarding employment law.[803] This raises the possibility that parties without legal representation may be in a disadvantaged position when agreeing on the terms of the settlement.

4.2.2.5 Lack of procedural mechanisms

This study observes that one of the main reasons for the low conversion rate to EC and settlement rate is the employers' reluctance to engage in the EC process. However, there is no procedural mechanism in place to penalise the parties for unreasonable refusal to engage in EC as advocated in *Halsey*. Unlike the judges in civil courts, the ET Judges do not usually award costs to the successful party save in exceptional circumstances of where a party or their legal representative was found to have acted unreasonably ringing and conducting the claim which had no reasonable prospect of success.[804] Another reason unavailability of legal aid ET claims in England and Wales.[805] Unlike CPR (part 44)[806] in civil disputes, failure to attempt to settle employment disputes using ADR and other non-court dispute resolutions does not appear as a reason for awarding costs in the ET rules; instead, it mentions unreasonable conduct of the party or representative.[807]

4.2.3 **Further initiatives to improve the current practice**

This study identifies the probable reason for the low conversion to EC and settlement rates being lack of awareness of EC, power asymmetry and lack of procedural mechanisms are the main ones. Further steps are needed to be taken to make a cultural change in the employment ADR landscape which are discussed next.

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[803] Ibid.

[804] S.76 (1) (a) of the Employment Tribunals Rules of Procedure 2013.

[805] Gibbons Review (n 771).

[806] When making cost order, the court will take into account, "Rule 44.4 (3)(ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute".

[807] S.76 (1) (a) of the Employment Tribunals Rules of Procedure 2013.

4.2.3.1 Educating parties about the benefits of ADR

One way to increase the conversion of cases from the notification stage to the actual EC procedure would be to educate the parties about the benefits EC has to offer. While exiting studies show that ACAS EC scheme offers opportunity to resolve disputes at less costs and quickly, it is often used an administrative 'tick box' exercise.[808] Surprisingly, any reference to ADR other than ACAS early conciliation is absent from ET forms. While awareness of ADR is important, it is crucial that the parties are aware of their rights conferred by employment law and that the door of the courts are open if they fail to settle.[809] Undeniably, ADR works in the shadow of the law, and it can never replace the courts. It is argued it is the authoritative force of the functioning courts that underpins the use of ADR.

From the above discussion,[810] it appears that while awareness of EC has improved among some groups of people (e.g., older employees and employers of large businesses), there are certain groups (e.g. younger people, employers in small businesses and first-timers etc.) who could benefit from increased awareness of ADR. It is recommended that Trade unions,[811] employer organisations, trade associations, and government should work together to raise awareness and promote ADR. Information about ADR should be an integral part of employment contracts. As noted in chapter 3,[812] traders in regulated sectors are required to inform consumers about the ADR schemes they are part of and direct them to the relevant schemes, and the same should be followed in employment disputes. The role of the lawyers, mediators and judges are paramount in educating parties about ADR, which is discussed in chapter 3.[813] Importantly, online technology should be used to raise awareness of the EC process. A

[808] P Frost, 'ADR for employment lawyers: lessons from the Civil Justice Council?' (ELA Briefing, 2019) Available at <https://hsfnotes.com/employment/2019/03/04/adr-for-employment-lawyers-lessons-from-the-civil-justice-council/>.

[809] *Unison* (n 69) [72].

[810] See subsection 4.2.2.3.

[811] For example, USDAW is one of Britain's largest trade unions which provides advice and representation to workers in many different workplaces..

[812] See subsection 3.5.4 above.

[813] See subsection 3.5.4 above.

survey conducted by the BEIS found ACAS website is most commonly used source of information amongst both claimants (73 percent) and employers (41 percent) alongside the government website (gov.uk) (54 per cent and 28 per cent respectively) and the HMCTS website (47 per cent and 22 per cent respectively).[814] The growing digitisation of the justice system is likely to increase the awareness of ADR, and this study strongly recommends increased use of online technology to raise awareness. However, these may not be enough to raise awareness level; hence some regulatory reform may be required, which is discussed next.

4.2.3.2 Regulatory reform to increase the uptake of EC

A regulation requiring the claimant and respondent to attend an information session with the EC Officer where they could be given important information about EC so that parties can make an informed decision rather than refusing to engage in the EC process without proper knowledge as it is now.[815] Existing studies suggest that cases were more likely to settle both the employee and employer agree and engage in EC.[816] ACAS 2019 Survey (published in 2020) found that in most cases EC did not take place due to the employers' unwillingness to participate. One of the significant drawbacks of the current regulation is that claimants are only required to notify ACAS but not to engage with the EC officer to get information about the EC process. Hence, they are not informed about the benefits of ADR and often refuse to go for EC outright. It would be helpful to introduce a new regulation/amend the existing regulation[817] requiring parties to attend an information session which will be helpful to raise awareness and increase uptake of ADR. A similar model has been introduced in the family law whereby the claimant is required to attend a MIAM.[818] It is evident that most of the cases converted to full

[814] BEIS, *Survey of Employment Tribunal Applications: findings from the 2018 survey* (2020) p8.

[815] The Scottish Parliament Justice Committee, *I won't see you in court: alternative dispute resolution* (SP, 2018 (Session 5), 381-IX); B Clark, 'Some Reflections on "I Won't See you in Court"' (2019) 2 Jur Rev 182, 188.

[816] BEIS, *Survey of Employment Tribunal Applications* (n 814) pp10-11.

[817] S. 18 of the Employment Tribunals Act 1996 as amended by the Enterprise and Regulatory Reform Act 2013.

[818] *A Practical Approach to ADR* (n 3) 307.

mediation after MIAM were settled discussed in the next section.[819] The CJC in their final report on ADR argued that MIAM works well where there is pre-existing relationship such as in family and employment disputes.[820] There should be opt-out options such as when both parties agree not to use it, where parties have already attended such information session recently (they have to produce a certificate showing the same) and when there is discrimination. The service provided by ACAS is free, and parties are not required to settle hence it is less likely there will be any issue with parties' access to courts as argued by the CJC and this study in chapter 2.[821] The ACAS should run a pilot of this mandatory information session. Unlike MIAM, in employment disputes, the attendance of the employer to an information session should be limited to once a year which would be helpful to educate them about EC. Otherwise, one employer may have to attend the information session several times a year that could be time-consuming, annoying and not worthwhile. Although each case is different, the EC process and its advantages over litigation are almost the same, and it would be pointless and annoying to require an employer who is a repeat user of EC to attend the information session frequently. Also, if one party decide to try it, the other party should be required to attend because the aim of this session would be to inform both parties so that they can make an informed decision. Attendance at the information session should be mandatory, but the parties will be at liberty to decide whether to go for conciliation or not, and the settlement will be voluntary; hence the voluntariness of ADR is protected.

4.2.3.3 Costs sanction for unreasonable refusal to undertake ADR

As noted in **c**hapter 2,[822] costs penalties act as a strong incentive for the parties to consider ADR seriously. As such, it can be argued that using costs sanction to penalise those employers who unreasonably deny an invitation to consider EC will send a clear message to the employers to think seriously before denying an invitation from the employee to consider EC.[823] The same goes for the employees who unreasonably refuse

[819] see subsection 4.3.2.1.

[820] CJC Final Report (n 2) section 8.

[821] See subsection 2.3.4.

[822] See Subsection 2.3.5.

[823] *PGF II* (n 132).

to engage in EC and choose to proceed to the ET. However, as noted above, in employment dispute the costs rule of civil disputes "cost follow the event" do not apply and costs award is rare and only awarded in exceptional circumstances. Hence, costs sanction may not work well in employment disputes.

4.2.3.4 Ensuring parties are on equal footing

One important argument advanced by critics of ADR, such as Fiss, is that the outcomes of ADR may be less favourable to employees than those of trials.[824] The study recognises that in employment relations, employees appear as the weaker party, and therefore employment laws have given them certain rights, which is only possible if their rights are vindicated in accordance with the law in ET. Many critics of ADR argue that the imbalance of power exists in employment relations impact the outcome of the EC.[825]

One possible option to minimise the power imbalance in employment disputes would be to advise parties, especially the employees, to have a legal presentation during the ADR process. However, this option must be considered in light of the practical difficulties (e.g., financial ability, nature of the dispute, what the employees actually wants etc.) employees faces. Arguably, the power imbalance can be minimised by way of representation of the weaker party[826] and putting them in a better bargaining position.[827]Additionally, empirical data indicate that mediators are often tend to put more pressure on claimants,[828] but representation may reduce that pressure.[829] Notably, there are also negative sides of having representation in the employment conciliation

[824] Fiss, Against Settlement (n 45).

[825] Ibid.

[826] C McEwen, R Nancy, and M Richard, 'Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation' (1995) 79 Minnesota Law Review 1360–61.

[827] McEwen (n 826)1360–61; M Mironi,'Reframing the Representation Debate: Going Beyond Union and Non- Union Options' (2010) 63 Industrial and Labor Relations Review 367–83, 373; J Sternlight, 'Lawyerless Dispute Resolution: Rethinking a Paradigm' (2010) 37 Fordham Urban Law Journal 381–418.

[828] T Metzloff, R Peeples, and C Harris, Empirical Perspectives on Mediation and Malpractice (1997) 60 Law & Contemporary Problems 107–52, 122.

[829] O Gazal-Ayal (n 801).

because lawyers may not be willing to reveal information during the process which may stand in the way of settlement;[830] lawyers may be less inclined to consider concession which they view as their failure; if their appearing fees in ADR process are less than the court and then they may not be in favour of settling the case.[831] It is common in adversarial systems lawyers put forward legal arguments to win for their client at the expense of the other party.[832] Therefore commentators argue that representatives of the parties enhance the inherent imbalance between the parties.[833] Studies from other adversarial legal systems suggest that the probability of settlement increases when neither party is represented.[834] For instance, one US study found that the settlement rate is higher while neither party is represented (75 percent), whereas the settlement rate is significantly lower when one or both parties were represented (48 percent).[835] Other studies conducted by Wissler[836] and Genn[837] found a similar pattern.

Conversely, sometimes presence of representatives in ADR is helpful as they facilitate the settlement.[838] Also, representatives for the parties help to minimise some of the obstacles to settlements such as information gap and emotional issues and actively

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[830] C Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem Solving' (1984) UCLA Law Review 31:754–842, 780–81.

[831] R Gilson, and R Mnookin, 'Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation' (1994) 94 Columbia Law Review 509–66; 532.

[832] R Mnookin and L Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979)88 Yale Law Journal 950–97, 986; Meadow, 'Toward Another View of Legal Negotiation' (n 830) 755- 778; G Sato, 'The Mediator–Lawyer: Implications for the Practice of Law and One Argument for Professional Responsibility, Guidance—A Proposal for Some Ethical Considerations (1986) 34 UCLA Law Review 507–35., 510– 12.

[833] Gilson, and Mnookin (n 831) 510–11.

[834] Ibid.

[835] K. Stuart and C. Savage, 'The Multi-Door Courthouse: How It's Working' (1997) Colorado 26 Lawyer 13–18, 15.

[836] Wissler, 'Representation in Mediation: What We Know from Empirical Research' (2010) Fordham 37 Urban Law Journal 419–71, 458.

[837] H. Genn CLCC (n 25) para3.8.4. The study conducted in England found that when neither party to the facilitative mediation process was represented, 76 percent of the cases were settled, whereas when both parties were represented, 55 percent were settled.

[838] C Meadow, 'Lawyer Negotiations: Theories and Realities—What We Learn from Mediation' (1993) 56 Modern Law Review 361–79, 375; Gilson, and Mnookin (n 831) pp541–50; McEwen (n 826) p1366.

encouraging their client to settle.[839] The main purpose of the ADR to facilitate talks between the parties in presence of a neutral third party (the mediator) so that they can reach an amicable solution to their dispute. As commentators argue, 'if only the plaintiff is represented, the settlement ratio will be greater than in other cases, and if only the defendant is represented, the settlement ratio will be lower than in other cases. The underlying rationale is once again related to the power imbalance'.[840]

This study argues, given the fact funding option are limited, it would not be feasible to recommend parties to have a lawyer present at the EC process. It is important to note that in employment disputes some time all an employee wants is an apology or a good reference letter from the employer. Similarly, for an employee who is still employed or wants to be reinstated to his job, the preservation of continuous relationships may be far more important than monetary compensation. To the same extent, employers who do not want to lose their good employees may actually prefer to settle the dispute by settling the matter in ADR than going for litigation and destroy their ongoing relationship. Arguably, the chances of producing these bespoke remedies/outcomes may be less when a lawyer with adversarial tactics in mind argues for their clients. Instead, it would be better if the parties are signposted to the free legal advice available before agreeing to a settlement to avoid being forced to settle on unfavourable terms.[841] The safeguards provided for consumers under Article 9 of the ADR directive discussed in chapter 3[842] could provide policy options for safeguarding the interest of employees. Also, parties must be explained their rights (e.g. right to consult lawyers before agreeing to settlement proposal, walkout of the process anytime and resort to court and agreeing to the proposal would forfeit right to go to court) from the outset so that they know their

[839] H Kritzer, 'Contingent-Fee Lawyers and Their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship (1998) Law & Social Inquiry 23:795–821, 801–12.

[840] O Gazal-Ayal (n 801).

[841] Mnookin and Kornhauser (n 832) 985–87; Kritzer, 'Contingent-Fee Lawyers' (n 839) 801; L Lederman, and W Hrung, 'Do Attorneys Do Their Clients Justice? An Empirical Study of Lawyers' Effects on Tax Court Litigation Outcomes' (2006) Wake Forest Law Review 41:1235–95, 1247–50; Sternlight (n 827) 406.

[842] See subsection 3.5.4.

position when engaging in discussion with their employer in the presence of the conciliator.

4.3 ADR in family proceedings

In family disputes, parties are encouraged to resolve their dispute through pre-issue ADR (Mediation Information Assessment Meeting (MIAM)) and post-issue ADR (Financial Dispute Resolution (FDR) Hearing). From April 2011 until April 2014, there was a requirement that parties should attend a meeting (MIAM) with a qualified mediator to get information about mediation and other ways to settle disputes out of court.[843] Significant changes in the Family Law have been brought by the Children and Families Act 2014, and the requirement to attend MIAM has been enshrined in statute.[844] In family disputes, parties are also encouraged to settle their disputes via ADR in the form of FDR hearing after issuing the claim.[845] These mechanisms are examined below.

4.3.1 MIAM and FDR processes

MIAM process

Separating couples in certain family proceedings such as the private law proceedings relating to children[846] and proceedings for a financial remedy[847] are now required to attend a MIAM before they can resort to the court.[848] However, in certain circumstances, this requirement does not apply to the parties, for example, where the claim involves domestic violence, the claim needs the urgent attention of the court and

[843] Edwards 'Closer Collaboration: Part I' (n 121).

[844] Ibid.

[845] CJC Interim Report 2017 (n 2) p39.

[846] Paragraph 12 of Practice Direction 3A – Family Mediation Information AND Assessment Meetings (MIAMS) of Family Procedure Rules 2010.

[847] Paragraph 13 of PD 3A-FPR 2010.

[848] Section 10 of the Children and Families Act 2014, and Rule 3.6 of FPR 2010.

the whereabouts of the defendant is unknown.[849] Initially, the prospective claimant is required to inform an accredited family mediator about the dispute and attend a MIAM to assess whether the dispute is suitable for mediation and eligibility for getting legal aid. The other party (the defendant) may but not be required to attend the MIAM.[850] After the notification, the first step is usually for the mediator to have an intake call or meeting with each of the parties to the prospective mediation. One of the principal tasks will be screening to see whether the case is suitable for mediation, its suitability for legal aid and the benefits of mediating than going further down the court. It is up to the individual/couple to decide whether to proceed to the full mediation or not; if not, the mediator signs the form, and the parties can issue claim at the court. If they decide to go for mediation, then mediation process starts.

Next, the mediator will send a 'mediation information form' to each spouse/parent, which will give some background information about the issues and what they each wish to cover within the mediation. At the first session of mediation, the mediator will go through the Agreement to Mediate with the parties and will have them sign it. The scope of the overall issues will be identified, and any immediate issues addressed, and interim agreements reached as appropriate so that there are hopefully calm waters as the longer-term issues are addressed in future sessions. Once the parties have proposals, they both find acceptable, the mediator prepares a without prejudice memorandum of understanding together with a summary of the financial information (written openly), which will be sent to each of the parties to discuss with their lawyers and to be converted into a legally binding document and implemented.

FDR Process

FDR was formally incorporated in the revised rules governing financial ancillary relief cases in June 2000 to enable litigants in family disputes to identify and effectively resolve the real in way that reduces the overall financial costs to them. Evidence shows

[849] The complete list can be found at https://www.justice.gov.uk/courts/procedure-rules/family/parts/part_03.

[850] Ibid.

that this innovative development has been proven as a successful means of resolving many financial disputes.[851]

FDR hearing is governed by Part 9 of the Family Procedure Rules 2010 ('FPR 2010') and the accompanying Practice Direction (PD9A). Under the rules, once the separating couple makes an application to the court for a financial order, the court will set a date for the parties to exchange financial information. Parties are required to complete details of their assets, liabilities, income and expenditure, and other relevant information backed up by evidence (e.g., bank statements).[852] Then they need to exchange the forms with each other which gives the parties the opportunity to ask written questions to each other to clarify information and/or provide further relevant documents. The court will also set a date for a hearing called a first appointment which called "First Directions Appointment" (FDA) where the judge will consider the documents, written evidence submitted by the parties and decide whether they are necessary and proportionate and may make further directions for additional information/documents to be adduced.[853] The parties are required to make a proposal for settlement and file details of proposals no later than seven days prior to the FDR appointment, including those made without prejudice.[854]

The FDR is typically a court hearing presided by a judge but instead of making decision on the outcome, the judge in FDR offers guidance as to the range of likely outcome at the final hearing. It is important to note that this is a non-binding opinion, and the parties and their representatives (if present) are given some time to enter into negotiations. If an agreement is reached, then the terms will be reported to the judge, who will consider whether they are fair in all the circumstances. Provided the judge approves the agreement, then it will be converted into a written consent order either there and then or via email/letters over the following days or weeks. If the parties do not reach an agreement, then the judge will either schedule a further FDR or set the case up

[851] Family Justice Council, *Financial Dispute Resolution Appointments: Best Practice Guidance* (2012) available <https://www.judiciary.uk/wp-content/uploads/2014/10/fjc_financial_dispute_resolution.pdf> last accessed 06 June 2022.

[852] FPR r.9.14 (2).

[853] Rule 9.15.

[854] Rule 9.17 (3); CJC Interim Report (n 2) [6.18].

for a final hearing. Because the FDR involves the presiding judge hearing the parties' without prejudice or 'off the record' offers, that judge cannot take any further part in the case other than to preside over another FDR.[855]

4.3.2 Assessments

This study observes that the failure of MIAM mechanism, sensitive family matters and power asymmetry, lack of funding, lack of awareness and under-resourced FDR system are the most important reasons for the low uptake of family mediation. These reasons are examined next.

4.3.2.1 Failure of MIAM to increase the take up of family mediation

One of the main features of MIAM is to identify family cases suitable for mediation and advise the parties accordingly. Unfortunately, MIAM has not helped to increase the take-up of family mediation in the way policymakers hoped.[856] It is important to note that MIAMs play an important role in signposting parties to mediation.[857] Research shows that when parties choose to go for mediation following a MIAM, it often brings a successful outcome.[858] Existing studies also show while the settlement rate of mediations following MIAMs is relatively high (around 70 percent),[859] the conversion rate to full mediation is not that satisfactory as policy makers hoped (39 percent).[860] According to the latest statistics published by the Family Mediation Council, three-quarters of the cases converted to full mediation following MIAM in Autumn 2019 when both parties attended the MIAM.

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[855] Rule 9.17 (2).

[856] Moore, 'MIAMs: A worthy idea' (n 375).

[857] CJC Interim Report(n 2) 38.

[858] Ibid.

[859] Justice Committee, *Government's proposed Reform of Legal Aid* (HC, Third Report of Session 2010-11 Volume I (15 March 2011) para 89; Family Mediation Council, *Family Mediation Survey 2019 – Results* (2020) <https://www.familymediationcouncil.org.uk/wp-content/uploads/2020/01/Family-Mediation-Survey-Autumn-2019-Results.pdf> last accessed 30 May 2022.

[860] Ibid.

Furthermore, despite the benefits of attending MIAM, existing studies suggest that six out of the couples do not comply with the MIAM requirement.[861] Although the settlement rate is essential, the number of MIAM taking place and the number of cases channelling from MIAM to full mediation process is equally important. Among the probable reasons for the failure of MIAM non-compliance with MIAM requirement, limited funding, loophole (e.g., the respondent is not required to attend the process), timing and less judicial check are the main ones which are better explained by examining these factors.

MIAM as tick box-exercise

Research shows that there is still a significant number of parties issuing court proceedings without complying with the MIAM requirement.[862] One of the reasons for low update of MIAM and low conversion to mediation is how the legal representatives of the parties advise their them about the advantages of MIAM and mediation. Existing studies suggest that solicitors for the parties view MIAM as tick-box exercise.[863] The Chief executive of National Family Mediation (NFM), Jane Robey expressed her concern that the solicitors for the parties view MIAM requirement as tick box exercise and advising their clients to attend the MIAM just to comply with the MIAM requirement so that they can issue claim at the court.[864]

It seems that legal representatives are partly responsible for the low uptake of MIAM and conversion to full mediation because they are not advising their client about the benefits of MIAM and mediation instead they are advising them to simply attend the MIAM so that they can proceed to issue the claim at the court. The apparent reason for

[861] Moore, 'MIAMs: a worthy idea' (n 375); National Family Mediation (NFM) Report 2017.

[862] Clenshaw (n 121); Edwards 'Closer Collaboration: Part I' (n 121); B. Hamlyn and others, *Mediation Information and Assessment Meetings (MIAMs) and mediation in private family law disputes: Quantitative research findings* (Ministry of Justice Analytical Series 2015).

[863] Jane Robey, online post (23 June 2017) as cited in A Moore and S Brookes, 'MIAMs: a worthy idea, failing in delivery' (2018) 1 P.C.B. 32-39; J. Robey,'Mediation Matters: MIAMs can be so much more than a box-ticking exercise' (2015) *Family Law*; Edwards 'Closer Collaboration: Part I' (n 121); K. Beatson, 'Family law in crisis: Pt II' (2014) 164 NLJ 7627.

[864] Ibid.

the solicitors in discouraging their clients in engaging with the MIAM and mediation is their own financial benefits as discussed in the next section below. Additionally, evidence shows that many parties are going for MIAM only because it is mandatory and they are only doing it to get a mediator "sign off" which is pre-condition for going to the court.[865] Commentators like Jo Edwards explained, 'there is still a significant number of cases where a party issues a court application without attending a MIAM; and that, even where there has been attendance at a MIAM, conversion levels to mediation are still relatively low'.[866]

The CJC, in their final report, highlighted that 'only one in 20 court applications has been preceded by a MIAM'.[867] This could be of lack of awareness among parties and lack of funding. Notably, family mediators are more regulated than other civil mediators, but conversion rate from MIAM to full mediation is relatively low which raises question about their ability to persuade parties to engage in mediation and deal with sensitive matters couples are involved with.[868] Importantly, the family mediators' skills and knowledge are only in use when parties attend MIAM which is not happening in more than 60 percent of cases.[869]

Lack of awareness of MIAM

As noted in the previous section, only one in twenty court applications parties have complied with MIAM requirement.[870] This could be down to lack of awareness among parties.[871] Furthermore, limited funding option is partly responsible for the low awareness among litigants because due to lack of funding parties are not contacting their lawyers and acting as litigant in persons.

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[865] Kim Beatson et al.'Family law in crisis: Pt II' (2014) 164 NLJ 7627.

[866] Jo Edward (n 121).

[867] CJC Interim Report (n 2) 39.

[868] Jo Edward (n 121).

[869] Moore, 'MIAMs: a worthy idea' (n 375); NFM Report 2017 (n 861).

[870] CJC Interim Report (n 2) 39.

[871] Moore, 'MIAMs: a worthy idea' (n 375); A Bloch and others, *Mediation Information and Assessment Meetings (MIAMs) and mediation in private family law disputes: Qualitative research findings* (Ministry of Justice Analytical Series 2014) p 3; B Hamlyn and others, Civil Court User Survey (n 862); CJC ADR Working Group Interim (n 1) and Final Report (n 2) para 2.4.

Existing studies[872] suggest that the failure of the MIAM could be down to the limited availability of legal aid.[873] The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) has limited the availability of legal aid in the majority of family cases.[874] Due to the limited funding options litigants are not contacting lawyers which means that they are not getting useful information about MIAM nor they are being referred to MIAM or mediation.[875] Importantly, pre-LASPO, 80 percent of publicly funded MIAMs were referred through to the mediation by legal aid solicitors, but the number of referrals fell dramatically to 10 percent after LASPO.[876] In practice, legal aid is still available, albeit in limited circumstances, and the MIAM is free where at least one party is eligible for legal aid. However, this is means-tested and not readily available.[877] However, there is a lack of awareness among family litigants which, again, refer to the fact that they are not contacting their lawyers due to lack of funding in the first place. Indeed, by looking at the pre-LASPO and post-LASPO statistics, it can be argued that economic incentives encourage parties to engage in ADR process, which results in more being settled through ADRs and less pressure on the strained resources of the courts.

Weakness in the existing regulation for MIAM

The educative role of MIAM is very helpful for the parties to make an informed decision, as noted above.[878] However, one significant weakness in the current legislative framework[879] is that only the applicant is required to attend the MIAM not the respondent as such many are not benefitting from it. Under the current legislative

[872] Ibid.

[873] Cortes, 'Making Mediation an Integral of the Civil Justice System' (n 62); Legal aid: UK's top judge says cuts caused 'serious difficulty' *BBC* (London, 27 December 2019).
< https://www.bbc.co.uk/news/uk-50923289> last accessed 07 June 2022.

[874] Fouzder (n 375).

[875] Cortes, 'Making Mediation an Integral of The Civil Justice System' (n 62).

[876] Fouzder (n 375).

[877] Moore, 'MIAMs: a worthy idea' (n 375); NFM Report 2017 (n 861).

[878] See subsection 4.3.2.1.

[879] Section 10 of Children and Families Act 2014.

framework,[880] the respondents are not bound to attend the MIAM process instead they are expected to attend, and this is why they decline to attend the MIAM. In most cases, after receiving the information about mediation, if the applicant wishes to engage in mediation, the mediator invites the other party (the respondent) to attend. However, in most cases, the respondents show their reluctance to participate in a MIAM and refuse the applicant's invitation to mediate outright which is a significant barrier to channel more cases to mediation.[881] The government's own statistics suggest that the chances of MIAM being converted to full mediation is significantly reduced when parties participate MIAMs separately.[882] The survey also indicated that the applicants had attended a MIAM in 56 cases (19 percent) out of the 300 cases reviewed during the survey in 2015 and had not done so in 122 cases (41 percent).[883] However, in the remaining 122 cases (40 percent) it was not entirely clear whether or not the applicant complied with the MIAM requirement.[884] The survey also highlighted that in 15 percent (45 out of 300) cases, exemptions to MIAM were claimed and unwillingness of one party (or either party) was the most common cited reason (in 20 cases out of 45 where exemptions claimed).[885] The study further indicated that non-attendance or rejection by one party was the main reason for non-conversions from MIAMs to mediation.[886] This study has found that this is happening because of loopholes in the current legislative framework. For instance, it can be noted that Rule 3.8 (2) of FPR provides certain exemptions to MIAM requirement such as where an authorised family mediator confirms that mediation is not suitable because none of the respondents is willing to attend a MIAM; or all of the respondents failed to attend a MIAM without good reason; or mediation is not a suitable method to resolve a particular dispute.[887] Additionally, the exemption that the parties are not required to comply with MIAM requirement if applicants have tried all/at least three mediators within 15 miles radius of their place of

[880] Para 32, PD3A of FPR.

[881] Report of the Family mediation task force (June 2014) para 71; Edwards 'Closer Collaboration: Part I' (n 121); Cortes, 'Making Mediation an Integral of The Civil Justice System' (n 62). L Parkinson, Changing the family justice system (2016) 46 The Family in Law 904-910.

[882] Hamlyn, *Quantitative research findings* (n 862).

[883] Ibid.

[884] Ibid, p 31.

[885] Ibid, p31.

[886] Ibid.

[887] Rules 3.8 (2) (a), (b) and (c) of the FPR.

residence, and the applicant was informed that they are unable to arrange a MIAM meeting within 15 working days (3 weeks)[888] are also problematic and unjustified in the age of modern technology that can be used to conduct MIAM and mediation remotely as discussed below. As such, commentators argue that MIAMs cannot operate effectively without much stronger compulsion for both parties to attend MIAM process prior to the court application.[889] Hence, there is a need to amend the current legislative framework especially the exemptions to MIAM requirement should be narrowed down which is further discussed below.

Lack of Judicial gatekeeping

In accordance with the Family Procedure Rules, family courts have a duty to consider whether ADR appropriate at every stage in the proceedings,[890] whether MIAM requirement was complied with, or a valid exemption claimed.[891] However, flagrant non-compliance with MIAM and allowing parties to continue with the litigation indicates that 'the courts are permitting a wholesale avoidance of MIAMs'.[892] This is further supported by the MOJ's 2015 research[893] which found that in majority of the cases (176 out of 300), there was no compliance with MIAM, but only one case had been challenged for not complying with MIAM.[894] Surprisingly, in none of the 176 cases, a judicial officer had referred parties to a MIAM.[895] Furthermore, in 15 percent (45 out of 300) case, exemptions were claimed.[896] This is shocking considering the fact that MIAM is a mandatory requirement, and the court is supposed to enforce it.

The above statistics support the findings of this study that there is a lack of judicial gatekeeping in family courts which allows parties to get away with the mandatory

[888] Rule 3.8 (1) (K) (ii) of the Family Procedure Rules.

[889] Parkinson, Changing the family justice system (n 881).

[890] Family Procedure Rules 2010, Practice Direction 3A, rule 3.3.

[891] Ibid.

[892] A. Moore and S. Brookes (n 375); 6 out of 10 separating couples ignore law and go straight to court (2017)< https://www.familylawweek.co.uk/site.aspx?i=ed178331> last accessed 07 June 2022.

[893] Hamlyn, *Quantitative research findings* (n 862) p36.

[894] Ibid.

[895] Ibid.

[896] Ibid, p31.

MIAM requirement and, as a result, the take-up of MIAM and eventually the conversion to mediation is still low. This finding is also supported by further empirical studies. For instance, in early 2015, the Resolution[897] surveyed[898] its members about the impact of the 2014 court reforms on family mediation. Three in ten (31 percent) respondents to the survey said the court they used had been content to issue applications in children or money cases where MIAM requirement was not complied with, and no exemptions were claimed. Considering the above statistics, it can be argued that the lack of proper judicial check is partly responsible for the low uptake of MIAM and conversion rate to full mediation.[899] It seems it is common behaviour of parties who is there just to sign off the form so that they can issue a claim at the court.[900] Importantly, judges are reluctant to penalise parties for not complying with MIAM requirements due to the fact that the majority of them are LIPs.[901] The reluctance of the judges to punish parties for not complying with MIAM requirements is one of the main reasons for the failure of MAIMs in most cases.[902]

4.3.2.2 Impact of power asymmetry in family mediation

An important factor that impacts the uptake and outcome of family mediation is the sensitive nature of the issues separating couples face. Notably, family issues are of a very sensitive nature where privacy is the utmost priority for separating couples which make mediation a perfect avenue for seeking redress. When couples go through the separation process, the most affected are the children who live 'in a 'war' zone, witnessing recurring parental battles'[903] and unable to recover from the hurt of

[897] Resolution is a community of family justice professionals who work with families and individuals to resolve issues in a constructive way. see https://resolution.org.uk/about-us/.

[898] Resolution Courts' Survey 2015 (as cited in Jo Edwards, 'Closer collaboration between the judicial and mediation communities Part 1: Mediation/ MIAMs – how they work in practice' (2016) 46 Fam. Law 1168-1171).

[899] E. Reyes, 'Feature: Game of give and take' *Law Gazette* (London, 3 October 2016) available at< https://www.lawgazette.co.uk/eduardo-reyes/3867.bio> last accessed 7 June 2022.

[900] See https://www.jamsadr.com/about/.

[901] Cortes, 'Making Mediation an Integral of The Civil Justice System' (n 62).

[902] Ibid.

[903] J Walker, 'Building a better future for separating families: the search for humanity?' (2016) 46 Family law 387-394.

separation.[904] Another factor that significantly impacts the outcome of the family mediation is the power imbalance between the separating couples.[905] The financial circumstances of the separating couples significantly impact the ability to control the bargain in a mediation. One of the most common power imbalances in divorce is financial disparity such as where one spouse owns more assets and higher earner than the other. If this causes difficulties for only one spouse who has less access to resources when it comes to paying the fees for the lawyer, the imbalance become clearer. Notably, there is no simple dichotomy based on gender alone. Nonetheless, it is not always easy to define power imbalances such where one spouse in controlling or have personality disorder. Although one partner may appear more powerful than the other, it often emerges in mediation that each has significant power or influence in certain areas. For example, while one parent may know about financial resources, the other may be closer to children and control childcare arrangements. Furthermore, one spouse may be more emotionally attached to the relationship making them more vulnerable.[906] Therefore, it is important for mediators not to assess too quickly who has more power and where the power lies.[907]

Research findings underline the importance of mediators' training and experience in enabling them to recognise and manage different power imbalances, including their own use of authority and power.[908] This study recognises that family mediators are regulated strictly by FMC and goes through training before they are accredited as family

[904] R Deutsch and M K Pruett, 'Child adjustment and high conflict divorce', in R M Galatzer-Levy and L Kraus (eds),*The scientific basis of custody decisions* (Wiley, 2nd edn, 2009) 353–374; L. Maloney, 'Intervening in post-separation parenting disputes: reflections on past, present and future principles and processes' (2013) 19 JFS 218.

[905] B Mayer, 'The Dynamics of Power in Mediation and Negotiation' (1987) 16 Mediation Quarterly, 75-85; M Olekalns, 'Conflict at Work: Defining and Resolving Organisational Conflicts' (1997) 32 Australian Psychologist 56-61; J Roehl and R Cook, 'Issues in Mediation: Rhetoric and Reality Revisited.' (1985) 41 Journal of Social Issues 161-178.

[906] Sams, 'Readiness for Mediation Part II – Power Imbalances'https://www.weinbergermediation.com/blog/divorce-family-law/readiness-for-mediation-part-ii-power-imbalances/amp/ last accessed 30 May 2022.

[907] J Kelly, 'Power Imbalance in Divorce and Interpersonal Mediation: assessment and intervention' (1995) 13 Mediation Quarterly 85–98.

[908] Ibid; L Parkinson, *Family Mediation* (4th edn, Jordan Publishing, 2020).

mediators. However, the low take-up of family mediation raises questions whether they are doing enough to persuade separating couple to try resolving disputes using ADR and whether they have adequate training is adequate to deal with the unique problems separating couples face. A recent survey by the Family Mediation Council noted around 20 percent (among 122 who responded to the survey) of mediators stated that there were not enough training opportunities available to meet their needs because most training opportunities are London based and not affordable.[909] It is undeniable the potential challenges family mediators face in resolving family disputes require knowledge and skills drawn from different disciplines, not only legal knowledge, to help family litigants to cooperate and come to family arrangements that is work for them. Currently, family mediators are required to attend and pass an FMC Approved Family Mediation Foundation Training Course, which runs for 8 days.[910] Following completion of the initial training, mediators will be able to apply for accreditation by completing a portfolio requirement with the help of a supervisor within three years. This short course mainly covers theories and principles of mediation; mediation process; conflict management skills and strategies; family dynamics; the impact of separation and divorce on children; family finance issues; an introduction to family law for family mediators, assessing suitability for mediation, domestic abuse and child protection issues.[911] In the meantime, they are required to conduct mediations with co-mediators for at least 10 hours before they can start conducting mediations. Research found that the current training requirements and the way it is designed are not enough for mediators to deal with the variety and unique challenges family mediators face.[912] It is questionable whether the brief foundation training provided by FMC member organisations gives enough attention to the skills needed to help parents move from

[909] Family Mediation Survey Results (2019) available at , <https://www.familymediationcouncil.org.uk/wp-content/uploads/2020/01/Family-Mediation-Survey-Autumn-2019-Results.pdf> last accessed 30 May 2022.

[910] https://www.familymediationcouncil.org.uk/wp-content/uploads/2019/10/Mediation-training-timelines-and-costs.pdf

[911] For details of the course see <https://thefma.co.uk/conference-and-training/train-to-become-a-mediator/>.

[912] A Ketani, 'Innovation in the Way Mediators and in Particular Family Mediators are Trained in England and Wales' (2020) Mediate.com https://www.mediate.com/articles/ketani-family-mediators.cfm; P E Bryan, 'Killing Us Softly: Divorce Mediation and the Politics of Power'(1992) 40 Buffalo Law Review 441, 503.

disputing or even agreeing on child arrangements to considering the child's needs and interests in the context of the child's age and stage of development, attachments, family circumstances, culture etc.

4.3.2.3 Successful but under-resourced FDR

The FDR has proved a very effective method of resolving family cases.[913] Even where cases do not settle at the FDR, many settles soon afterwards because of the intervention of the judge in FDR. Also, the cases do not settle help narrowing down the issues for the trial.[914] Conveniently, court-based FDR is free for the litigants. The neutral judge's indication can be a very powerful incentive to people to abandon arguments that would be unlikely to succeed at a final hearing, and the whole experience can be a bit of a reality check for everyone. In most cases, the judge will also give a stark warning as to what further costs may be incurred if the case does not settle soon. Again, this exerts pressure on everyone to think pragmatically and consider whether certain points of principle are really worth pursuing when measured against the commercial reality. Usually, a significant majority of the cases settle either at the FDR or in the weeks shortly after an FDR.

This study notes that the family courts in English jurisdiction is currently severely under-resourced and over-worked. As a result, judges conducting FDR appointments will often have to deal with several matters on the same day which means they may not be able to devote the amount of time required on a particular case. [915] Evidence shows that the time gap between the first appointment and FDR has increased from the usual three months to more than a year in some cases.[916] The excessive delay badly impacts the already strained relationship between the separating couple, who are desperately

[913] Briggs Final Report (n 25); CJC Interim (n 2) and Final Report (n 2).

[914] CJC Interim Report (n 2) para 6.19.

[915] A Boxer, 'The issue of delay in financial remedy cases: why not engage in arbitration instead or arrange a private FDR?' (2021) Family Law.

[916] M Lockyer, 'Delays in the Family Court – Mitigating Delays in Financial Proceedings' (2020) <https://www.hanne.co.uk/family-court-mitigating-delays-financial-proceedings/> last accessed 07 June 2022.

looking to move on with their lives.[917] It is surprising that despite the government's positive stance on the promotion of ADR, this highly successful mechanism is under-resourced, which raises doubt about the government's intention to fund this highly successful mechanism.

4.3.3 Further measures to improve the current practice

It appears that while there are many ADR options, particularly mediation, out there to help parties to resolve disputes out of court, the existence of these options is little known to the parties. MIAM is a perfect tool for communicating information regarding mediation, but it is less used by separating couples and failing to divert enough cases to mediation which was the main idea behind its introduction. As such, this study recommends the following measures to be taken to improve the current practice.

4.3.3.1 Ensure FDR is properly resourced

One of the main reasons for the delay in FDR processes is lack of enough judges to deal the numbers of cases. One possible option to resolve the current problem would be to invest more in recruiting more judges to conduct FDR which will eventually save courts resources and taxpayers' money by preventing cases from going for the full hearing, which would certainly cost more. However, this proposal seems impractical given that the Ministry of Justice is not protected from austerity policies, and it is the civil justice system that suffers the most from the funding cut, as evidenced from the previous measures taken by the government (e.g. LASPO). It can be noted that this thesis highlights that the civil and family courts are most affected by the funding cuts and there is no indication that the government is willing to invest more. Hence, it would be better to make current system more efficient by converting first appointment to FDR, outsource appropriate cases to other forms of ADR especially mediation and private FDR which are discussed below.

Using First Appointment as FDR

[917] Ibid.

It is noted that despite being a successful mechanism to settle family disputes, FDR is under-resourced which causes excessive delays between the first appointment and the FDR hearing (more than 7 months). One possible option to reduce the delays would be to use the first appointment as an FDR hearing if both parties agree and are prepared. This could save court resources, and at the same time, parties will avoid the agony of waiting for several months to appear before a judge for FDR hearing. If parties do not settle at FDR, they will still have a chance to appear before a judge for the full hearing. However, studies suggest that it may happen in exceptional circumstances such as when judges approve the request by the parties.[918] This is only possible if the parties are well prepared in advance otherwise it will not be fruitful. In order for the parties to be prepared, there should be a clearer indication to the parties that the court may treat the First Appointment as an FDR, even if one or both parties are unwilling to do so. However, excessive coercion may frustrate settlement as discussed throughout this thesis.[919] Furthermore, considering that judges are overburdened with cases, there may not be sufficient time to convert the First Appointment into an FDR. Additionally, there may not be sufficient information and papers available to the judges to read before the First Appointment and form a view enabling him/her to give a considered indication. To overcome these problems, advance preparation is required by the court and the parties. This study recommends that it would be better to inform the parties when they issue Form A- notice of intention to proceed with an application for a financial order that (i) they should be prepared in advance to enable the court to convert the First Appointment as an FDR and (ii) the litigants should inform and may apply to court in advance for more court time to convert the First Appointment into an FDR. However, if this is not possible, the Court should actively encourage parties to consider ADR especially mediation and Private FDR.

[918] HHJ Stuart Farquhar, 'The Financial Remedies Court - The Way Forward: A Paper to consider changes to the Practices and Procedures in the Financial Remedies Court: Part 2' (2021) p 28. Available at < https://www.judiciary.uk/wp-content/uploads/2021/10/Report-of-the-Farquhar-Committee-Part-2-The-Financial-Remedies-Court-The-Way-Forward-September-2021.pdf> Accessed 07 June 2022.

[919] H Genn, 'Twisting arms'(n 33).

Outsource to private FDR and mediation

Exiting studies found that there is strong support among commentators for more robust encouragement by the courts of ADR, mediation and Private FDRs.[920] As noted in the previous section, litigants could be encouraged to consider mediation or private FDR when they issue Form A (notice of intention to proceed with an application for a financial order) or at the first appointment with the judge. Private FDR has many benefits over court-based FDR such as including but not limited to:

- Parties are in control of arranging the date, time and place for the FDR suitable for them;[921]
- Unlike the compulsory court-based FDR, private FDR is voluntary which means the parties are likely to engage in the process with intention to settle;
- Unlike judges in court-based FDR, in private FDR the evaluator will have one case to deal with which will give evaluator sufficient time to read the case papers and give the matter his or her full attention. This is also mean that a whole day can be set aside for the private FDR in order to encourage the parties to actively engage in negotiations and work towards settlement.
- The process is flexible, which means that it can be conducted via remote means which saves the parties time and costs by avoiding travel to a particular place. [922]

It can be noted that unlike court-based FDR, parties must pay for the Private FDR. The costs can vary but for low value cases they can be as low as £1,500.[923] Conveniently, the costs of FDR are shared by the parties. However, the costs of private FDR may put off a lot of parties in the face of court based free FDR. Nonetheless, the parties must weigh the benefits described above of going for private FDR instead of court-based FDR. A recent survey found that private FDR is more effective than Court FDRs.[924] As parties are in control to fix the date and time for private FDR and the process takes place a number of months sooner than through the Court which can amount to a saving

[920] Farquhar, 'The Financial Remedies Court' (n 918) p 28.

[921] M Lockyer, 'Delays in the Family Court' (n 916).

[922] A Boxer 2021 (n 915); Farquhar, 'The Financial Remedies Court' (n 918).

[923] Ibid p 29.

[924] Ibid.

in costs to the parties.[925] This study recognises that there will be many cases (e.g. low value, one or both parties are LIPs) where lay parties may not be able to afford a private FDR. In such cases, this study recommends that in low value cases and where one or both parties cannot afford private FDR, the first hearing should be conducted as a court-led FDR, avoiding the long wait for the typical FDR appointment and the referral of parties to private FDR.

4.3.3.2 Amending the legislative framework and rules requiring the respondent to attend the MIAM

This study observed that when both parties attend the MIAM, conversion rate to full mediation from MIAM increases significantly but evidence shows that this is not happening in practice as such further measures need to be taken to ensure that both parties attend the MIAM. Hence new regulations/amending the existing regulations[926] requiring the respondents to participate in a MIAM should be introduced.[927] However, a question may arise that it will infringe parties' right to access to justice under Article 6 of the ECHR. Nonetheless, in line with the arguments advanced in chapter 2,[928] it can be argued that such requirement can be justified on the ground that the applicants in family disputes are already required by law to attend the MIAM and it is a mere information session not mediation itself and this requirement will not prevent the parties from resorting to the courts if need be thus preserving the voluntariness of mediation process.[929]

Moreover, the exemptions to MIAM requirement should be narrowed down. As noted above, there are several exemptions in place to the MIAM requirement and the unwillingness of one party (or either party) is the predominant block to engagement with the MIAM. It seems that the litigants especially the respondents are taking advantage of this weakness in the current legislative framework to avoid MIAM requirement. Hence, this study recommends requiring respondents to attend the MIAM

[925] M Lockyer, 'Delays in the Family Court' (n 916).

[926] Section 10 of Children and Families Act 2014; Rule 3.8, Para 32 of PD3A of Family Procedure Rules.

[927] P Johnson and N Robinson, 'Mending the MIAMs process' (2018) Faw Law 909.

[928] See subsection 2.3.4.

[929] Johnson, 'Mending the MIAMs process' (n 927) p910.

and removing the exemptions referred above from the current list of exemption laid down in Rule 3.8 of the Family procedure rules. Additionally, the exemptions of mediators' availability within 15 miles or within 3 weeks[930] should be scrapped as they are unjustified in the age of modern technology that enables to conduct MIAM and mediation remotely as discussed below. This study believes that most companies now can accommodate meetings within this timescale especially if they offer MIAMs or mediation online using the modern technologies. Therefore, these exemptions should also be reviewed and accordingly amended.

While MIAM can play an important role in educating parties, more needs to be done to raise awareness of ADR. How parties can be educated about ADR has been discussed in detail in chapter 3.[931] One of the reasons for non-compliance with MIAM requirements and low conversion rate is lack of awareness.[932] The MOJ's 2015 report[933] found that there was a 'need for marketing and provision of MIAMs and mediation to cater at least in part for different groups of potential litigants in children and finance cases, in terms of age and marital status'.[934] There needs to be more publicity about mediation as well as information that public funding in suitable cases is still available for mediation. Then the question will arise who will fund these programmes. It should be primarily the job of the government.[935] Also, lawyers and the judiciary have an important role in educating parties about ADR, as discussed in chapter 3.[936] Once parties are in attendance in the MIAM process, it would be the responsibility of the mediator at the MIAM stage to educate the parties.

4.3.3.3 Managing power asymmetry in family mediation

There are already some safeguards in place to minimise the risks as a results of power imbalance in family mediation. For instance, in order to have binding effect, mediated

[930] Rule 3.8 (1) (K) (ii) of the FPR.

[931] See subsection 3.5.4.

[932] Hamlyn, *Quantitative research findings* (n 862) p5; CJC Final Report (n 2).

[933] Ibid.

[934] Ibid, p43.

[935] Moore, 'MIAMs: a worthy idea' (n 375).

[936] see subsection 3.5.4 ; also, Jackson Final Report (n 2) ch36.

settlements in family mediation must be approved by a judge which act as safeguard against the risks posed by power asymmetries in family mediation. Moreover, mediation process is designed in a way to minimise power imbalances by facilitating the exchange of information and ideas between the parties in presence of neutral mediator.[937] However, sometimes this is not enough as discussed above.[938] One possible solution to the power imbalance in family mediation would be the mediator may actively suggest an obvious alternative or a specific resolution.[939] However, one potential problem with this approach is that it may violate the mediator's duty of neutrality.[940] It will also undermine the essence of mediation, i.e. litigants will try to mediation is a process where a neutral third (the mediator) assists parties to communicate so they can find a common ground from where to reach an amicable settlement. However, commentators have argued that, '[T]o be neutral in the face of inequalities of power promises not indifference to outcome, but acquiescence to the perpetuation of power imbalances, to the perpetuation of a status quo of power inequalities'.[941] This study recommends that the mediators must not compromise their neutrality, instead they should adopt other simple steps to minimise the power imbalance such as arranging the setting and the format for the mediation process in a way that makes both parties comfortable, explain the process to the parties so that they understand what is it about and highlight their interests in the matter; discuss and add suggestion about different options the partis may have; control the discussion between the parties; prevent interruptions and set the amount of time that each party speaks.

During the introduction in the mediation process, the mediators should inform the parties about the process and discusses the nature of conflict and how parties can face

[937] S Hughes, 'Elizabeth's Story: Exploring Power Imbalances in Divorce Mediation' (1995) 8 Geo. J. Legal Ethics 553, 579; J Haynes, "Power Balancing." in J Folberg and A Mitro (eds.), *Divorce Mediation: Theory and Practice*. (New York: Guilford Press, 1988) p 284.

[938] See subsection 4.3.2.2.

[939] J Pearson et al., 'A Portrait of Divorce Mediation Services in the Public and Private Sector' (1983) 21 Conciliation CTS, p 16.

[940] Note, 'The Sultans of Swap: Defining the Duties and Liabilities of American Mediators' (1986) 99 HARV. L. REV. 1876, 1889.

[941] J Forester & D Stitzel, 'Beyond Neutrality: The possibilities of Activist Mediation in Public Sector Conflicts'(1989) 5 Negotiation J. 251, 254.

and deal with conflict.[942] Additionally, the mediator can do something as simple as changing the seating arrangements in a way that parties can avoid direct eye contact with the other.[943] These methods are likely to help reinforcing the mediator's control of the process,[944] and help 'deflect very hurtful or verbally aggressive comments because they would not be eligible to be written down'.[945] The mediator also can explore the parties' understanding of each other's position and interests.[946] The caucus can be useful for the mediator to further minimise the power imbalances[947] which allows the mediator to meet the parties separately which is helpful to 'improve the party's attitudes and perceptions toward the other, generate information and alternatives that the party is unwilling to talk about in open session, and regulate the expression of destructive comments'.[948]

It is important to note that, there are already some safeguards in place in family ADR to ensure that a party to process is not forced to settle on unfavourable terms. It can be noted that in order to have a binding effect, mediated settlements in family mediation must be approved by a judge, which acts as a safeguard against the risks posed by power asymmetries in family mediation. Some commentators argue that if the parties were able to obtain joint advice within the mediation, then this imbalance would be addressed.[949] If a power imbalance is such that the mediator is unable to minimise, then the mediator should terminate the mediation and refer them to the court.[950] Even if

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[942] J Folberg & A Taylor, 'Mediation: a comprehensive guide to resolving conflicts without litigation'(1984) at 38-43; C Moore, 'The mediation process: practical strategies for resolving conflict (1986) 53-54; D Saposnek, *Mediating child custody disputes* (1983) 56-60; W Donohue, *Communication, marital dispute, and divorce mediation* (Routledge; 1st edition 1991)) at 45.

[943] J Blades, 'Family mediation: cooperative divorce settlement' (1985).

[944] J Haynes & G Haynes, *Mediating Divorce* (Jossey-Bass; 1st edition 1989)) at 142-143.

[945] W Donohue (n 942) at 44.

[946] J Blades (n 943).

[947] Ibid, pp 47-48.

[948] C Moore, *The Caucus :Private Meetings That Promote Settlement' (1987)* 16 Mediation Q. 87, 88-89.

[949] M Maclean and J Eekelaar, *Lawyers and Mediators: The Brave New World of Services for Separating Families* (Hart Publishing 2016).

[950] R Voyles, 'Managing an Imbalance of Power' (Mediate.com, 2004) https://www.mediate.com/articles/voylesR3.cfm last accessed 07 June 2022.

where is it apparent that the proposed agreement is fair, but one of the parties is in a weaker position and unable to make a reasoned decision, a presumption should arise that the weaker party could obtain a better result under improved conditions. The mediators should then encourage the weaker party to seek outside counselling. If counselling is unsuccessful, the mediator should terminate the mediation.[951]

Furthermore, the mediators need to watch for any signs of intimidation by one partner and submissiveness from the other, terminating mediation if the imbalance is extreme and not responsive to mediation. They should take active steps to control abusive language or threatening behaviour. The mediator has an active role in creating space for both to speak and be heard. As such, if a participant constantly interrupts the other and tries to dominate, the mediator should not allow this to continue.[952] In this regard, adequate training for the mediators is necessary which is discussed next.

4.3.3.4 Adequate training for family mediators

As noted above,[953] the current training is not sufficient to prepare family mediators to deal with sensitive and challenging family disputes especially where children are involved. Therefore, it is crucial that the mediators have background knowledge of particular issues they are dealing with which will enable them to effectively deal with the issues and facilitate the discussion between the parties. If we look at the educational courses and training programmes for solicitors and barristers, they are required to pass a law degree, professional course, and successfully complete two years rigorous training programme before they can practice as qualified solicitors or barristers. Arguably, the role of family mediators is no less than those required of qualified lawyers as they face daunting task when they face separating couples whose relationship may have already broken down in MIAM and mediation. Although it would not be feasible to require the family mediators to undergo extended courses and training like solicitors or barristers, it would be possible to improve the current training programmes. The foundation

[951] Hughes, 'Elizabeth's Story' (n 937).

[952] Parkinson, *Family Mediation* (n 908).

[953] Subsection 4.3.2.2.

programme should include theoretical and practical elements akin to professional courses designed for lawyers.

The theoretical aspect of the training programme recommended above should educate mediators how to reduce conflict and the risks of negative outcomes, and to reduce the number of parents relying on the courts to make decisions which parents. The main objective of the family mediators should be to reach workable settlements which take account of the needs of the children and adults involved; and the long-term objective as being to help both parents maintain their relationship with their children and achieve a cooperative plan for their future welfare.[954] This study recognises that it is not possible for the mediators to know everything about family law as they do not undergo law degrees like solicitors or barristers, yet they often required to deal with the difficult job to help separating couples with the sensitive matters they face when going through the divorce proceeding. Notably, their job becomes more complicated when children are involved. Therefore, this study believes that the eight days foundation programme is not enough to prepare a family mediator and recommends the FMC should consider redesigning it after discussing it with the mediators and mediation providers, but this is not possible within the scope of this study.

4.3.3.5 Using online technology to make MIAM and family mediation more accessible

While education and encouragement will help to increase the uptake of ADR, good mediation facilities are also important.[955] This study observes that in order to improve the practice of family mediation, there is a need to embrace the digital age.[956] Access to technology is increasing rapidly, and blended services are clearly attractive to many clients. Moreover, conducting ADR online has many benefits such as they can be accessed in a variety of places at different hours of a day, parties can join the meeting, which means they do not have to take a day off from work or arrange childcare to travel to attend the face-to-face meeting as such MIAM and mediation are likely to be less

[954] Barlow et al, *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave Macmillan UK, 2017).

[955] Genn, *Twisting Arms* (n 33) pV.

[956] Walker (n 903).

costly and are client-centred. Independent evaluations illustrate very positive findings, and users regard both the processes and the outcomes as fair and appropriate.[957]

Online dispute resolution may be preferred by couples who do not want to negotiate in person and those who would normally refuse to participate, including those in very high conflict. It can reach more couples because options are increased, and client choice extended. MOJ's 2015 study[958] found that age of the parties also impact the conversion rates from MIAMs to mediation. The study also identified that in cases where the parties are under 34 years of age, 63 percent converted to mediation, compared to 88 percent for those over age 50. Making ADR available online will streamline the process and is likely to attract the younger generation to know more about ADR and how to resolve their disputes using ADR. It would bring a cultural change which is much needed in family disputes because of the particular problems separating couples face. Typically, when parties are given the option to attend a MIAM or mediation via skype using their laptop or smartphone from the comfort of home or travelling to the mediator's office, which may be miles away, it is likely most parties will choose the former option. Also, it can be argued that if the head of civil justice is considering a 'virtual' justice system, surely virtual MIAMs is feasible. For the participants who are not confident about using technology, the mediators should provide flexibility about the location of the mediation which is more accessible or convenient for them. The impact of technology in reshaping the ADR landscape is examined further in the next chapter, where it is more relevant.

4.3.3.6 Incentivise family ADR backed by appropriate procedural mechanisms

It is noted above that the take up of MIAM and conversion to mediation is significantly low. One of the main reasons is the lack of procedural mechanisms. One option to raise the uptake of MIAM and mediation would be to penalise parties with costs sanction for unreasonable refusal to mediate. Although senior members of the judiciary[959] and civil justice reforms reports[960] indicated that costs sanction for unreasonable refusal to

[957] Ibid.

[958] MOJ, *Quantitative research findings* (n 862).

[959] *Halsey* (n 59).

[960] Jackson Final Report (n 2); CJC Final Report (n 2).

consider ADR may be useful in channelling more cases to ADR,[961] it is very rare in practice. It is understandable why judges are reluctant to penalise litigants in family disputes because it seems unfair to penalise litigants (especially LIPs) who may not be aware of MIAM requirements and penalising them for non-compliance will hit their joint budget, which the judges are helping to divide. But it is not helping, and one of the main reasons for low uptake of MIAM and conversion to full mediation is in many cases, even if one party attend MIAM, the other party declines an invitation outright. As such, it can be argued without the active judicial encouragement and check, the non-compliance with MIAM will not improve, so as the conversion rate to full mediation.

In the latest survey conducted by the FMC found that courts needed to do more to enforce MIAMs rules and encourage mediation.[962] One option would be to use costs sanction to penalise parties for unreasonable refusal to consider ADR. Notably, this study observes that judges in English jurisdiction have interpreted the term "unreasonableness" differently in various cases, and their approach to costs sanction remains largely inconsistent. As such, commentators argue that English courts should carefully formulate, on a case-by-case basis, a consistent and clearer approach to costs sanctions for not complying with the MIAMs requirement and unreasonable refusal to mediate.[963] But would it be useful to penalise litigants in family disputes who are going through a painful divorce and unaware of the MIAM requirement because they did not have legal advice due to lack of funds (e.g. legal aid) is subject to debate. While this study recognises that costs sanction in suitable cases may work as a strong incentive for the parties to consider ADR seriously which should remain an option, it would be more effective to incentivise the family mediation and increase judicial encouragement and check to increase the uptake of MIAM and conversion to full mediation.

It can be noted from the discussion above[964] family courts are required to encourage parties to consider ADR and check whether parties have complied with MIAM

[961] J Edwards 'Closer Collaboration between judicial and Mediation Communities Part 2: The legal framework and working more closely together in practice (2016) 46 Family Law Journal 1168-1171.

[962] Family Mediation Survey 2019. Available at<https://www.familymediationcouncil.org.uk/wp-content/uploads/2020/01/Family-Mediation-Survey-Autumn-2019-Results.pdf>.

[963] Ahmed, *Mediation Act for Scotland* (n 760).

[964] See subsection 4.3.2.1 above.

requirements. But this is not happening in practice because there is a lack of judicial gatekeeping in family courts which allows parties to get away with the mandatory MIAM requirement, and as a result, the take-up of MIAM and eventually the conversion to mediation is still low. As such, this study suggests for a tough approach to be followed by the court staff not to issue a claim if the relevant sections (section of MIAM) in the court form are not filled in. In addition, the judges should actively check whether a party applied for a valid MIAM exemption and if the exemption claimed is not valid, the judges should adjourn the proceedings in order for the MIAM to take place in accordance with the existing power under PD3A. The court could also go further and make an "Ungley order"[965] requiring a written explanation in the form of witness statement as to why they think ADR is not suitable for their dispute. This statement would be considered by the judge when dealing with costs at the end of the trial. This study believes that such measures would be helpful in encouraging parties to actively consider MIAM and mediation more seriously. In a word, there should be continuous attempts to encourage family litigants to use ADR in every step of the dispute cycle. In this regard, Sir Geoffrey Vos recommended for creation of an online 'processes of continuous alternative dispute resolution' because 'every dispute has a sweet spot at which it is most susceptible to resolution'.[966]

While judicial encouragement can be an effective instrument to attract parties to ADR, economic incentives may also attract parties to consider ADR. In this regard, the new mediation voucher scheme[967] introduced by the government is an important step which likely to encourage more people to mediate. The main aim of the family mediation voucher scheme is to encourage family mediation and reduce pressure on the family courts. The scheme is operational since 26 March 2021 and eligible parties are entitled to a financial contribution of up to £500 towards the costs of mediation and it is not means-tested.[968] According to the preliminary report by the Family Mediation Council noted that more than three-quarters (77 percent) of the first 2,000 cases using the

[965] Named after the judge who first conceived the order and approved by the Court of Appeal in Halsey v Milton Keynes NHS Trust [2004] EWCA Civ 576.

[966] G Vos, 'Reliable data and technology' (n 68).

[967] See https://www.gov.uk/government/news/1-million-voucher-scheme-to-help-families-resolve-disputes-outside-of-court?utm_medium=email&utm_source=%3E.

[968] See https://www.gov.uk/guidance/family-mediation-voucher-scheme.

vouchers, reached either a whole or partial agreement outside of court.[969] This statistics is promising and shows that this incentive has really helped litigants to consider mediation and avoid litigation because 49 percent of the applicants say they would not have considered mediation if they had not received the voucher.[970] Following the initial successful outcome, the govern has pledged to invest an additional £1.3 million into the UK Family Mediation Voucher Scheme.[971] However, this amount is nowhere near enough as the average total costs for both participants to attend a MIAM, a successful mediation, and any relevant outcome documentation is about £1641.[972] Also, not all cases are suitable for this scheme, and it only applies to mediation involving child arrangements issues.[973] Most importantly, the scheme does not cover the costs of MIAM which is a significant weakness in the scheme.[974] It can be argued that the chances of conversion of cases to full mediation will be increased when parties attend the MIAM and get information about the benefits of mediation and the existence of the voucher scheme (for the time being). However, it is the first stage (i.e., MIAM) where parties have to pay (£107 per party)[975] to get information that is fund restricted which is problematic. It is recommended that it would be better to include the MIAM in the voucher scheme as well as the mediation on a trial basis. Although the voucher will not cover the whole costs of the process, the benefits of including the MIAM would be parties will get information on whether their dispute is suitable for mediation, eligibility of legal aid, the advantages of mediation over litigation and why it may be worthwhile to spend some money to mediate which still could be cheaper and less stressful than courts in suitable cases. The pre-LASPO statistics[976] clearly support this finding.

[969] Ministry of Justice, 'Family mediation scheme to help thousands more parents' (16 January 2022) available < https://www.gov.uk/government/news/family-mediation-scheme-to-help-thousands-more-parents> last accessed 29 May 2022.

[970] Ibid.

[971] MOJ, 'Family mediation scheme to help thousands more parents' (n 969).

[972] Family Mediation Survey 2019 (n 859).

[973] Ibid.

[974] see fn 969.

[975] Family Mediation Survey 2019 (n 859).

[976] See subsection 4.3.2.1 above.

4.3.3.7 MIAM requirement for other civil disputes to increase awareness and uptake of ADR

This chapter observed that MIAM has great potential to educate parties about and divert more suitable cases to ADR. Educating parties about ADR has been the centre of attention of the academics, judiciary and policymaker which has been echoed in academic articles, civil justice reform reports and government policy papers as discussed throughout this entire thesis. It is acknowledged some progress has been made, but still, there is a severe lack of awareness of ADR among ordinary people. Hence, this study proposes that the MIAM requirement could be extended to civil disputes with the necessary amendments this study has proposed (e.g., requiring both parties to attend). Recently the Scottish government has proposed new legislation that makes mandatory MIAM for all civil disputes.[977] Under the bill, when a civil case is issued at the court, unless the case relates to an issue excluded from the Bill,[978] the parties will be issued with a self-test questionnaire to enable them assessing the suitability for mediation. Additionally, a duty mediator will then be appointed by the court who will meet the parties (akin to MIAM) to discuss their matter further and whether the parties are willing to proceed to mediation. [979]

The issue of introducing MIAM in other civil procedures was examined by the CJC in their recent report on ADR[980] and the CJC warned that MIAM was not 'appropriate for the diversity of civil cases and the nature of undefended money claims meant MIAMs would not work'.[981] This study recognises that it would increase costs to the parties if they are required to attend a MIAM and put all the efforts into a case that actually be undefended. Hence, the most important issue is to consider funding for the MIAM and its sustainability. It is observed that the low uptake of MIAM is partly due to the limited availability of legal aid, and the government has not shown any sign to reverse that position. Hence, requiring parties to attend a civil MIAM and pay for it is likely to

[977] Mediation (Scotland) Bill 2019, p16.

[978] For example, proceedings related Abusive Behaviour, Sexual Harm, Domestic Abuse, rape, declarations of validity or dissolution of marriages etc.

[979] Stage 1 of the proposed bill.

[980] CJC Final Report (n 2).

[981] Ibid.

suffer the same fate as the family MIAM unless publicly funded which may not be possible and not sustainable. After considering all the issues, this study recommends running a pilot of civil MIAM at stage 2 of the OCMC for parties who chose to opt out of the telephone mediation. Currently, there is an opt-out mediation pilot running at stage 2 of the OCMC where parties are automatically referred to Small Claim Mediation Service unless they opt out. Importantly, under the pilot, the defendant is required to tick a box to express his intention to mediate. If a party decides not to consider mediate, he can just tick "no", but he is not required to provide reasons for opt-out. Indeed, more than 72 percent of litigants opted out of the mediation pilot.[982] Hence, requiring them to attend an online MIAM would be beneficial to educate them about ADR and probably persuade them to undertake ADR. This would also address the concern raised by CJC about putting too much effort into a claim which is going to be undefended because, at this stage, the defence would be filed. Also, parties would have already paid court fees which would cover the MIAM. Additionally, if the MIAM can be provided via an automated online portal, then it would involve low/no costs as it will not involve the court's staff. This is further discussed in chapter 5 below.[983] This study recommends for the MIAM to run a pilot basis in small claim disputes in the OCMC, and based on the result, it could be a permanent feature of the OCMC. If the pilot is successful in encouraging parties to early settlement through ADR, introducing such a mechanism at the pre-issue stage of the OCMC could be considered. The government, in their consultation paper 2012, acknowledged the lack of knowledge on ADR and stated:

> [H]owever it is recognised that there remains a lack of knowledge about the use of ADR and mediation as a mechanism for resolving disputes. It is therefore proposed that we should assess the effectiveness of mediation information delivered by various means, including telephone, face-to-face, web and hard copy formats at various stages of the pre and post issue process.[984]

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[982] K Greenidge And S Liddiard, Online Civil Money Claim (Presentation at the HMCTS Public User Event 05 November 2020) <https://www.youtube.com/watch?v=oLIyhgb6cyM&list=PLORVvk_w75PzeIYHwTWA5KBuWwcMc-y7g&index=6&t=881s> last accessed 07 June 2022.

[983] See subsection 5.2.4.2.

[984] MOJ, *Solving Disputes in the County* Courts (n 156) para24.

The above statement was also echoed in Briggs LJ's interim report on Civil Court's Structure Review, where his Lordship referred to the small claims which are often conducted by LIPs and opined that introduction of civil MIAM in these cases worth considering further,[985] but it has not happened yet. It is noted above that due to lack of funding, the number of LIPs is on the rise. Small claim cases tend to be conducted by LIPs due to the restriction on the recoverability of costs. However, many of these cases are suitable for ADR and can be settled quickly and at a proportionate cost.[986] As the LIPs are not contacting their lawyers, they are unaware of the ADR process. Hence, introducing MIAM in small claim cases could be a real benefit for the parties. An important finding of the 2012 consultation paper is that compulsory MIAM could be beneficial for the parties in court[987] which has been reaffirmed by the government in their recent consultation paper.[988] Hence, this study recommends the pilot run at stage 2 of the OCMC. But there should be some opt-out, such as on the point of law, already attended ADR but failed, the need for an injunction, and there are limitation issues as it is acknowledged that not all civil cases are suitable for ADR.

4.4 Small Claim Mediation Service

ADR is encouraged in England and Wales even after the parties resort to formal litigation. The Small Claims Mediation Service (SCMS) is an example of ADR after the issue of a claim (valued up to £10,000) which is court-annexed and operate after issuing a claim and defence is filed. In practice, once a claim is issued and defence is filed, the parties are required to complete and file an allocation questionnaire in accordance with the case management under Part 26 of CPR as part of the overriding objective. In the questionnaire form,[989] all the parties are required to state whether they want to try to settle their dispute at this stage. If both parties agree, then the SCMS process starts, which is discussed next.

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[985] Briggs LJ Interim Report (n 25) para 11.21.

[986] CJC, *The Resolution of Small Claim Disputes* (n 124).

[987] MOJ, *Solving Disputes in the County* Courts (n 156) para184.

[988] MOJ Consultation on ADR (n 118) p10.

[989] The form can be found at https://www.moneyclaimsuk.co.uk/PDFForms/N150.pdf.

4.4.1 Small Claim Mediation Service process

SCMS is conveniently provided over the telephone by trained mediators for claims valued up to £10,000 free of costs to the parties. Importantly, in a claim started in the county court that would normally be allocated to small claim track (valued under £10,000) the court will refer the claim to SCMS operated by Her Majesty's Courts and Tribunals Service (HMCTS) if the parties indicate on their directions questionnaire that they agree to mediation.[990] Notably, the SCMS is also operating in the new OCMC for cases valued up to £500.

The SCMS is generally carried out over the phone by well-trained civil servants; however, they are not legally qualified. The SCMS offer a one-hour free telephone mediation. Initially, the mediators call the parties separately to obtain details on the background of the claim and defence which is known as shuttle mediation to discuss their disputes in order to reach a suitable solution for the parties.[991] The mediation session itself lasts an hour. The mediator then calls each party separately to get their views as to any arguments raised, and obtain further settlement offers a resolution to their claim is found and agreed. If a settlement is reached, the mediator will write it down in form of a Tomlin Order.[992] The terms and contents of the order if confidential and cannot be used as evidence subsequently in a Trial.[993]

4.4.2 Assessments

4.4.2.1 The success of SCMS process in resolving civil disputes

Having started its journey in 2007, the SCMS is now being used nationwide. The scheme saw huge success in settling civil disputes, and the settlement rate is around 60-

[990] CPR r26.4A (1)-(4).

[991] *A Practical Approach to ADR* (n 3) p42; Briggs Interim report (n 25) [2.30]; Prince, 'Encouragement of mediation' (n 191).

[992] It is a type of consent order whereby the parties agree to the terms of the settlement and proceedings are stayed.

[993] P Gardner, 'Small Claims mediation - make the time or waste of time?' (2015) https://www.lexology.com/library/detail.aspx?g=8826b7b1-bcaf-4011-9938-41efec0ab9ea.

65 percent.[994]Also, parties are very satisfied with the service.[995] Importantly, over 65 percent of the reach a settlement on the same day, and further cases settle before the hearing there were mediated but were not settled.[996] The scheme is very popular amongst litigants because of the practical benefits it provides to the litigants; i.e. the process is free of cost to the parties, it is conducted conveniently over the phone which helps the parties to join the process from anywhere and save the journey to the court, and it is fully confidential.[997] Moreover, resolving disputes through SCMS has other benefits such as there is no risk of costs and litigation risks. Notably, Small Claims cases can sometimes be expensive and time consuming, and in accordance with rules in place any costs other than Court fees and some fixed costs are recoverable regardless of the outcome.[998]

4.4.2.2 The impact of lack of mediators on the SMCS

Despite being highly successful, there is a lack of mediators. The mediators have impressive success rate in 60-65 percent of the cases referred to them.[999] However, the number of mediators (currently stands at 28) is nowhere near enough to meet the demand.[1000]

With the civil justice system is expanding, and cases are being referred to mediation from different entry points, County Court Money Claims Centre (CCMCC), Money Claims Online (MCOL), OCMC pilot referrals and judicial referrals, the lack of mediators is a burning issue. Evidence shows that the vast majority (94 percent) of the cases are pre-allocation with approximately 15,000 mediations being conducted annually.[1001] According to existing studies, despite the huge demand, less than half of parties requests for mediation are allocated to a mediation appointment due to the lack

[994]CJC, *The Resolution of Small Claims* (n 124) para55.

[995] Faulks Keynote Speech (n 354).

[996] Vos, 'Speech at Hull University's Mediation Centre' (n 125).

[997] Cortes, 'Making Mediation an Integral of The Civil Justice System' (n 62).

[998] Gardner (n 941).

[999] CJC, *The Resolution of Small Claims: Interim Report* (n 124) para 55.

[1000] Ibid, para 54.

[1001] Ibid, para 46.

of mediators.[1002] Existing studies show that while the number of cases going for mediation is high, there is not enough mediators to deal with these cases (only 35 to 40 percent of the national demand).[1003] The obvious result is that some cases are going back to the local hearing centre as defended cases as those cannot be settled within 28 days of referral due to lack of capacity of the mediators.[1004]

The lack of resources within the service is well established. Currently, there are 28 mediators (with 20 support staff)[1005] however, the number of mediators is still significantly low compared to the number of cases referred to the scheme (in March 2019, 39095 cases were referred).[1006] This lack of mediator was recognised in the CJC report on ADR,[1007] and they specifically recommended (number 12) that small claims mediators and the SCMS should be fully resourced.[1008] In this regard, the MOJ pledged to raise the number of mediator[1009] , but no significant improvement has taken place to date, which is evidenced in the latest report by the CJC Working Party.[1010] The effect of the low number of mediators is obvious, with more than half of the cases referred to mediation did not receive an appointment in the past years. Hence, all the District Judges consulted by the CJC expressed concern about the lack of resources at SCMS and reported complaints by litigants about not getting an SCMS appointment despite their intention to mediate.[1011]

4.4.3 Further measures to improve the current practice

This study observes that the SCMS model is highly successful but under-resourced. As such, it is recommended that the policymakers should look into this issue with utmost priority and work with the HMCTS to ensure that all parties who requested an

[1002] Ibid. Briggs Interim report (n 25) paras. 2.30 and 2.90.

[1003] Ibid.

[1004] Cortes, 'The Promotion of Civil and Commercial Mediation in the UK' (n 45) p15.

[1005] CJC, *The Resolution of Small Claims* (n 124) para 54.

[1006] Briggs Interim Report (n 25) [2.30], Brigs Final Report (n 25) para 2.15.

[1007] CJC Final Report (n 2) para 4.13.

[1008] Ibid para 9.12; Also, CJC, *The Resolution of Small Claims* (n 124).

[1009] see https://committees.parliament.uk/writtenevidence/19449/html/

[1010] CJC, *The Resolution of Small Claims* (n 124) para 54.

[1011] Ibid, para 56.

appointment for SCMS receive an appointment before reaching he court. The SMCS is now also providing service to the opt-out mediation pilot in the OCMC as such the success of the pilot is also dependant on the SCMS. Thus, the government should actively consider further investment schemes. As the CJC in their recent report concluded, 'Continued and, if possible, increased funding and support for the Small Claims Mediation scheme is absolutely vital'.[1012]

4.5 Conclusion

Upon analysis of the MIAM, ACAS EC and SCMS, this chapter found that while some of these measures have seen some success in increasing settlement rates, the overall number of cases going for ADR is not satisfactory as hoped by the policymakers. This chapter noted that the probable reasons for the unsatisfactory performance of these existing mechanisms are lack of awareness, gaps in the current law (e.g., only claimants are required to attend the MIAM, not the respondent), lack of enough judicial check and procedural mechanism (e.g. costs sanction) are the main ones.

The above findings led this study to conclude that it would be effective to incentivise the existing mechanisms to encourage more parties to resolve their disputes through appropriate methods of ADR. In family disputes, the introduction of a new voucher scheme, albeit temporarily, is likely to incentivise couples to attend MIAM and mediation and the latest data, albeit limited, shows a promising success. The scheme should cover the MIAM session because it is the first step of the family mediation and could be a permanent one. At the same time, raising awareness is equally important for the parties to make an informed decision whether to go for ADR or litigation. In this regard, mediators, lawyers and judiciary can play an important role because they are in a position to educate parties about the benefits of ADR over litigation and the consequences of crystallising a dispute into a claim and dragging it further down the expensive and lengthy courts.

This study recognises that while positive incentives and education are effective to encourage litigants to undertake ADR, sometimes these are not enough, as observed in

[1012] CJC Compulsory ADR (n 141) para 115.

this chapter. Therefore, to increase uptake of MIAM and conversion to full mediation, this study recommends amending the Children and Families Act 2014[1013] and relevant Family Procedure Rules or introduce new legislation requiring the defendants to the MIAM with a mediator which could be really helpful to educate parties and divert more suitable cases to mediation. Because research shows that when both parties attend the MIAM, the conversion rate to full mediation increases significantly (about 75 percent).

Moreover, as civil justice is expanding, the use of costs sanction has become more relevant, and research shows that when parties are signposted to specialised mediation services with the background threat of costs sanction, parties are more likely to engage and settle in mediation. As such, costs sanction in appropriate cases should be used consistently. However, the problem with this approach is that cost sanctions do not work well in small claim cases due to restrictions on the recoverability of costs or LIPs. Notably, most of the civil cases are low value (valued up to £10,000) that comes before the court (about 90 percent) and the number of LIPs is on the rise. As such, this study recommends the use of costs sanction in appropriate cases, which must be proportionate subject to enough safeguards as described in chapter 2.

This chapter identified that MIAM plays an important role in educating parties about mediation and defining appropriate cases that are suitable for ADR. As such, MIAM has the potential to be extended to other areas of civil disputes. It would be good to run a pilot on small claims cases at stage 2 of the OCMC. Additionally, this chapter notes that in employment disputes, MIAM type information will be really helpful. Currently, the claimants are only required to notify ACAS about their intention to lodge a claim, but they are not required to engage with the case officer to discuss the EC process like MIAM which is partly responsible for the low uptake of the EC process. Hence, this study recommends introducing new regulation/amending the existing regulation requiring the parties to attend an information session with the ACAS case officer. The service provided by ACAS is free and efficient; hence there may not be any issue with the Article 6 rights as argued in chapter 2.[1014]

[1013] Section 10 of Children and Families Act 2014.

[1014] See subsection 2.3.4.

Perhaps the most surprising finding of this study is that there are highly successfully ADR mechanisms already exists, such as the SCMS in civil courts and FDR in family courts in England and Wales but they are seriously under-resourced, which has been echoed in recent civil justice reform reports. The reason for the underfunding is not clear, but it does not sit comfortably with the government's pledge to promote ADR. As such, this study invites the government to give urgent attention to this issue and make sure these mechanisms are properly resourced.

It is also recommended to streamline the ADR process online, which will make it more accessible and will attract wider users of litigation to the ADR process. Obviously, there will be some groups (i.e., vulnerable users) who may not be comfortable with the ODR processes, but that should be the sole reason for holding us back. Instead, it would be better to have inbuilt support for the most vulnerable users. Internet and innovative technologies have transformed almost every aspect of our life, and the same should be applied in dispute resolution systems. This study recognises there will be difficulties (e.g., dealing with various and unique types of cases and referring to appropriate mechanisms) in streamlining the ADR process, but additional measures can be taken to overcome the possible difficulties which are examined in the next section where it is most relevant.

Finally, this study acknowledges that in order to increases the uptake of ADR, an effective court system is needed. In the absence of a background threat of a functioning court system, parties will not mediate. This chapter notes that the lack of proper judicial checks is partly responsible for the low uptake of ADR. It is recommended that judges should actively encourage parties to consider ADR in appropriate cases in furthering the overriding objective. They should exercise their powers conferred by CPR and FPR to ensure that parties comply with the statutory requirements (e.g. attending MIAM and notification to ACAS EC) and give maximum effort to resolve their disputes via non-court dispute resolutions, including ADR. Additionally, when parties are found to be unreasonable in refusing to consider ADR despite repeated encouragement in different stages of the dispute cycle, then judges should not hesitate to impose appropriate and proportionate penalties.

This study notes that the government, in a further effort to promote ADR introduced the new OCMC to make the justice system accessible and affordable with ADR embedded into the heart of the justice system. This is a great step in the time of austerity, and it could be the perfect platform for signposting and channelling suitable cases to the appropriate method of ADR which is discussed next.

Chapter 5: The Online Civil Money Claim – embedding mediation and ADR into the judicial process.

5.1 Introduction

Chapter 4 noted while the existing mechanisms saw some success in increasing settlement rates in ADR, the number of cases going for the full ADR process is not that satisfactory. As such, there is a need for further initiatives to make ADR culturally normal and channel more cases to ADR. In an attempt to make litigation more affordable and make ADR culturally normal, Briggs LJ came up with the proposal for a new Online Solutions Court to deal with the majority of civil disputes of low and medium value up to £25,000 with ADR embedded to it.[1015] Like any other new idea of the government, the idea of the Online Solution Court has sparked a substantial debate among the judiciary, ADR providers and academics that are examined in detail in this chapter as it is a new court process that for the first time introduces an ADR stage that is considered for all the defended claims.

The Online Solutions Court has been renamed as Online Civil Money Claim (OCMC), and it is informally known as the Online Court (OC).[1016] The OCMC is a simplified civil procedure designed to operate entirely online to make it more accessible and affordable using modern technologies and embedding ADR techniques for the litigants as proposed by the Civil Justice Council[1017] and JUSTICE.[1018] Chapters 3 and 4 noted that making ADR accessible online is likely to encourage more parties to use the process. Also, streamlining the process would make the process quicker and costs less which will further the overriding objective under CPR. This is particularly more important when dealing with small claim cases. Notably, small claims (are valued up to £10,000) makeup of the large majority of claims (77.8 percent) determined at final hearings in the civil courts.[1019] Evidence suggests that the courts often spend

[1015] Briggs Final Report (n 25).

[1016] P Cortés and T Takagi, 'The Civil Money Claim Online: The Flagship Project of Court Digitalization in England and Wales' (University of Leicester School of Law Research Paper 2019).

[1017]CJC ODR Report (2015) (n 144).

[1018]JUSTICE, *Delivering Justice in an Age of Austerity* (April 2015).

[1019] CJC, *The resolution of small claims: Interim Report* (n 124).

disproportionate number of resources dealing with these cases.[1020] Hence, the introduction of OCMC which is designed to deal with small and medium value cases up to £25,000 quickly and cheaply, is likely to make the justice system more accessible. Chapter 1 of this thesis noted that ADR is suitable for the majority of civil cases and using ADR in suitable cases has proven to be less expensive and quicker. Thus, this chapter seeks to identify whether it is high time to re-evaluate the role of ADR, in particular mediation, in resolving disputes, especially low-value claims, because a simplified process is more proportionate to the value of the dispute. It is hoped that the OCMC will reduce the costs of litigation, and litigants will be able to use the service without lawyers.[1021] Whether the OCMC would be cheaper than the traditional court and would provide easy access to justice is examined in this chapter.

Thus, this chapter critically examines the OCMC as the OCMC, in particular stage 2, is very significant because of its emphasis on ADR. It is hoped to bring a cultural change as ADR emerged as an alternative to the court and with the OCMC, ADR is seen as part of the justice process. Thus, this chapter critically analyses the stages of the OCMC and tries to find how the OCMC will promote out-of-court settlements. In doing so, the chapter seeks to identify what impact this may have on the dispute resolution landscape in particular ADR, why this is important and whether it may bring about a change in awareness of ADR or perception of its value. More importantly, this chapter will assess the impact of ODR on access to justice (less default cases) and how technology/ODR could facilitate access and promote settlement. This chapter also examines whether the OCMC can be a solution to the problem the civil courts are currently facing, i.e., high costs.

5.2 The Online Civil Money Claim

The OCMC is designed in a way to provide the litigants, especially those who are LIPs, easy and affordable access to the justice system. The idea is that it will deal with low and medium-value cases (valued up to £25,000) using mainly online technology once

[1020] Ibid, para 92.

[1021] Briggs Interim Report (n 25).

fully operational.[1022] It started its soft launch (valued up to £10,000) on a pilot basis in March 2018. The HMCTS has reported more than 200,000 claims have now been issued since the OCMC launched on a pilot basis in 2018. The average time to settle a case using the OCMC is 5.2 weeks, compared to 13.7 weeks using our non-reformed services. Also, user satisfaction is quite impressive (around 91 percent).[1023] In order to make the OCMC more accessible, it is divided into three stages: (I) Stage 1: parties are required to fill in their claims forms and responses, and they can exchange "without prejudice" offers with a view to settle their claim; (ii) Stage 2: Telephone mediation via Small Claim Mediation Service and case management decisions by legal advisers (up to £300 under the pilot scheme) where parties do not settle in mediation and require determination by a judge, and (iii) stage 3: determination by a District Judge. These stages are better explained by examining those.

5.2.1 Stage 1: Issue of a claim and without prejudice offers to settle

This stage operates online and is designed to help parties to fill in an online claim form and send responses electronically. Besides, this stage is intended to promote early settlements.[1024] The claimants are required to upload documents online in support of their claim and exchange information with the prospective defendants and defendants are required to respond via the online platform. Stage 1 is currently being piloted[1025] and has been successful in attracting a significant number of claims (over 200,000 since its launch in March 2018) that had been issued using the new system with a high user satisfaction (around 91 percent).[1026] The pilot has recently been extended to run until 30 November 2023.[1027]

[1022] Ibid.

[1023] See https://www.gov.uk/guidance/hmcts-services-online-civil-money-claims.

[1024] CJC Interim Report (n 2) p70.

[1025] See https://www.gov.uk/make-money-claim.

[1026] See HCMTS Reform update at https://www.gov.uk/guidance/hmcts-services-online-civil-money-claims.

[1027] See https://www.gov.uk/government/publications/practice-direction-update-130-civil-procedure-rules-51r-and-51s.

This stage, as it currently stands, provides information about mediation; offers help to those who lack technical knowledge via Assisted Digital in filling the application forms,[1028] and it assists parties to make "without-prejudice"[1029] offers to settle their claims. These functions of the OCMC are discussed in greater detail below.

5.2.1.1 Without prejudice offers to settle

The OCMC allows parties to settle claims without the need for any third-party involvement by making and accepting "without prejudice" offers online. This option is offered in all defended claims. If the parties agree to a settlement, the new system drafts a settlement agreement to settle the case. Without prejudice offers to settle is designed in a way that parties can explore early settlement options by exchanging settlement offers without fearing that the conversations could be used against them in the event the matter goes to court. The HMCTS reported about 200 settlements had been reached using this negotiation tool since the launch of the new system until June 2019 among the 26,000 defended claims during that period.[1030] Although data shows only 200 settlements had reached, there is no data on how many litigants actually used the service. Also, it is also important to note that 44,000 requests for default judgement were made during that period.[1031] One probable reason for the low uptake could be down to lack of awareness and incentives the parties have in the new system. This is a new process (currently in beta) and may not be widely understood among LIPs. Also, unlike the part-36 offer,[1032] there is no costs consequences for rejecting a without prejudice offer to settle embedded into the OCMC. Another drawback of this tool is that it is not available before the issue or after stage 1.

5.2.1.2 Educative function

[1028] HMCTS, 'Helping people to use online Services' (June 2018). Available at <https://insidehmcts.blog.gov.uk/2018/06/28/helping-people-to-use-online-services/>.

[1029] Statements made in the settlement negotiation are not admissible at court as evidence.

[1030] HMCTS Reform Update (Summer 2019).

[1031] T Etherton MR, Rule-making for a digital court process' (speech at the Civil Procedure Rules– 20th Anniversary Conference Mansfield College, Oxford, 10 June 2019) https://www.judiciary.uk/wp-content/uploads/2019/06/mr-oxford-cpr-conference-june-19.pdf.

[1032] See subsection 2.2.1 for details.

While the new OCMC pilot programme, currently in beta, has been successful in attracting a large number of litigants (over 200,000 claims issued)[1033] to issue claims online. Currently, stage 1 is divided into two parts, part 1 and part 2. Part 1 provides only limited information about mediation via link to Civil Mediation council, not other ADR options, which is limited to its definition and not enough to educate or persuade litigants to mediate let alone LIPs.[1034] CJC Working Party, in their recent report, highlighted the insufficient and unclear information provided to the litigants and stated that that, 'Despite the availability of a new online processes, OCMC, the Working Party is concerned that some litigants in person still cannot follow some on the instructions given and struggle with some of the languages used'.[1035]

5.2.1.3 Assisting LIPs with technology (Assisted Digital)

It is important to note that stage 1 is fully online and require minimum skills to understand the information and fill in the form online. It is argued for the OCMC to be successful, the design of the OCMC must be truly accessible for all litigants include those who have basic or no IT skills at all.[1036] According to the Ministry of Justice, 18 percent of the population is not able to or choose not to use digital services due to lack of IT facilities, IT skills and low motivation.[1037] Notably, the government has introduced 'Assisted Digital Services' to help digitally challenged people. The HMCTS has partnered with a charity, the Good Things Foundation to deliver face-to-face assisted digital service.[1038] However, in the Justice Select Committee meeting,[1039] it was reported that the uptake of Assisted Digital is not satisfactory because of its low awareness levels. The issue was also highlighted in the recent Justice Select Committee

[1033] Vos, 'Recovery or Radical Transformation' (n 125).

[1034] M Ahmed, 'Moving on from a judicial preference for mediation to embed appropriate dispute resolution' (2019) 70 (3) NILQ 331–354, 350.

[1035] CJC, *The Resolution of small claims* (n 124) para110.

[1036] Cortes, 'Filling the gaps' (n 107).

[1037] Ibid.

[1038] Reform Update (n 1030) 24.

[1039] Justice Committee, *Court and Tribunal reforms* (HC 2019, 190-II) para 39.

Meeting[1040] and in the report by the Civil Justice Council and the Legal Education Foundation.[1041] Arguably the traditional courts provide better assistance to litigants through court kiosks and court clerks than the current OCMC. As such, the current OCMC design does not take account of the need for all users, which undermines the main aim of the OCMC, i.e., provide easy access to justice to LIPs.

5.2.2 Further steps to improve the practice

It can be noted from the above discussion that the current structure of the OCMC has some shortcomings. Arguably the OCMC represents a replica of the traditional court online. In order to make the OCMC effective, this study recommends the following steps to be taken:

5.2.2.1 Educating litigants about ADR before they issue a claim

To encourage pre-action settlements, it would be better to include an educative and softer pre-action protocol function at stage 1 before a claim is issued. The educative stage can play an important role in educating litigants about ADR and litigation. As this stage will be fully online, it will not involve courts staff and will not incur costs. It is argued 'if the parties do receive an explanation of the alternatives to court the majority will take the'.[1042] Hence, education about ADR should be viewed as wider public legal education.[1043] In the educative stage, there should be specific information about mediation and other types of consensual ADR options (e.g. ENE); what ADR has to offer over litigation; list of certified ADR providers with links; the consequences of escalating a claim further; risk of possible costs consequences and where parties can get further free advice[1044] and ADR services.[1045] Apart from consolidated information about different types of ADR, there should be some video demos on how the ADR processes

[1040] Justice Committee, *Coronavirus (COVID-19): The impact on courts* (HC2019-21, 299-VI)) para 41.

[1041] N Byrom, S Beardon and A Kendrick, *The impact of COVID-19 measures on the civil justice system: Report and recommendations* (May 2020) p10.

[1042] CJC Interim Report (n 2) para6.16.

[1043] CJC, *Compulsory ADR* (n 141) para116.

[1044] For example, the "Advice now" website at https://www.advicenow.org.uk/tags/small-claims.

[1045] Ahmed, *Mediation Act for Scotland* (n 760) p19.

work and how it differs from the formal court process. Hazel Genn, in a recent Select Committee Meeting,[1046] explained the usefulness of video demos, 'It may be that over time we can produce good videos and YouTube things; I learned how to fix my dishwasher the other night by looking at something on YouTube, so we can all learn things from watching how they are done'.[1047] It can be noted CRT in British Columbia provides video demos for the litigants, which has been proven helpful for the parties to understand the process better.[1048]

It inevitable that there will be many digitally disadvantaged and the vulnerable parties will use OCMC, but this factor cannot be a bar to the development of innovative systems that can be accessed by most litigants.[1049] Instead, it would be better to make sure digitally disadvantaged and vulnerable people are not left behind. Assistance should be readily available to help parties who lack IT skills, have no access to the internet or are illiterate. The OCMC should incorporate clear and sufficient information about the available help, such as how and where to get help and links to charitable organisations at the start of the process in the current structure of the OCMC.

5.2.2.2 Triage

The intention of the policymakers is to design the OCMC in a way so that LIPs can use it without/minimal help from their representative. Hence there is a need for a triage or diagnosis tool to be incorporated at this stage as LIPs may not be able to identify correctly if they have a dispute or what they actually want (e.g., they simply need to seek enforcement). An effective self-diagnosis tool may help the litigants to seek the resolution of their disputes before triggering the OCMC process.[1050] This tool will help

[1046] Select Committee on the Constitution, Corrected oral evidence: Constitutional implications of Covid-19 (Wednesday 3 June 2020) available at <https://committees.parliament.uk/work/298/constitutional-implications-of-covid19/publications/oral-evidence/>.

[1047] Ibid.

[1048] S Salter, 'RDO speak to Shannon Shalter about all things ODR' (November 2019) <https://resolvedisputes.online/blog_shannon_salter.html>.

[1049] Vos, 'Recovery or Radical Transformation' (n 125).

[1050] CJC ODR Report (n 144) para. 6.2.

users to define their problems or where there is any problem at all and understand their positions and the options available to them. Hence this tool will provide information and diagnostic service and should be free of costs. It would be better to provide links to valuable online legal services such as "AdviceNow"[1051] helps users with their legal problems. This online evaluation will help litigants to better understand their position who think they may have a problem.[1052] Lessons can be learned from Civil Resolution Tribunal (CRT) Solution Explorer,[1053] which operates fully online and is designed to provide free information and advice to litigants. The Solution Explorer is an online diagnosis tool that asks some interactive questions to classify the dispute concerned and based on the information, provides free legal information, including ADR options and appropriate application form should they wish to go ahead with the claim. The CRT boasts that the bulk of their users do not proceed to the next stage of online negotiation, and according to the latest statistics,[1054] there were 105,461 case explorations in January 2020, and only 15,080 disputes (14 percent) proceeded to the next section, which highlights that people do want to resolve their disputes among themselves, but there is a lack of advice in lay language that can help them to decide what to do.[1055] When designing such online tools, particular attention should be the need of all users, not only people with legal knowledge. The questions should be asked in plain language; otherwise, it will not be helpful for the LIPs.

5.2.2.3 Facilitate negotiation between parties at pre-issue and post-issue

The current structure of the OCMC offer a negotiation tool only after issuing the claim, and defence is filed at stage 1 which has not been that effective as discussed above.[1056]

[1051] See at https://www.advicenow.org.uk/.

[1052] CJC ODR Report (n 144) para6.2.

[1053] The portal can be accessed at https://civilresolutionbc.ca/how-the-crt-works/getting-started/small-claims-solution-explorer/.

[1054] CRT Statistics Snapshot – January 2020 (February 2020) <https://civilresolutionbc.ca/crt-statistics-snapshot-january-2020/>.

[1055] S Salter, 'Dispute Resolution in the Digital Age: An introduction to the British Columbia Civil Resolution Tribunal (CRT)' (Innovations in Technology Conference, Portland Hilton Downtown, 15-17 January 2020) https://lscitc2020.sched.com/event/Y03z/welcome-and-opening-plenary-with-john-levi-jim-sandman-and-shannon-salter.

[1056] See subsection 5.2.1.1.

It would be better to incorporate this tool at the pre-issue stage of the OCMC, and it should be designed in a way so it can work as an online mediator by facilitating online negotiations between the parties and help them to reach a solution suitable to their dispute. Notably, technology-mediated software is already being used in England and Wales to promote early settlements that avoid expensive and complex court litigation. In this regard, a number of pre-action protocols[1057] now require prospective litigants to explore a settlement via an online portal before they are allowed to escalate their claims to the court. These pre-action processes are increasingly supported by ODR platforms that facilitate the negotiation between the parties and their legal representatives. Two important initiatives in this field in England are the Claims Portal for personal injury claims from road traffic accidents and the new Whiplash Portal for low-value personal injury claims also resulting from road traffic accidents. The RTA portal acts as an online mediator and provides parties with the necessary information to conduct their negotiations online in good faith to reach an early settlement to their dispute.[1058] The Whiplash Portal, launched in May 2021, seeks to reduce fraudulent cases, resulting in a reduction of vehicle insurance premiums. Under the new protocol,[1059] before initiating a claim at court, the claimant must share provide certain information via the online portal, and the defendant's insurer must make a settlement offer within a set time frame in cases where liability is admitted. The new Portal is free of costs, and it can be used by claimants with minor personal injuries when the compensation sought is under £5,000 for personal injury and up to £10,000 for other losses, such as loss of earnings or damages to the vehicle.[1060] Unlike the Claims Portal, the Whiplash Portal processes claims where liability is disputed, and notably, it allows parties to refer an element of the claim to the court (say liability), the court will review the evidence entered by the parties in the Portal and will adjudicate the element of the dispute after a hearing. Once the contested issue is resolved, the case will resume in the Portal so that the parties can reach a settlement.

[1057] PD27B, paragraph 2.16(2).

[1058] E. Katsh and C. Rule, 'What We Know and Need to Know about Online Dispute Resolution' (2016) 67 South Carolina Law Review 329.

[1059] Ibid.

[1060] See MIB, Official Injury Claim. Available at <https://www.mib.org.uk/managing-insurance-data/mib-managed-services/whiplash-reforms-programme>.

In their recent report,[1061] CJC the Working Party noted that LIPs rarely engage in adequate pre-action correspondence and discussions. This is understandable as LIPs may not know the existence of the Practice Direction- Pre-action conduct and protocols (PAP). Also, research[1062] shows that parties incur most costs (front-loading of costs) when they pay for legal representation in order to comply with the pre-action correspondences (e.g., contacting a lawyer and corresponding with the other parties). One way to simplify the process would be to provide clearer signposting within OCMC to the PAPs.[1063] However, this option may not be helpful for LIPs who may not understand the legal language used in PAPs without the help of their lawyers. Instead, the litigants should be provided with an easy-to-understand guidance on how to draft a pre-action letter and respond.

It is possible to have an inbuilt system at the stage of the OCMC where parties can simply put some information, and the automated system would produce a letter that could send to the respondent electronically. Lessons on how to design and embed such a tool can be learned from the existing online portal such as Which?[1064] The online portal provides service for different types of claims and asks some interactive questions and, in the end, produces a claim letter to be sent to the other party for a response and the whole process takes about 5 minutes. The letter is sent electronically to the other party containing instructions on how to respond. The mechanism is followed in the Resolver platform discussed in chapter 3.[1065] This advance notice to a party would be helpful in preventing a dispute from crystalising into a claim and escalate further down the court. Once the response is received from the defendant, the parties would be in a better position to make an informed decision about considering ADR, and easily accessible guidance should set out the advantages of ADR at this stage, and parties should be presented with online negotiation tools or links to existing ADR providers. In this way, stage 1 could be used in effect as the replacement of the pre-action protocol. In a similar vein, it could be argued that the issue of "front-loading of costs" associated with pre-

[1061] CJC, *The Resolution of Small Claim* (n 124) para108.

[1062] Jackson Final Report (n 2).

[1063] Paragraphs 6 (a), (b) and (c) of this PD set out quite clearly the expectation of the court in relation to a pre-action letter and information and response.

[1064] The portal can be accessed at https://www.which.co.uk/tools/flight-delay-cancellation-compensation/.

[1065] See subsection 3.5.2.

action protocols will not be an issue in the OCMC as this stage will be automated and will not use the court's resources, it will not cost to the court.

There should be built-in bypass options for those with legal representation or who have already tried mediation but failed to settle. However, the bypass option, if implemented, for parties with legal representation, assuming there will be many, will allow them to escape most of this stage which in effect will give them the excuse to justify their refusal to consider mediation at an earlier stage. To avoid this from happening, a mandatory requirement for legally represented parties to provide the particulars of the claim and a justification for not using ADR should be embedded in the OCMC, and this would be helpful for the judges to decide whether the refusal was unreasonable. The obligation to justify reasons for refusal to use ADR is likely to encourage more parties to consider ADR before issuing their claims. Besides, costs sanction should be applied against those with legal representation to discourage them from taking advantage of the bypass option and jumping into issuing claim forms to start the proceeding without providing proper consideration for ADR in the pre-action stage.

5.2.3 Stage 2: ADR stage

This stage includes mediation and simple case management.[1066] The case management for cases valued up to £300 is managed by legally trained legal advisers, and mediation is conducted by the Small Claim Mediation Service. It is hoped that this stage will bring a cultural change in the ADR landscape as it embeds ADR into this stage.

5.2.3.1 A cultural change in the ADR landscape

It can be noted that ADR emerged as an alternative to the court system, but it is now embedded into the court process hence an integral part of the justice system. It is likely to bring a cultural change as people will think of ADR as part of the justice process, not an out of court process. This is a significant culture shift in embracing ADR as part of the civil justice system underpinned by the principle of proportionality. Moreover, the

[1066]Briggs Final Report (n 25) para 6.112.

incorporation of ADR into the court process highlights its importance as the appropriate dispute resolution process.

Notably, OCMC is being developed reflects the structure of the ODR tool called the Civil Resolution Tribunal[1067] that has been introduced in British Columbia in Canada. It is reported that the innovative ODR tribunal is an integral part of justice system and it achieved great success.[1068] Commentators argue that 'in low-value small claims, there are advantages in using an online process that incorporates mediation'.[1069] Online system has the potential shorten the time between the claim and the mediation. Moreover, those cases that do not settle at online mediation can easily be directed to other online resources to prepare for hearing or other settlement options using the innovative technologies.

Chapter 1 noted that the place of ADR has been rather patchy in the civil justice system until now. Indeed, embedding ADR into the OCMC makes it an integral part of the civil justice system, and parties will be required to consider mediation (unless opt out) as part of the justice process. This step is a significant culture shift away from thinking of ADR as an alternative and 'second class justice'[1070] towards accepting ADR as part of the civil justice system. This culture shift recognises that civil disputes can and should be resolved via different dispute resolution mechanisms such as ADRs and traditional court system where ADR is not suitable. It is also indicative of the increasing desire of policymakers to continue to promote ADR as part of the civil justice system. Senior members of the judiciary have also been advocating for increased promotion of ADR to resolve civil disputes, which marks a cultural shift. [1071]

This increased emphasis on ADR as part of the civil justice system and inclusion of the mediation in the OCMC will mean that mediation will be become an integral part of the

[1067] It was created by statue under the Civil Resolution Tribunal Act 2012.

[1068] S Salter and D Thompson, 'Public Centred Civil Justice Redesign: a case study of the British Columbian Civil Justice Tribunal' (2016–17) 3 McGill Journal of Dispute Resolution 113, 135.

[1069] Prince, 'Encouragement of mediation in England and Wales' (n 191).

[1070] Genn, *Judging Civil Justice* (n 51).

[1071] Vos, 'The Relationship between Formal and Informal Justice' (n 125).

justice process.[1072] This formal integration of ADR will allow litigants in low-value cases to navigate through the user-friendly process as they will see ADR as culturally normal.[1073] It is hoped that by placing ADR into the heart of the court system would bring a culture change in civil justice landscape. It can be noted that lawyers are not required to advise their clients about ADRs unless litigants ask for them. In a recent Judicial ADR Liaison Committee meeting,[1074] it was confirmed that the regulatory bodies such as SRA and Bar Standard Board (BSB) confirmed that they would not be amending their code of conduct to place a duty on the lawyers to advise about ADR instead there was a suggestion for lawyer promoting ADR through case studies and materials sent out to solicitors. Nonetheless, with the ADR being part of the civil justice system now, lawyers, including the judiciary will need be aware of ADR process and actively engage with it which is a significant step. Furthermore, the lawyers will now have to explain and advise their clients about the ADR process as part of the structure of the courts and their obligation to consider it at stage 2 or opt out.

People's perception of ADR is well documented in numerous academic papers and civil justice reform reports, as discussed throughout this thesis. Awareness of ADR among the general public is not satisfactory and this is one of the obvious reasons for the low uptake of ADR. They view ADR as an alternative to the court process which has now changed as ADR is now part of the court. This is likely to change the general public's perception of the ADR, and it is hoped that they will think of ADR as culturally normal than before, and the success of the SCMS and FDR support this finding. Additionally, the placement of the ADR within the court process is likely to increase awareness of ADR among litigants, lawyers and judiciary.

5.2.3.2 Telephone mediation

Although it was initially proposed that the legal advisers would provide ADR, it is now provided by the existing SCMS, which is already struggling to meet the demand, as

[1072] 111th Update, Civil Procedure Rules Practice Amendment Update (September 2019).

[1073] CPR Part 27.14.

[1074] The minutes from the meeting can be accessed at https://www.judiciary.uk/wp-content/uploads/2021/06/SUMMARY-MINUTES-March-2021.pdf.

noted in chapter 4.[1075] It is noted that the OCMC will deal with cases valued up to £25000, which comprises 90 percent of cases that come to the courts. As such, a significant challenge for the SCMS would be to meet the huge demand of cases. Chapter 4 found that despite the high success of the SCMS, currently, only around 20 percent of cases where parties request mediation is allocated to a SCMS slot,[1076] but the reasons behind the inability to meet the existing demand remain unclear.[1077]

Currently, stage 2 offer telephone mediation via SCMS as opposed to traditional mediation, where parties come face to face with the mediator. However, there is a concern among commentators that moving mediation online may impact the settlement rates of mediation because mediation is effective when parties come face to face.[1078] There is a concern that the mediation process at stage 2 will lack these important elements of mediation which is likely to hinder the success of stage 2 of the OCMC and will result in reduced trust and rapport.[1079]

5.2.3.3 Opt-out mediation

Currently, an opt-out mediation pilot is running on the OCMC website. In the OCMC, September 2019 an "opt-out" mediation was introduced on pilot basis for defended claims, initially up to £300, then raised to £500. Any claim within this value is automatically referred to mediation unless a party specifically opted out. The recent data published by the HMCTS has provided some mixed results. At the end of 2020, the HMCTS reported that 67 percent of cases in the pilot that went to mediation were settled.[1080] However, evidence suggests that majority of litigants opted out (72.8

[1075] See subsection 4.4.2.2 of chapter 4.

[1076] Briggs Interim Report (n 25) paras2.30- 2.90.

[1077] See subsection 4.4.2.2 of chapter 4.

[1078] J Eisen, 'Are We Ready for Mediation in Cyberspace? (1998) BYU L. Rev. 1305, 1308.

[1079] L Teitz, 'Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of Online Dispute Resolution' (2001–2002) 70 Fordham L. Rev. 985, 1002; N Ebner and J. Thompson, '@ Face Value? Nonverbal Communication and Trust Development in Online Video Mediation' (2014) 2 IJODR 14–15.

[1080] See https://www.gov.uk/guidance/hmcts-services-online-civil-money-claims.

percent) of the process since its launch in September 2019.[1081] These numbers are alarming, and at the time of writing, HMCTS is analysing the reason for the unexpectedly high opt-out rate.[1082]

Under the opt-out system, parties are automatically referred to mediation unless one party expressly opt-out[1083] and they do not need to justify their decision due to low value of the cases under the scheme which is a major drawback of the current structure.[1084] This is another reason for the high opt-out from the mediation pilot. Hence, to make the process effective, policymakers will need to incorporate options for opt-outs.[1085] Parties must be required to give reasons for the opt-out. Another drawback of the opt-out system is that it is not backed by any costs sanction which leaves the process open to misuse by the parties. As noted above, 72.8 percent of litigants opted out of the mediation pilot since its launch in September 2019 until May 2020. As such, commentators argue that to be successful, there should be built-in incentives into the OCMC, and the opt-out system should be backed by some procedural mechanisms otherwise, the parties will use it as a tick-box exercise to proceed to stage 3.[1086]

5.2.4 Further steps to improve the practice

Stage 2 of the OCMC is very important in bringing a significant cultural change in the UK, but there are some shortcomings with the system as currently designed. This study recommends the following steps to be taken to address the problems identified above:

[1081] HMCTS Public User Event (05 November 2020) https://www.gov.uk/government/news/hmcts-heads-online-for-2020-public-user-event .

[1082] K Swann, 'Small Claims Mediation Service (Presentation at the HMCTS Public user Event 05 November 2020) https://www.youtube.com/watch?v=lFHMafBvVxk&list=PLORVvk_w75PzeIYHwTWA5KBuWwcMc-y7g&index=7&t=801s; CJC, *The resolution of small claims* (n 124) para 54.

[1083] D Phillips, 'Courts, Tribunals and Regional Tier'(HMCTS Event, 11 March 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785324/Civil_reform_event_11_March_2019.pdf>.

[1084] Greenidge (n 931).

[1085] Cortés and Takagi (n 1016).

[1086] M Ahmed and D Anderson, 'Expanding the scope of dispute resolution and access to justice' (2019) 38(1) C.J.Q. 1-8.

5.2.4.1 Outsourcing suitable cases to existing specialised ADR schemes

Considering the huge number of cases, the OCMC will deal with, this study suggests that an important policy choice would be to choose between doing the mediation in-house or outsourcing cases to existing certified ADR schemes (e.g. publicly certified ADR entities or ombudsman schemes) which are increasingly specialised and carry out a public service. This study observed that existing successful mechanisms such as the SCMS and FDR are seriously under-resourced. This issue was highlighted in the recent report by the CJC Working Party,[1087] and it was found in a large number (68 percent)[1088] of cases where parties opted-in for the SCMS, did not get an appointment and resorted to court which could have settled via mediation if appointments were given. The CJC recommended that no case should proceed to the court without having an appointment for mediation if they opted for it.[1089] However, like previous recommendations made in a series of civil justice reform reports,[1090] this recommendation of the Working Party may not get the proper attention of the policymakers probably because of the government's austerity measures. Although the number of mediators in the SCMS has been increased from 17 to 28 recently, this is nowhere near enough. There is no indication that enough funds will be available to address the issue (under-resourced) identified in the FDR process operating in the family courts.

It can be noted that at stage 2 of the OCMC parties are being diverted to the existing SCMS which is already struggling.[1091] As such, it can be argued that choosing to do the mediation in-house will not be a wise choice unless significant investment by the government that may not be possible.[1092] Instead, it is recommended to outsource appropriate cases to existing specialised ADR bodies (e.g. free consumer ADR schemes). As many existing mechanisms are free for the consumers (family MIAM and

[1087] CJC, *The Resolution of Small Claims* (n 124).

[1088] Ibid, para 47.

[1089] Ibid, paras 57 & 60.

[1090] For examples CJC Interim (n 2) and Final Reports on ADR (n 2), Briggs Reports (n 25) etc.

[1091] CJC, *The Resolution of Small Claims* (n 124).

[1092] Ibid.

mediation are not free and paid by the parties unless they are eligible for legal aid) and they are more specialised, it will not cost extra to the litigants and the OCMC. From the governmental perspective, the ability to save public funds is relevant because the consumer ADR in regulated sectors is funded by traders. As such, outsourcing suitable cases to relevant ADR bodies outside of the OCMC would be an important policy option the government should seriously consider.

5.2.4.2 Increase use of online dispute resolution system

The increased use of ODR is likely to ease pressures further from the public fund. As noted in chapter 1, mediation is defined as a process where a neutral third (the mediator) assists parties to communicate so they can find common ground from where to reach an amicable settlement and this can be in many forms. Notably, flexibility is one of the core natures of mediation which allows the process to be conducted informally. As CJC noted, 'Mediation is a flexible technique: it can be face-to-face or conducted at a distance (the parties not being physically in the same mediation space). It can be high-tech (videoconferencing, etc.), low-tech (telephone or letters) or zero-tech (meetings)'.[1093] The SCMS service is already being used over the phone (low-tech) with impressive success rate (over 65 percent) as discussed in chapter 4.[1094] However, this does not go well with the vision to transform the dispute resolution because the current structure represents the automation of the traditional system, not transformation.

It is noted while it appears that the government is unwilling to make sufficient funds available for SCMS, they are more willing to invest in technologies to move the justice system online, which is evidenced from the government's pledge to invest £1 billion in the digitization of the justice system. While the justice system is gradually moving online, it seems that online technology is being used to replicate the traditional court online, which is good because it will help to resolve cases smoothly and at less costs than traditional courts. But advanced technologies can be used to do things in

[1093] CJC Interim Report (n 2) para84.

[1094] See subsection 4.4.2.1 of chapter 4.

innovative ways. The use of telephone in dispute resolution is branded by the CJC as first-generation technology.[1095]

Importantly, ADR making mediation available online arguably makes it easier to integrate into a tiered process such as in the ombudsman model. When conducting online or over the phone, the characteristics of mediation such as party autonomy, third party facilitation, flexibility and confidentially will remain almost the same.[1096] It is a significant step in terms of easy access to the service and cost-efficiency. This is a good incentive for the parties to go to mediation where they can join the process from anywhere, and they would not have to take a day off to attend a mediation process. The use of technology increasingly being indispensable in the delivery of mediation services, especially in light of the Covid-19 pandemic. According to the latest statistics published by the Centre for Effective Dispute Resolution (CEDR),[1097] the number of online mediations grew exponentially to 89 percent (compared to 2 percent in the previous year) between March to September 2020 as well as the settlement rates (93 percent).[1098] At the same time, in the first six months of the pandemic, 71 percent of mediators reported that they switched to online mediation compared to 26 percent in the previous year (prior to March 2020).[1099] The audit report also reported that 91 percent of the respondents to the audit stated that online mediation provided "ease of access" primarily arising from the avoidance of travel and the flexibility of parties having more choice about where they were located for the mediation.[1100] While telephone mediation is effective, using video technology to replace the face to face meetings could address the concern of commentators noted above.[1101]

The structure of stage 2, at it currently stands, does not incorporate any negotiation tools which is only available at stage 1. This study recommends making available this tool at this stage which will further encourage parties to consider early settlements. Most

[1095] CJC ODR Report (n 144) para8.4.

[1096] L Boulle and N Miryana, *Mediation: Principles, Process, Practice* (Butterworths, London, 2001).

[1097] CEDR, *The Nineth Mediation Audit* (n 38).

[1098] Ibid.

[1099] Ibid, p20.

[1100] Ibid, p21.

[1101] See subsection 5.2.3.2.

importantly, given the shortage of mediators providing SCMS and lack of sufficient fund, this stage could be designed in a way so it can work as an online mediator by facilitating online negotiations between the parties and help them to reach a solution suitable to their dispute. Such tools are already existing in the UK, as discussed in the previous section.[1102] eBay and Amazon boast that they resolve millions of cases every year without any human intervention. The HMCTS has been working on a dispute resolution tree for passengers and airline disputes over delays and cancellations.[1103] It is an ambitious but not impossible vision and could be a real game-changer in the OCMC. In their report on ODR in 2015, the CJC envisaged that:

> The third generation of systems, which we can expect to be in widespread use in the 2020s (and in occasional use much sooner), will be those that are enabled by AI (artificial intelligence)… For certain categories of dispute, in Tier Two, these systems will themselves be able, without the direct involvement of human beings, to facilitate negotiation and informal settlement.[1104]

However, it is acknowledged that developing such technology to conduct mediation at stage 2 without human intervention would require significant effort and time. The OCMC is still in beta, and the OCMC pilot has been extended to November 2023.[1105] For the time being, it would be better to introduce a mandatory fully automated ADR information session akin to MIAM for those who opted out of telephone mediation. As this tool will be automated, it will not involve court staff; hence would be free of cost to the litigants. Parties should be required to complete this session and confirm before they can move to stage 3. This requirement is compatible with the CJC's recommendation discussed in chapter 2[1106] as this is free and will not take much time. Following completion of the session, if the party agree to consider ADR, then he should be referred to SCMS or existing ADR providers outside of the court as discussed above. There should be built-in options for parties to opt-out, albeit on limited grounds.

[1102] See subsection 5.2.2.3.

[1103] HMCTS reform update 2019 (n 978).

[1104] CJC ODR report (n 144) para8.5.

[1105] see https://www.gov.uk/government/publications/practice-direction-update-130-civil-procedure-rules-51r-and-51s.

[1106] see subsection 2.3.1.

Instead, for now, it could be argued parties in low-value cases should be able to opt out easily than those involved in higher-value cases.[1107] Indeed, low-value cases tend to be less complicated and do not cost much for trial. However, parties in higher-value cases should only be allowed to opt-out on limited grounds, e.g. a point of law, already attended ADR but failed, the need for an injunction, and there are limitation issues.

5.2.4.3 Offering appropriate ADR options to suitable cases

Currently, stage 2 relies on mediation only, and the new opt-out pilot offers only mediation, not other types of ADR available, which is a significant weakness in the current structure.[1108] The significance of this stage has been articulated at the beginning of this section, and it is noted that this stage, together with the changes to stage 1 proposed above[1109] in signposting and educating the parties has the greatest potential to promote a wider understanding and application of ADR and dispute resolution. It is very important in that the jurisdiction of the OCMC will include higher-value (up to £25000) and more complex disputes which indicate that some other forms of ADR such as the Judicial ENE might be more suitable in certain types of cases than mediation such as small construction disputes and boundary disputes are more suitable for ENE than mediation and require some expert opinion which mediation cannot provide.[1110] This requires judges at the OCMC to engage actively at the stage and conduct ENE, and this option is further discussed in the next section, where it is more relevant.

5.2.5 **Stage 3: Adjudication by a judge**

Those cases that have not been settled proceed to this final stage of the OCMC to be decided by a District Judge. However, this stage will be different, once implemented, from the traditional face-to-face court hearing as it is managed on paper submitted digitally on the online platform. The determination is to be made by District Judges or Deputy District Judges, either on the documents, over the telephone, by video or at

[1107] Ahmed and Anderson (n 1086).

[1108] Ahmed, Mediation Act for Scotland (n 760).

[1109] See subsection 5.2.2.1 above.

[1110] Ahmed, 'Moving on from a judicial preference' (n 1034).

face-to-face hearings if needed.[1111] However, it is noted that Judicial College funding is an issue.[1112]

At this stage, litigants will have the opportunity for their case to be decided by a judge, but it will be mostly online unless the nature of the case (e.g. where cross-examination is needed) requires a face-to-face oral hearing. Notably, with the justice system moving online, a substantial debate arose among academics and the judiciary on how open justice can be ensured in the online justice system, which is discussed next.

5.2.6 Open Justice and Online Court

There is an ongoing academic debate about open justice in the OCMC because cases will be managed online, and even if a hearing is necessary, it will be through online communications. Open justice is a fundamental principle in the UK justice system, and enshrined in common law, ECHR and various international human rights instruments.[1113] According to CPR rule 39.2, hearings will generally be held in public. Also, Article 6 provides for the right to fair a public hearing. In the case of *R v Sussex Justices Ex p. McCarthy,*[1114] Lord Hewart CJ referred to the concept of open justice and stated that 'a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done'.[1115] Open justice provides the public and media with the opportunity to observe and scrutinise court proceedings.[1116]

In the traditional courtroom, the public can access and watch the procedure which ensures transparency in the process, but this is not possible when cases are managed

[1111] Briggs Interim Report (n 25) para6.7.

[1112] See https://www.judiciary.uk/wp-content/uploads/2020/07/SUMMARY-MINUTES-October-2019-Judicial-ADR-Liaison-Committee.pdf.

[1113] J Bosland and J Townend, ´Open Justice, transparency and the media: representing the public interest in the physical and virtual Courtroom' (2018) 23 Communications Law; A. Harvey, 'Public Hearings in Investor-State Treaty Arbitration: Revisiting the Principle' (February 2020, Doctoral thesis, University of Luxembourg).

[1114] [1924] 1 KB 256.

[1115] *McCarthy* [1924] 1 K.B. 256, [259].

[1116] Prince, 'Encouragement of mediation in England and Wale' (n 191); *Scott v Scott* [1913] AC 417.

online. In addressing the issue, the government, in their recent memorandum,[1117] mentioned that there would be viewing screens in courts to view online proceedings and the listing of such hearings will be made available to interested parties so that they can attend at the appropriate time.[1118] However, academics[1119] expressed their concern that this step is not useful as people will still have to attend the court building to view the process. There is also a proposal from the HMCTS that there will be "public viewing centres" in public buildings, and the public will be able to watch the live stream of the online hearing.[1120] At the time of writing, there is very little detail available on how these public centres would work in practice 'but practically, such devices would be unlikely to meet the weighty demands of the principle of open justice'.[1121]

Commentators like Sue Prince argues that it is the right time to change people's perception of open justice in the traditional courts and take the reform of the courts as an opportunity to change 'radically rephrase the way we design legal processes to increase transparency rather than just make court services more efficient.[1122] Senior members of the judiciary also emphasised that open justice must adjust according to changes of circumstances.[1123] Indeed, Geoffrey Vos MR, in his recent speeches,[1124] emphasised on streamlining the justice system online and advocated for the creation of an online funnel through which every dispute will start and will be directed to the appropriate dispute resolution. He argued making the justice system available online will enable the courts to resolve more cases which will increase access to justice.[1125] He further emphasised that 'it will hugely increase access to justice by allowing individuals

[1117] See https://publications.parliament.uk/pa/bills/lbill/2017-2019/0176/ECHR-Memorandum.pdf.

[1118] J Tomlinson and M Ahluwalia, 'Why the Courts and Tribunals (Online Procedure) Bill needs rethinking' (2019) *Legal Action*.

[1119] Cortés and Takagi, (n 1016).

[1120] Courts bill: 'viewing booths' to preserve open justice' *The Law Society Gazette* (London, 23 February 2017) ECHR memorandum.

[1121] Prince, 'Encouragement of mediation in England and Wale' (n 191)

[1122] Ibid.

[1123] *Guardian* [2013] Q.B. 618 at [80].

[1124] Vos, 'Reliable data and technology' (n 68); Vos, 'Keynote Speech' (n 125) and Vos, 'Recovery or radical transformation' (n 125).

[1125] Ibid.

to vindicate their legal rights at proportionate cost and without undue delay. That will promote public confidence in the justice system'.[1126] The spirit is further reinforced by the government's new Judicial Review and Courts Bill[1127] introduced to the parliament in July 2021. The new Bill emphasised on the online justice system and under the provisions of the bill, a new online procedure rules committee would be created with the powers to require certain types of proceedings to be initiated, conducted, progressed or disposed of by electronic means.[1128] Professor Richard Susskind further added, 'I can clearly envisage a more distant world in which asynchronous hearings, artificial intelligence, and virtual reality are central pillars of our court system'.[1129] While referring to the impact of the Covid-19 on the judicial system and the increased use of the technology in the courts, Hazel Genn stated, 'we can now see that there are some real opportunities in this to make things flow more smoothly and easily for certain kinds of people in certain kinds of cases'.[1130]

Open justice has an educative function as it provides important information to general people on how cases are conducted and what the process involves. In this regard, Genn rightly stated, 'If the public can watch what goes on in remote hearings that would normally be public, it will make it easier for them to see what is going on and keep a judge under review'.[1131] While the traditional courtrooms provide limited opportunity to observe the court process in action due to practical difficulties (e.g. limited space), the virtual court is the perfect platform to watch the court process by an unlimited number of people. Video hearing will particularly be helpful for vulnerable witnesses and those who are unable to travel.[1132]

[1126] Ibid.

[1127] Judicial Review and Courts Bill, HC Bill (Session 2021 -22) [152].

[1128] Sections 18 and 21 of the Bill.

[1129] R. Susskind, *Online Courts and the Future of Justice* (OUP 2019); R. Susskind, 'The Future of the Courts' (2020) The Practice, <https://thepractice.law.harvard.edu/article/the-future-of-courts/>.

[1130] House of Lords Select Committee on the Constitution, Oral evidence: Constitutional implications of Covid-19 Wednesday 3 June 2020.

[1131] Ibid.

[1132] J Rozenberg, *The Online Court: Will IT Work* (2016). Available at https://long-reads.thelegaleducationfoundation.org/plans-for-2019/ .

Although the court reform programme launched in 2016, the Covid-19 pandemic posed the justice system with a real challenge. When pandemic forced the physical courts to close, hearings were conducted mostly via remote hearing using video conference and over the phone. A study conducted by the Civil Justice Council and the Legal Education Foundation found that majority of the respondents (Journalists and court reporters) to the survey they have largely been able to attend hearings online and none of them were denied access.[1133] However, the study could not find enough responses from the public to make a conclusive finding on whether the general public had access to the virtual hearing.[1134] An interesting finding of the study was that the experience of the respondents was significantly different between the upper and lower courts because the information from the lowers courts on how to attend the virtual hearing were less clear than the hearing information published by the higher courts.[1135] This concern was echoed on 29 May 2020 by a coalition group of campaigning organisations, academics and open justice advocates, who noted some members of the public have encountered severe obstacles when trying to attend hearings online, particularly in the lower courts.[1136] This is a matter of serious concern and the policymakers should conduct in-depth research to establish how the principle of open justice should apply to remote hearings and how the public can easily attend virtual hearings.[1137]

One option would be to live stream hearings, but there is an inherent danger of misuse of the system, e.g. people can record the proceedings and put it on social media, which may be harmful to the parties involved or may compromise the whole process. There are already guidelines for recording and sharing court proceedings, and sometimes judges put restrictions on their own initiative to protect the parties and breaching those restrictions bears grave consequences.[1138] However, this may not be possible to

[1133] *Impact of Covid* (n1041).

[1134] Ibid para 7.10.

[1135] Ibid para 1.25.

[1136] Letter on Open Justice, 'We need to protect open justice during the Covid-19 emergency', The Justice Gap (29 May 2020). https://www.thejusticegap.com/we-need-to-protect-open-justice-during-the-covid-19-emergency/ .

[1137] See https://publications.parliament.uk/pa/cm5801/cmselect/cmjust/519/51907.htm#footnote-034-backlink.

[1138] See the new sections (85B) inserted into the Courts Act 2003 by the Coronavirus Act 2020; Section 41 of the Criminal Justice Act 1925 and section 9 of the Contempt of Court Act 1981.

replicate in the OCMC as it is online, and live streaming means it would be impossible to control the misuse. Instead, it would be better to make it easier and effective if people can be given access to the online hearing via a secure online platform.

5.2.7 Further steps to improve the practice

This study recognises that an effective justice system is necessary for the promotion of ADR, and judges can play an important role in encouraging parties to mediate. Stage 3 of the OCMC is different from the traditional face to face courts because cases are managed online. However, to make this stage effective, this study proposes the following recommendations.

5.2.7.1 Referring appropriate cases to suitable ADR options

Those cases that do not settle at stage 2 or parties opted out of the mediation will end up with the judge at stage 3. As noted above, more than 72 percent of litigants who were automatically referred to the mediation pilot service opted out of the system, which is a significant number. Although it is not clear why this large number of litigants opted out, presumably, a lot of those could have been settled by ADRs, saving costs and judge's time at stage 3. One option would be to have a referral system in place from judges to SCMS at stage 2 to send the cases which were suitable for ADR at stage 2, but one of the parties opted out unjustifiably. Now that it is recognised that English judges can lawfully compel parties to consider ADR in certain circumstances,[1139] the judges in the OCMC should strongly encourage parties to settle out of court using ADR and may refer cases that are suitable for mediation back to stage 2. But this option may not be that effective because at stage 2, telephone mediation is provided by SCMS, which already under-resourced, as identified in the chapter 4 of this thesis.[1140] Hence, if the stage 2 mediation service is not properly resourced, then there will not be any benefit of referring back to stage 2. The CJC Working Party in their recent report found that district judges are worried about the under-resourced SCMS, and every judge consulted reported complaints by litigants that they wanted an appointment for mediation but did

[1139] See subsection 2.3.4 for details.

[1140] See subsection 4.4.2.2.

not get one.[1141] As a result, judges are reluctant to refer cases back to SCMS, knowing that they are already struggling. Given that stage 2 of the OCMC using the existing SCMS to deal with the cases, it is likely stage 2 will suffer the same problem unless this mechanism is properly resourced.

Another option would be to offer litigants judicial ENE/mediation who have opted out of the mediation at stage 2.[1142] Judges can provide a judicial ENE at stage 2 which is likely to encourage parties to settle early. Lessons can be learned from the pilot scheme operating in Birmingham Civil Justice Centre called "Dispute Resolution Hearing (DRH)" which was set up to deal with the backlog of cases built up during the Covid-19. The DRH is a preliminary hearing listed after evidence has been exchanged for 30-minute conducted telephone hearing (using BT MeetMe) (akin to an ENE) with the aim of voluntary mediation/early neutral evaluation or early disposal of the case (e.g. by strikeout).[1143] The pilot has achieved an impressive result with 47.5 percent of effective DRHs resulted in disposal of the claim between July 2020 and February 2021.[1144] It could be argued that if the judges actively provide ENE at OCMC for suitable cases, it is likely that more cases will be settled before the final hearing, as can be seen from the DRH pilot. In this regard, the judges can use their power to order parties to go for ENE as recognised in the case of *Lomax*,[1145] where the COA recognised for the first time that the courts do have the power to compel unwilling parties to engage in ENE and such order will not hinder parties' access to justice.[1146] The recent report by the CJC on compulsory ADR also stated that parties could be lawfully compelled to consider ADR.[1147] Therefore, the judges can exercise this power to order parties to go for judicial ENE. This continuous encouragement to settle from the start of a dispute to the door of the final hearing is likely to bring about a successful outcome.[1148]

[1141] CJC, *Resolution of Small Claims* (n 124) para 56.

[1142] M Abbasy, 'The Online Civil Money Claim: Litigation, ADR and ODR in One Single Dispute Resolution Process' (2020) International Journal of Online Dispute Resolution.

[1143] Ibid.

[1144] CJC, *The Resolution of Small Claims* (n 124) para129.

[1145] *Lomax* (n 86); see subsection 2.3.1 of chapter 2.

[1146] See section 2.3.4 of chapter 2 for details.

[1147] CJC, *Compulsory ADR* (n 141) para 7.

[1148] Vos, 'Reliable data and technology' (n 68).

The OCMC provides a perfect opportunity to create an innovative online platform where parties will be encouraged to settle using ADR from stage 1 to stage 3. However, policymakers should consider the costs implications of requiring judges to conduct ENE which will take judicial time means a higher cost than mediators. While the figures show that the success of DRH is impressive, there is an important issue to consider here that the parties were given an appointment for mediation with SCMS, then those cases would have been settled early, saving the costs and time of the courts.[1149] Also, those cases that do not settle at the ENE will require a final hearing before a different judge means double judicial time for the same case, which may not be economically sound unless the majority of the cases settle at this stage. This option should also be considered against the fact that the majority of the cases settle before reaching trial via different means. If the percentage of settlements remains the same even after the JNE at stage 2, then there would be little or no benefit of introducing ENE at stage 2. As such, it would be better to introduce ENE at stage 2 on a pilot basis, and based on the result, it could be made a permanent feature at the OCMC. Another option would be to refer suitable (possibly higher-value cases, valued more than £10,000) cases to existing ADR providers outside of the court, as discussed above.[1150]

5.2.7.2 Using costs sanction for unreasonable refusal to consider ADR

Judges in the OCMC could play an active role in encouraging litigants to consider ADR by actively using costs sanction against those who unreasonably refuse to consider ADR. While settlements should be confidential, judges should publish the determinations whereby a party was penalised for not considering ADR without good reason at stage 1, stage 2 and stage 3 (when referred by the judges) of the OCMC which is highly likely to make parties such as businesses, public bodies and universities who care about reputation to think seriously about considering ADRs. It is noted that judges in English jurisdiction hesitate to use their existing power to penalise litigants, especially LIPs, with costs sanction as they may not be aware of mediation or costs

[1149] CJC, *The Resolution of Small Claims* (n 124).

[1150] See subsection 5.2.4.1.

sanction.[1151] However, this could be justified in the OCMC (subject to this study's recommendation for educating and signposting parties at stages 1 and 2) where parties are informed about parties' duty to consider ADR from the start of the process.

5.3 Conclusion

The OCMC is a significant step in making the court itself affordable and accessible to the litigants, especially LIPs. The most striking feature of the OCMC is that it acknowledges the importance of ADR by embedding mediation at stage 2 which is now being used as an opt-out procedural stage. This is a significant step as ADR emerged as an alternative to the court system, but it is now part of the process. Importantly, this step represents ADR as appropriate dispute resolution, not an alternative.

The OCMC is admirable in a number of aspects. This chapter notes that the OCMC is likely to have a huge impact on the current ADR landscape because it will be the busiest and largest online court in the world and ordinary citizens are more likely to use it. The OCMC is designed in a way that parties will think of ADR as culturally normal as it is being incorporated within the court.

Stage 1 of the OCMC is a fully automated process that does not require the attention of the court staff. However, the current structure of this stage does not incorporate effective mechanisms to encourage early settlements except the without prejudice offers to settle which is only available after the issue of a claim. This study recommends the introduction of an effective educative and pre-action stage before issuing a claim at stage 1 in the OCMC, which are absent in the OCMC. This chapter observed that LIPs do not usually comply with the pre-action protocols and conducts because they are mostly unaware of it, and they cannot comply efficiently with these on their own without the help of their lawyers. This study recognises the importance of pre-action protocols and conducts in encouraging parties to settle early using different dispute resolution processes, including ADRs. At the same time, it is also noted that parties incur the most costs in complying with these pre-action conducts. As such, this study recommends that stage 1 of the OCMC can effectively replace the pre-action protocol

[1151] See subsection 2.3.5 of chapter 2.

function with a softer version by providing litigants with template letters that could be sent to the other party electronically and receive a response in the same way. It is recommended that Stage 1 of the OCMC should be simpler than the pre-action protocols while retaining the key functions of pre-action protocols. Importantly, this study argues that parties should be offered online settlement tools at the pre-issue stage (e.g. RTA portal) as well as stage 2. This will be free of costs and involve minimal effort as it will be fully automated and will not involve court staff.

This chapter noted that stage 2 of the OCMC plays a significant role in channelling more cases to ADR. This study recommends that parties should only be allowed to opt-out on limited grounds from the mediation service, e.g. they have already tried meditation, a point of law, the need for an injunction and unreasonable conduct by one of the parties. Most importantly, parties should be required to provide reasons for opt-out, which is currently absent in the OCMC. Most importantly, a party who opt-out of the mediation service should be required to attend a mandatory mediation information session online as a pre-condition to move to stage 3. This should run on a pilot basis alongside the opt-out mediation pilot. Based on the result, it could be a permanent feature of the OCMC.

This chapter observed that stage 3 could play an important role in increasing the uptake of ADR. It is well established that parties believe in court determinations produced by legally qualified and well-experienced judges. It would be better to offer parties judicial ENE at stage 2 or make a referral to stage 2 in appropriate cases. If ENE is not suitable for a particular case or an economically viable option, the judges should refer the case to locally approved ADR providers or existing free ADR schemes or ombudsman services. If parties are found to be acted unreasonably in refusing to consider ADR despite repeated encouragement throughout all stages of OCMC, the judges should actively use costs penalties in appropriate cases to penalise them. The main aim of the OCMC would be to create a process of "continuous ADR" so that parties offered appropriate dispute resolutions throughout their journey in the OCMC because every dispute has a "sweet spot" when it is more susceptible to settlement.[1152]

[1152] Vos (n 125).

The success of the OCMC in channelling more cases to ADR will depend on how it interacts with the existing ADR mechanisms for channelling cases to ADR and how it will incentivise its stages to encourage early settlements using ADR.[1153] It is argued that if the incentives recommended in this chapter are embedded into the OCMC, it is likely that the uptake of early settlements via ADR will improve. As Pablo Cortes rightly stated, 'if the right incentives to consider ADR are embedded in the OCMC procedure, then litigants will be able to resolve more effectively their disputes, putting us closer to filling the gaps in the English Civil Justice System.'[1154]

[1153] Abbasy, 'Online Civil Money Claim' (n 1090).

[1154] Cortes, 'Filling the gaps' (n 107).

Chapter 6: Conclusion

6.1 Introduction

This study has found that the use of ADR, in particular mediation is underused in England and Wales and the existing mechanisms to remedy the low uptake of ADR has not been proven that satisfactory. As such, academics, policymakers and the judiciary are looking for ways to better/more effectively promote ADR to resolve civil disputes. This chapter seeks to address the research questions in light of the findings, summarise the recommendation and make concluding remarks. Hence, this final chapter is divided into two parts; the first part addresses research questions, and the final part of this chapter summarises the recommendations based on the findings of this study and makes concluding remarks.

6.2 Answering the research questions

The main aim of this thesis is to critically analyse the current practice of sectorial ADR in England and Wales and based on the findings, recommend ways to best channel civil disputes to consensual ADR options (particularly mediation). In summary, this study critically analyses the following four research questions:

(e) Why is ADR (and mediation in particular) promoted by English law to settle civil claims in England and Wales?
(f) How are individuals informed about and encouraged to use mediation or other types of consensual ADR?
(g) In what ways more suitable civil cases can be diverted to mediation or other types of consensual ADR?
(h) To what extent can modern technology be used to effectively promote mediation or other types of consensual ADR?

6.2.1 Reasons for promoting ADR to resolve civil disputes

It is well established that the English civil justice system is struggling with strained resources to deal with a huge number of cases and is unable to provide affordable

justice to many litigants in English jurisdiction, as discussed in chapter 1.[1155] Conversely, ADR has the potential of delivering procedural justice to litigants because ADR is often quicker, cheaper, and less adversarial than a court hearing and may provide a better outcome for the court user, as found in chapter 2.[1156] However, the usage of ADR is below its potential in England and Wales that was reflected in a series of studies conducted by the Department of Constitutional Affairs (DCA, now Ministry of Justice) in early 2000, Jackson LJ, Briggs LJ, Hazel Genn and Civil Justice Council.[1157]

Cost efficiency of ADR is one of the main reasons for promoting ADR as observed in chapter 2.[1158] Chapter 2 found that ADR in suitable cases is cheaper and quicker than litigation when successful. This finding is also supported by several studies conducted by the DCA and civil justice reform reports.[1159] Most importantly, saving costs in small value cases has been the main priority of the government as disproportionate amount of court's resources are often spent in dealing with the type of cases which contrary to the overriding objective of CPR. Besides, most claims are settled before trial, so ADR can help to speed up the settlement. Chapter 5 found that ADR is preferable for small claim cases to get outcomes quickly and at a propionate costs because these types of cases are often straightforward and dealt with by LIPs which corresponds with the overriding objectives. Hence, ADR reinforces the principle of proportionality so that the civil justice system benefits overall which is highlighted throughout this thesis. Hence, one of the government's main policy aims to promote ADR is to save costs and reduce pressure on the courts.

Another important motivation for promoting ADR is its preference over adversarial litigation process especially in certain types of cases such as family, employment and commercial disputes where ongoing and future relationship is important as discussed in

[1155] See subsection 1.5.2.1; also see House of Lords Select Committee on the Constitution, COVID-19 and the Courts (HL 2019–21 257)

[1156] See subsection 2.6.3 of chapter 2; see also House of Commons Constitutional Affairs Committee, The courts: small claims (TSO 2005) p30.

[1157] See point (iii) of introductory chapter; see subsection 1.5.2 of chapter 1.

[1158] See subsection 2.6.3.

[1159] Ibid and point (iii) of chapter 1.

chapter 2.[1160] Chapter 2 found that in the case of family separations with kids, the ongoing relationship is really important for the future arrangement for the kids, which makes it less suitable for adversarial litigation. Similarly, in employment disputes and commercial disputes, a no-going relation is paramount.

For the above reasons, the government and most judges are in favour of promoting ADR, and some measures have already been taken by policymakers to encourage ADR in recent years, as described throughout this thesis. This is important because the Ministry of Justice is not protected from austerity policies, and it is the civil justice system that suffers the most from the funding cut, as evidenced from the previous measures taken by the government (e.g. LASPO). For all these reasons, there is a need to raise the profile of ADR, in particular mediation to resolve civil disputes.

6.2.2 Different ways to inform and encourage parties to use ADR

One of the main reasons, perhaps the most important one, for the low uptake of ADR is the lack of awareness and education about ADR.[1161] Thus, as a primary step, the public and lawyers should be made aware of what ADR is, how it works, its advantages and disadvantages, as discussed in chapters 3, 4 and 5 of this thesis.[1162] While the popularity of ADR is increasing day by day, the majority of people, including some lawyers, are unaware of the benefits that ADR has to offer which is one of the main reasons for the low uptake of ADR as identified in this study.[1163] This education on ADR also includes the nature of the process, how it works and the role of mediator to ensure procedural justice in ADR.

This study has found that many legal professionals are still unaware/ignorant of the ADR process, let alone the general public. In this regard, Jackson LJ recommended raising awareness about the ADR process and publish a handbook[1164] on ADR.[1165] This

[1160] See subsection 2.6.1.

[1161] CJC Interim and Final Report (n 2).

[1162] See subsections 3.5.4, 4.2.3.1, 4.3.3.4 and 5.2.2.1 above.

[1163] Cortes, *Online Dispute Resolution for Consumers in the European Union* (Routledge 2011) p 173.

[1164] *ADR Handbook* (2nd edn) (n 8).

[1165] Jackson Final Report (n 2).

book has obtained some success amongst judges and practitioners who refer to this book.[1166] However, it is unlikely that LIPs will buy the book and read it before issuing litigation, so it may undermine access to justice.

Thus, the availability of information and guidance regarding ADR is crucial in encouraging people to consider ADR. This study recommends that legal professionals, businesses and employers should be required to provide information about ADR. Pre-action Protocols and court guidance documents should provide clear, consistent guidance on using ADR using plain, direct language.[1167] Chapter to 2[1168] found that one of the problems with the pre-action protocols is that the language used which may be understandable to legal professional or judges, it is of little/no help to ordinary litigants. In this regard, the OCMC[1169] can play an important role in providing vital information and educating people about the legal procedure and ADR at stage 1, which is a part of the government's reform programmes and the government has already allocated funds for it as such extra funds may not be needed.[1170] This should be an integral design option for all dispute resolution systems.

This study observes that lawyers can play an important role in educating litigants by advising them about ADR options. However, this study observed that there is a lack of education about ADR among lawyers and judiciary as such many litigants are not getting advice on ADR. In order to educate the legal professionals, this study recommends introducing experimental educational programmes about ADR for all lawyers from Law School through to later Continuing Professional Development (CPD) which is likely to play an important role in the future progress of the use of ADR.[1171] In this regard SRA, CILEX and BSB should review their existing code of conduct for barristers and solicitors and make specific reference to ADR options and require

[1166] CJC Final Report (n 2) para6.14.

[1167] Ibid, para 2.6.

[1168] see subsection 2.2.1.

[1169] See subsection 5.2.2.1 of chapter 5.

[1170] Ibid.

[1171] CEDR, 'Response to the ADR and Civil Justice Interim Report Consultation of the CJC ADR Working Group' (2018) https://www.judiciary.uk/wp-content/uploads/2018/03/ced-response-interim-report-future-role-of-adr.pdf.

lawyers to advise their clients about ADR as discussed in chapter 3.[1172] More importantly, there is a need for a change in culture among the judiciary. Chapter 5[1173] noted that judges have an important role to play in encouraging and referring parties to ADR. While there are some judges such as Geoffrey Vos MR, Briggs LJ and Jackson LJ who are in favour of promoting ADR and strongly encourage its use, there is still reluctance among the judiciary towards encouraging litigants to consider ADR. Lack of awareness of ADR, nature of the process and lack of proper judicial training on ADR are important factors that impact the uptake of ADR. It is strongly recommended that there is a need for continued co-operation between judges, legal professionals and ADR providers to raise awareness of ADR.[1174] Most importantly, arranging a nationwide campaign periodically could be helpful to raise awareness and spread information about ADR among the people as well as legal professionals. There has been a call for a serious campaign for a long time,[1175] yet- nothing serious happened as found by the CJC.[1176]

Information about ADR options should be made available online would be helpful to reach more people at less/no costs. Crucially, the CJC, in their final report,[1177] recommended creating a single website called "Alternatives" for ADRs but falls short of what information should be included on the website. Recently, Sir Geoffrey Vos suggested creating a centralised website that will provide information on different types of ADR with an inbuilt option to collect data. This study recognises the potential of creating a centralised website whereby parties can learn about different ADR options and can be direct to ADR providers. What information can be useful for parties to make an informed decision to undertake ADR has been discussed throughout this thesis, and based on the findings, the following information tab can be added to the central website:

a. Comparison between the court and ADR.

[1172] See subsection 3.5.4 of chapter 3.

[1173] See subsection 5.2.7.

[1174] See subsection 3.5.4 of chapter 3.

[1175] Jackson Final Report (n 2) p22.

[1176] CJC Final Report (n 2) [6.3].

[1177] Ibid.

b. Different ADR options because not all cases are suitable for mediation, other ADR options may be suitable for a particular case such ENE or conciliation;[1178]
c. Education and training materials for legal professionals. This will be helpful for judges, lawyers and Judges.
d. Reports and research materials. This would be helpful for academics to evaluate the ongoing practice and propose recommendations for reform.[1179]
e. List of accredited mediators and links to mediation providers. This would provide litigants with easy access to the service.
f. Feedback system for mediators and other legal professionals. This would incentivise mediators to provide good service and help parties to select good mediator from the list. However, there is a danger that parties unsatisfied with the outcome may leave bad review against the mediator which may damage his reputation. Hence, this option should be carefully monitored.

The CMC should be tasked with creating a centralised website. The CMC already has a working website[1180] that could be modified to include the information recommended above. The above initiatives to raise awareness about ADR would require substantial funding and efforts. The UK government has already shown a great interest in the promotion of ADR and should also fund these initiatives which are part of the promotion of ADR and can save taxpayers' money in the long run by reducing caseloads from the courts, as discussed in chapter 2 and throughout this thesis.[1181] Chapter 2 found that when ADR is successful, it is significantly cheaper than litigation. If more suitable cases are diverted and settled in ADR, then it would reduce pressure on the court's resources. However, a failed ADR will increase the costs and then it will add to the costs of the trial, which is already high. But there are other benefits (e.g. narrowing down the issues) even if ADR fails, as highlighted in chapter 2 and throughout this thesis.[1182] Besides, some charities such as Citizens Advice can help in educating people about ADR.

[1178] See subsection 5.2.4.3 of chapter 5.

[1179] See subsection 3.5.2 of chapter 3.

[1180] see https://civilmediation.org/.

[1181] See subsections 2.6.2 and 2.6.3 in particular.

[1182] Ibid.

6.2.3 Other ways to channel suitable cases to mediation or other types of consensual ADR

While raising awareness about ADR could be effective in increasing take-up of ADR, it is argued that appropriate incentives backed by appropriate pressure would bring about a cultural change in the ADR landscape. This study welcomes the mediation voucher scheme in family disputes to encourage separating couples to mediate, as discussed in chapter 4.[1183] However, this study argues that the scheme would be more useful if it covers the MIAM session because more than 60 percent of family litigants are coming to the court without complying with the mandatory MAIM requirement, which is designed to inform and encourage parties about mediation. Chapter 4 noted that when a couple attends the MIAM, the conversion rate to full mediation and settlement increases. However, the lack of funds means parties are not contacting their lawyers, thus are not aware of MIAM. Hence, funding the MIAM sessions could bring about a real change in the family ADR process. As the voucher scheme is for a limited time only, it would be better to make legal aid more readily available for MIAM sessions, as discussed in chapter 4.[1184]

As with the introduction of OCMC, the scope of civil justice is expanding in that courts will deal with cases valued up to £25,000 once fully operational. As such, there is a pressing need to incentivise ADRs so that more litigants are encouraged to use ADR.[1185] This study recognises that in some cases, incentives alone may not be enough, and appropriate pressure may be needed. While in some jurisdictions (e.g. Canada,[1186] Germany,[1187] Greece[1188] etc.) ADR is made mandatory, in England and Wales, ADR is largely voluntary. There is an ongoing debate on whether the voluntary nature of ADR is responsible for the low uptake of ADR and compulsion should be used to channel

[1183] See subsection 4.3.3.6 above.

[1184] Ibid.

[1185] See subsection 5.2.7.

[1186] Rule 24.1 of the Rules of Civil Procedure.

[1187] Section 278, Germany Civil Procedure Code.

[1188] Article 214 of the Greek Civil Code.

more suitable cases to ADR, but there is strong resistance among policymakers and the judiciary.[1189]

From the existing studies, it appears that there is growing support for using some kind of compulsion to channel more civil cases to ADR, as discussed in chapter 2.[1190] Chapter 2 noted in light of the existing powers in the CPR and the recent judgements of the European Court of Justice, [1191] the Court of Appeal in *Lomax*,[1192] some academics argue that judges already have the power to compel parties to engage in ADR and there is no clash with the parties right to access to justice[1193] Importantly, despite the reluctance to introduce blanket compulsion to force parties to go for ADR, policymakers have already taken some steps, notably mandatory MIAM in family disputes, mandatory EC notification for employment disputes, and mandatory sectoral consumer ADR schemes for traders. Recently the Scottish government proposed to introduce mandatory MIAM in civil courts.[1194] Most importantly, the CJC, in their recent report,[1195] stated that parties could be lawfully be compelled to consider ADR, as discussed in chapter 2.[1196] Chapter 2 noted that the new clarification from the CJC is ground-breaking and is likely to help to settle the long and most debated issue regarding the promotion of ADR. It is noted that CJC recommended parties could lawfully be compelled to undertake ADR where it is free and efficient.[1197] Also, it seems that CJC's recommendations favour mandatory introductory information sessions online, which can be provided free of cost and takes less time. However, the CJC did not make any detailed proposals for reform. This study does not recommend using blanket coercion to consider ADR because not all cases find ADR suitable and failed mediation would add extra costs and delay to the process.

[1189] See subsection 2.3.1 of chapter 2.

[1190] See for example Lord Clarke, 'Mediation: An Integral Part of Our Litigation Culture' (n 333); Ahmed, 'Implied Compulsory Mediation' (n 82) etc.

[1191] *Alassini* (n 97).

[1192] *Lomax* (n 86).See subsection 2.3.1 of chapter 2.

[1193] See section 2.3 for details; Ahmed, 'Implied Compulsory Mediation' (n 82); P Cortes, *Online Dispute Resolution for Consumers in the European Union* (Routledge 2011) 173.

[1194] Mediation (Scotland) Bill (n 977) 16.

[1195] CJC Compulsory ADR (n 141).

[1196] See subsection 2.3.4.

[1197] Ibid.

This study recommends that it would be better to introduce MIAM requirements at stage 2 for those who opt-out of the telephone mediation at the OCMC with suitable opt-out options as discussed in chapter 4.[1198] Notably, chapter 5 observed that more than 72 percent of litigants opted out of the opt-out mediation scheme since its launch in September 2019 until May 2020. One probable reason is that parties are not required to justify their decision to opt out. Importantly, even if parties opt-out unjustifiably, there is no procedural mechanism in place to penalise them. Existing studies suggest costs sanctions act as a strong incentive for parties to consider ADR seriously.[1199] However, existing case laws show inconsistencies in approaches taken by the judges in English jurisdiction when exercising their power to penalise a party for unreasonable refusal to mediate.[1200] Despite the problems associated with using costs sanction to penalise parties for unreasonable refusal to mediate, academics[1201] argue for more robust use of costs sanction to channel more cases to ADR. This study recommends the judges should consistently use costs sanctions in appropriate cases, which must be proportionate. This study argues that the costs sanction should be proportionate and should not be too harsh like part-36 or under *Halsey* guidelines as it might be too harsh for OCMC, which deals with mostly low-value cases and in small claims cases, the costs for legal representation is severely capped. The costs sanction should be limited to court fees for LIPs only in small value cases. Importantly, judges should be careful in using costs sanction against LIPs[1202] who are the main users of OCMC. This study argues that if parties are properly signposted to ADR coupled with the concern of costs sanction, the uptake of ADR is likely to go upward.

6.2.4 Influence of modern technology in the promotion of ADR

The influence of technology in the promotion of ADR is undeniable as discussed throughout this thesis, especially in chapter 5.[1203] Chapter 5 noted that there is a

[1198] See subsection 4.3.3.7.

[1199] See subsection 2.3.5 of chapter 2.

[1200] Ibid.

[1201] Jackson Final Report (n 2) para6.3; A. Hildebrand, 'Cracking It!' (2014) New Law Journal.

[1202] See subsection 5.2.7.2.

[1203] See subsections 5.2.3.1 and 5.2.3.3 of chapter 5.

growing acceptance of using technology to make dispute resolution systems online among policymakers and the judiciary. It is also observed that the new Judicial Review and Courts Bill paves the way for the creation of a new centralised online dispute resolution system where innovative technology will be used to resolve disputes quickly and cheaply, as envisaged by Master of the Rolls Geoffrey Vos.[1204] There are online dispute resolutions that exist in the UK, such as the RTA portal, Financial Ombudsman Service, and the new OCMC are perfect examples of online portals which illustrate the influence of technology in promoting ADR.[1205] The introduction of the OCMC is a significant step towards making the court system and dispute resolution process entirely online.

Existing examples such as the CRT in British Columbia, RTA portal in the UK, eBay[1206] and Amazon.[1207] indicate that it is possible to make dispute resolution system successfully online. The advantage of online dispute resolution is that it allows mediated interventions at different stages of the dispute cycle which is useful to bring a successful outcome. A lot of work needs to be undertaken to make ADR service available online in England and Wales as currently there is very little information on the impact of the online processes have on litigants –let alone LIPs. It is noted in chapter 5, there is a concern that online dispute resolution may frustrate the settlement rates because there is no face-to-face interaction which is crucial for the ADR process. Chapter argued that face to face meetings could be replicated using high-tech video conferencing tools such as Zoom and Skype. It is argued due to practical difficulties, it is not always possible to arrange face to face meetings at reasonable costs, for example, where parties live far away/different jurisdictions from each other. In this regard, online ADR could be a real benefit and will provide easier access to dispute resolutions.

This study recognises that pre-action protocols encourage parties to consider early settlement using different forms of ADR. However, most LIPs are not aware of it and do not comply with it in most cases. As such, this study recommends introducing a requirement for parties to attend an ADR information session akin to MIAM subject to

[1204] Vos, 'Reliable data and technology' (n 68).

[1205] Ibid.

[1206] See https://resolutioncentre.ebay.co.uk/.

[1207] See https://pay.amazon.com/ie/help/201751580.

the opt-out options discussed in Chapter 4 of this thesis.[1208] This information session could be made available online, and perhaps stage 2 of the OCMC is the perfect platform to do that for those who opted out of telephone mediation. Artificial intelligence and innovative technologies could be used to inform parties about the benefits of ADR, how it works and what ADR option is suitable for their claim. This should run on a pilot basis and based on the result, it could be a permanent feature. However, there should be some safeguards for those who do not have access to modern technology or do not know how to use them otherwise online ADR will not be truly accessible for all. Crucially, CABs, universities and pro-bono services can be of great help in assisting the parties who have limited access to modern technology and language difficulties.[1209]

Finally, it is acknowledged it is not possible to assess the full impact of the ODR within the scope of this study; hence this study recommends further rigorous empirical research on the impact of ODR processes because empirical evaluations are always crucial to inform policy changes. Lessons can be learned from the past empirical analysis[1210] that will help us to monitor procedural and distributive justice of ODR processes, including the OCMC. The initial focus should be on identifying best practices in other ODR processes, such as Civil Resolution Tribunal, Road Traffic Accident portal, Nominet and FOS. The assessment of the leading ODR processes can be used to inform the design of ODR in the UK. Crucially, there should be continuous monitoring and evaluation of accessibility and user-friendliness of the HM Small Claim Mediation Service, possible hindrances and floodgates, the time and costs involved in resolving disputes and the level of user satisfaction. Besides, distributive justice factors, such as the socio-economic composition of litigants and the fairness of outcomes (e.g. whether there are under-settlements), should also be monitored that will allow the policymakers to make better policy choices that contribute to increasing access to justice.

[1208] See subsection 4.3.3.7.

[1209] Briggs Final Report (n 25) paras 6.17-6.19.

[1210] For example Genn, *Twisting Arms* (n 33).

6.3 Summary of recommendations

This section summarises the recommendations based on the findings in 4 stages, i.e. promoting mediation in general, once disputes arise, before issuing claim and post issue.

Promoting ADR generally:

i. Further steps should be taken to encourage and raise awareness about ADR among general people to promote ADR at source, i.e. before contemplating legal proceedings. This study recommends the following steps to educate and raise awareness about ADR:

   a. Universities should make study mediation and other ADR options core module as part of the syllabus of the law degrees. This would help to enhance the drive for public legal education.
   b. Regulatory bodies such as SRA, CILEX and BSB should review their existing code of conduct for barristers and solicitors and require them to advise clients about ADR options. Chapter 5[1211] noted that the regulatory bodies are not that much interested in changing their code of conduct to place a duty on the lawyers to advise their client's about ADR. However, as the ADR is now part of the court, the regulatory bodies should seriously consider this option to make a cultural change. Nonetheless, the lawyers have a duty to help the courts in furthering overriding objectives by advising litigants about ADR.
   c. Continuous training on ADR should be part of lawyers and judges' Continuous Professional Development (CPD).

ii. A single online website for ADR should be created, and the Civil Mediation Council should carry it out. The system should be designed in a way to inform parties about different ADR options, how those works, advantages over litigation, the danger of escalating matter further down the court in plain

[1211] Sub section 5.2.3.1.

language and direct them (via link to the dedicated website for the relevant sector) to appropriate ADR options. The design of the website must include a built-in option to collect data on the performance of ADR in different sectors akin to the EU justice scoreboard.[1212]

Promoting mediation once a dispute arises

iii. It would be better to establish one single competent authority for all the consumer sectors, such as the Consumer Scotland, to monitor and be responsible for maintaining standards of all the consumer ADR entities than having different competent authorities for different sectors as it may cause inconsistent standards. It will further simplify the consumer ADR landscape and increase standards.

iv. A centralised system/website akin to EU ODR should be created for consumer disputes, as discussed in chapter 3.[1213] Chapter 3 noted that before exiting the EU, UK consumers had access to the single EU ODR platform but no longer. Also, there is Resolver platform, but it does not cover all the sectors. Creating centralised access would enable consumers from different sectors to access all the relevant ADR schemes operating in different sectors, which will make sure easy access and will help to educate and encourage parties to seek early settlements using ADR. This website will be linked to the centralised ADR website proposed at point (ii) above.

Promoting pre-issue mediation

v. Introduction of an obligatory information session in appropriate cases akin to MIAM will be helpful for the parties, especially LIPs in small claim cases on a pilot basis, as discussed in chapter 4.[1214] This obligatory information session will help the parties to understand what they are coming to and what they want from the process. This study observes that stage 2 of the OCMC could be designed to

[1212] section 3.5.2 of chapter 3.

[1213] Ibid.

[1214] Subsection 4.3.3.7.

work as a MIAM session for LIPs with the usage of innovative technologies, and it could be free of cost as it will not involve the court's resources and it will not involve that much effort or costs. This study recommends running a pilot in the OCMC for small claims.

vi. A regulation requiring both parties to attend MIAM in family disputes should be introduced, as discussed in chapter 4.[1215]At present, only the claimant is required to attend the MIAM session, not the defendant as such the defendant remains unaware of the benefits of mediation and refuses to mediate outright when invited by the claimant.

Promoting after-issue mediation-at defence stage

vii. This study observes that two highly successful ADR mechanisms, Small Claim Mediation Service and FDR are under-resourced, as discussed in Chapter 4.[1216] Chapter 4 found that over one-third of cases where parties requested a telephone mediation, the mediation did not take place mainly due to the lack of available time slots and this is concerning and undermines the drive for more ADR. Therefore, it is crucial that the SCMS is properly resourced to make sure cases where parties have opted for mediation do not continue in the litigation process without having a mediation appointment. It is also found that the FDR hearing is effective, but there is a lack of judges to deal with the huge demand.[1217] These mechanisms should be properly resourced with immediate priority.

viii. There is a need for cultural change among judges about the ADR process. Judges should actively encourage parties to consider ADR at every stage of judicial proceedings, especially during the case management conferences, rather than only at the allocation stage. This study observed that there is a lack of judicial push towards encouraging parties to consider ADR. For instance, chapter 4 found that high numbers of litigants are not complying with the MIAM

[1215] See Subsection 4.3.3.2.

[1216] See Sections 4.3 and 4.4.

[1217] See Subsection 4.3.2.3.

requirement and get away with it due to less judicial check. Chapter 3 found that there is a continuing education course that includes a mandatory module on ADR for any judge who sits in certain courts such as the business and property courts, technology and construction, circuit commercial, chancery (property, trusts, probate and insolvency). However, this is not the case for county court judges and district judges. Hence, it would be better to extend this requirement to CCJ and DJs. It would be helpful for the judges to identify cases that are suitable for ADR and refer to specialised ADR services.

ix. It is recommended to use proportionate costs sanction for unreasonable refusal to consider ADR should be actively used in suitable cases to encourage unwilling parties to consider ADR seriously. Chapter 2 found that judges are reluctant to use costs sanction against LIPs. However, as LIPs are on the rise as such judges should be more active but be careful using costs sanction against LIPs for unreasonable refusal to consider ADR where appropriate. This study recommends that when using costs sanction against LIPs extra safeguards must be in place to make sure they are not penalised unfairly such as (but not limited to):

   a. Whether the party has been made aware of the possible costs sanction in clear and unequivocal terms either by his lawyer, mediator or the judge;
   b. Whether the party has refused to comply with a clear invitation from a judge to consider mediation such as the Dunnett type cases;
   c. Whether the party has been invited by the other party and was informed about costs consequences at court in the event of unreasonable refusal to mediate;
   d. Whether the party is already familiar with the mediation process and possible costs sanction through previous experience, e.g. attended a mediation process before;
   e. Whether the party has acted in good faith.

x. Chapter 5 found the OCMC, if properly structured, can bring about a cultural change in the ADR landscape. However, the current structure does not include

effective mechanisms to divert more cases to ADR as such this study recommends the following:

a. Stage 1 of the OCMC should include an educative stage, triage and pre-action stage, and these stages should be free of cost. These should be placed in stage 1 of the current OCMC and before the fee is paid and the claim is issued. Currently, OCMC provides information about mediation but does not signpost or provide information about certified ADR providers. It would be better to include this information at stage 1. Chapter 5 noted that one of the lackings of the current structure is that the online negotiation tool only comes after issuing a claim at stage 1 but not pre-issue or stage 2. Hence, this study recommends this important tool should be available from the pre-issue stage all the way to the trial as every dispute has a sweet spot where they are more susceptible to settle, and the high number of settlements (only three percent reach the trial stage) before the trial via different means support this proposal. This tool is fully automated and does not involve the court's staff as such will not involve any/minimal costs to the courts.

b. OCMC should incorporate costs sanction which is currently absent. Costs sanction should be proportionate. Unlike the traditional court system, litigants in the OCMC will be informed about the ADR processes, their duties to consider early settlements using ADR to help the court further the overriding objective and possible consequences of unreasonable refusal to consider ADR from stage 1 to the trial. Costs sanction in the OCMC will be justified as the invitation will come from the automated stage, legal advisers and the judge and consequences of unreasonable refusal will be explained. Most importantly, litigants should be required to provide reasons for opt-out, which they do not have to do at the moment, and the court should consider them when making the costs allocation. At that point, if it found that litigants opted out of the mediation unjustifiably, the court should consider proportionate costs sanction.

c. The judges should provide ENE at stage 2 subject to economic analysis. The success of the Dispute Resolution Hearing (DRH) pilot at Birmingham County Court Centre support justifies this recommendation. This could run as a pilot in the OCMC.

6.4 Concluding remarks

This thesis observes that consensual ADR (particularly mediation) is very helpful in resolving many civil disputes out of court as such praised by academics, lawyers, judges and policymakers. Mediation is the most used and preferred method of consensual ADR process to resolve civil disputes in England and Wales. This study notes that the uptake of ADR is not that satisfactory, as confirmed in a series of civil justice reform reports despite the fact that seeking redress through litigation has become unaffordable for most litigants due to high costs. It can be noted that ADR is often more advantageous than litigation in different ways, e.g. it preserves the existing relationship and helps to prevent future disputes, it is cheaper if used early, and in suitable cases, it can provide tailored remedies suitable to the parties' needs, and it can provide a range of remedies which are not available to the courts such as an apology.

It is noted that while the concept of ADR is not new, there is still a lack of awareness among people and legal professionals about it. If people do not know there are ADR methods such as mediation, then they will not use them. Therefore, it is important to educate and raise awareness among people first. Existing studies suggest that ADR is successful when parties are properly signposted it. For instance, Consumer ADR schemes in regulated sectors have achieved some success because people are informed and properly signposted to it as soon as a dispute arises. In this regard, lawyers, mediators and judges can play an active in educating parties about ADR. This study acknowledges the importance of the educative function of MIAM type information sessions, which has also been recognised by the judiciary, policymakers and civil justice reform reports.

This study observed that academics are concerned about the low uptake of ADR, and some of them are in favour of using compulsion to force people to consider ADR. It is noted that while using compulsion may be useful to bring people to the negotiation

table, using excessive force may lead to coerced settlements which is undesirable. Besides, blanket compulsion is not always helpful as ADR is not a "panacea" and is not suitable for all cases; hence making ADR mandatory, at least for now, for all cases would not be a worthy option. Thus, this study recommends using compulsion to a limited extent such as requiring parties to attend an information session akin to MIAM. It is argued that requiring parties to consider ADR information session does not necessarily clash with their access to justice because requiring parties to attend an ADR information session does not mean they have to undertake ADR or settle, and they can always resort to the courts as such preserving the voluntariness of ADR. Chapter 1 noted that it is difficult to create an exhaustive list of disputes that find ADR suitable, and an information session on ADR can be really helpful to identify cases that could find ADR useful. In the UK, MIAM is already in use for family disputes, although both parties should be compelled to attend the MIAM. Such a system (in a softer form online as discussed in chapter 5, 6) can be extended to small claim disputes in the online portals, including the OCMC, on a pilot basis subject to the recommendations this study has made. This information session pilot should be compulsory with suitable opt-outs, which is also supported by the CJC. As the OCMC is still in beta (full launch is expected at the end of 2023) and the opt-out mediation pilot is ongoing, it is a good time to launch a pilot of the information session at stage 2. More importantly, the Ministry of Justice has launched a consultation[1218] where they acknowledged the importance of mandatory dispute resolution gateways, such as the Mediation Information & Assessment Meeting (MIAM) and stated, 'these work well when they are part of the court process'.[1219] And the MOJ is seeking evidence on this.[1220] This study recommends the government should consider the findings of this study and start a pilot of the information session at stage 2 of the OCMC. Based on the data, it could be a permanent feature of the OCMC when fully launch in 2023.

This study recommends that proper signposting and use of costs sanction in suitable cases is likely to channel more civil cases to ADR and bring successful outcomes. Because it is well established that if people go to ADR with the knowledge of what it

[1218] MOJ Consultation 2021 (n 118).

[1219] Ibid, p10.

[1220] Ibid (question 3).

has to offer and there are consequences for unreasonable refusal to consider ADR, then people are more likely to explore early settlements and probably settle. This study argues that using proportionate costs sanction in appropriate cases and in the OCMC subject to appropriate safeguards for LIPs are in place does not necessarily breach parties' right access to justice under Article 6 because it does not prevent parties from resorting to court; instead, it reminds parties about the consequences that may follow for unreasonable refusal to ADR.

This study recognises the role of an effective court system in increasing awareness and channelling more cases to ADR. It is argued that it is important to have an effective adjudication behind an ADR process because the credible threat of an effective court system is crucial in encouraging parties to explore and achieve early settlements. A balance between the ADR and formal litigation should always be maintained so that parties can choose appropriate dispute resolution options. The role of the judiciary in educating and encouraging litigants to undertake is paramount as they are in the best position to decide whether a particular case is suitable for ADR, and parties tend to believe in judges as well qualified and experienced to decide what is best for the parties. It is hoped that the OCMC will work more actively in educating and encouraging litigants in the English civil justice system to actively consider ADR throughout stage 1, stage 2 until they reach the final hearing because ADR is a continuous process and should be considered throughout the dispute cycle.

It is also noted that the influence of modern technology has a positive impact on the ADR landscape. This study noted that providing ADR online is convenient and cheaper for parties than resolving their disputes in court. It is observed that there is a growing acceptance of the online dispute resolution system among academics, judiciary, and policymakers which is evidenced from the recent recommendation by a series of civil justice reform reports and the initiatives taken by the government in England and Wales to modernise the courts and tribunal with ADR integrated into it. The use of innovative technologies and growing digitisation is making traditional dispute resolutions more accessible and affordable for litigants. This study observed the advantages of the online dispute resolution process had led policymakers to invest in reframing the justice process online with the aim to make it accessible and affordable for litigants. As Geoffrey Vos MR recently said, 'the use of technology by the courts is not optional, it is

inevitable and essential. Appropriate and accessible dispute resolution mechanisms must be made available. This is central to the rule of law itself'.[1221] He emphasised that 'From the economic point of view, the imperative is to provide up-to-date online systems that can resolve the bulk of claims with the minimum of costs and delay'[1222] and committed, 'to establish a direction of travel for an online justice system, with sophisticated integrated ADR mechanisms'.[1223] Considering the benefits of online dispute resolution, this study recommends ADR should not only confine to traditional face to face and on the phone but also online via asynchronously or synchronously (via video-conference) to make ADR more accessible for parties which ought to help to channel more cases to ADR. It is hoped that the growing digitisation of dispute resolution systems would make it easier to educate mass people about ADR with less effort and costs. It would be easier for parties to find appropriate dispute resolution for their disputes if centralised online access can be created. In this regard, this study recommends creating a single website where information about ADR processes, their advantages over litigation and links to certified ADR bodies would be embedded. This would make ADR more accessible, which is likely to increase its uptake.

Finally, this study recommends for the introduction of a more effective ADR policy combining education and encouragement through proper signposting to ADR processes; facilitation via modern technologies; and well-targeted intervention in individual and appropriate cases by judges, lawyers and mediators who must undergo a cultural change. It is hoped that upon implementation of the recommendations this study has put forward, people will think more actively about ADR as opposed to court as soon as any dispute arises, and the uptake of ADR is likely to increase.

[1221] Vos, 'Reliable data and technology' (n 68)

[1222] Ibid.

[1223] Ibid.

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