

# MEDIATION: INTERNATIONAL EXPERIENCE AND GLOBAL TRENDS

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**Abstract:** Mediation involves neutral third party intervention to facilitate settlement of disputes (Section II). It is on the rise (Section IV), partly because it is encouraged by Government in various ways (Section V) and by the European Union (Section VI). Detailed global investigation of mediation (see notes 1 and 2, and Sections VII and VIII) reveals general support for the “voluntary principle” (Section IV), namely, (1) parties should not be compelled to mediate; (2) at all times the process should be under their joint consensual control; and (3) the parties must be completely free to agree whether to settle and on what terms. Including endorsement of the voluntary principle, the author proposes six fundamental principles within this field (Section III).

**Keywords:** *mediation; governmental promotion of mediation; compulsory mediation; mediation principles; voluntary principle of mediation*

## I. Introduction

This survey of modern international experience draws upon four large anthologies of national reports,<sup>1</sup> various studies of mediation in particular regions<sup>2</sup> or jurisdictions,<sup>3</sup> general cross-border studies of the

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1 The four anthologies are as follows: (1) C Esplugues and S Barona (eds), *Global Perspectives on ADR* (Cambridge: Intersentia Publishing, 2014); (2) C Esplugues-Mota et al (eds) *Civil and Commercial Mediation in Europe* (Cambridge: Intersentia Publishing, 2013 and 2014), Vol 1: *National Mediation Rules and Procedures*, Vol 2: *Cross-Border Mediation*; (3) K Hopt and F Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 2013); (4) F Steffek and H Unberath (eds), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (Oxford: Hart Publishing, 2013).

2 G De Palo and MB Trevor (eds), *EU Mediation: Law and Practice* (Oxford: Oxford University Press, 2012); N Trocker and A De Luca (eds), *La Mediazione Civile alla Luce della Direttiva 2008/52/CE* (Florence: Firenze University Press, 2011); Wang Guiguo and Yang Fan (eds), *Mediation in Asia-Pacific* (Hong Kong: CCH Publishing Hong Kong, 2013).

3 England and Wales: Tony Allen, *Mediation Law and Civil Practice* (London: Bloomsbury Publishing, 2013); Neil Andrews, *The Three Paths of Justice: Court Proceedings, Arbitration and Mediation in England* (Dordrecht, Heidelberg, London, New York: Springer Publishing, 2012); Neil Andrews, *Andrews on Civil Processes*, Vol 2 (*Arbitration and Mediation*) (Cambridge: Intersentia Publishing, 2013) Ch.1; S Blake, J Browne and S Sime, *A Practical Approach to Alternative Dispute Resolution* (Oxford: Oxford University Press, 2011); S Blake, J Browne and S Sime, *The Jackson ADR Handbook* (Oxford: Oxford University Press, 2nd ed., 2016); H Brown and A Marriott, *ADR Principles and Practice* (London: Sweet & Maxwell, 3rd ed., 2011); H Genn, *Judging Civil Justice* (Cambridge: Cambridge University

subject,<sup>4</sup> the author's discussion with colleagues over many years and specific information obtained for the purpose of the present report.

Section II concerns the main characteristics of mediation. Section III notes different attempts to produce a canon of fundamental principles. Section IV concerns the factors which underlie the modern growth of this technique. Section V explores official responses to the under-use of mediation. Sections VI to VIII are summaries of non-English experience, arranged with reference to the European Directive (VI), European jurisdictions (VII) and non-European jurisdictions (VIII).

## II. Nature of "Mediation"

This term is preferred to "conciliation".<sup>5</sup> Mediation is used here to refer to the technique by which parties to a dispute communicate with a neutral third party, whose function is to facilitate or achieve settlement by amicable negotiation. It is not the function of the mediator to impose solutions.

Most commercial mediators operating in the United Kingdom aim to act as facilitators, that is, as an independent and disinterested third party whose task is to encourage the parties to talk and to move towards a possible agreed settlement. The predominant style of mediation in the United Kingdom, at least concerning mainstream civil disputes, involves the mediator assisting the parties to gain an outcome. Such influence as the mediator does acquire is the result of gaining the parties' confidence.

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Press, 2010); and H Genn's reports for the Ministry of Justice, concerning court-linked ADR schemes: *Central London County Court Mediation Scheme: Evaluation Report* (1998); *Court-Based ADR Initiatives for Non-Family Civil Disputes: The Commercial Court and the Court Appeal* (2002); *Twisting Arms: Court Linked and Court Referred Mediation Under Judicial Pressure* (Ministry of Justice Research Series, 1/07: 2007) p.iii, available at [https://www.ucl.ac.uk/laws/judicial-institute/files/Twisting\\_arms\\_mediation\\_report\\_Genn\\_et\\_al\\_1.pdf](https://www.ucl.ac.uk/laws/judicial-institute/files/Twisting_arms_mediation_report_Genn_et_al_1.pdf).

4 N Alexander, *International and Comparative Mediation* (Netherlands: Kluwer Law International, 2009); L Cadet, E Jeuland and T Clay (eds), *Médiation et Arbitrage: Alternative Dispute Resolution-Alternative à la Justice Ou Justice Alternative? Perspectives comparatives* (Paris: LexisNexis: Litec, 2005); C Hodges and A Stadler (eds), *Resolving Mass Disputes: ADR and Settlement of Mass Claims* (Cheltenham: Edward Elgar Publishing, 2013); M Palmer and S Roberts, *Dispute Processes* (Cambridge: Cambridge University Press, 2005; reprinted 2008); D Spencer and M Brogan, *Mediation: Law and Practice* (Cambridge: Cambridge University Press, 2006).

5 There are terminological problems within some jurisdictions, where "conciliation" is a term of art denoting a more active involvement of the third party, or even evaluative mediation conducted by a judge in court (eg, Hopt and Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 2013) p.1098). Conversely, some jurisdictions make explicit that mediators must not make settlement proposals: Esplugues and Barona (eds), *Global Perspectives on ADR* (n.1) p.47, nn.190 and 191, referring to Bulgaria and the Czech Republic. Article 1.3 of the UNCITRAL Model Law on International Commercial Conciliation (2002) uses the word "conciliation" (on this Alexander, *International and Comparative Mediation* (n.4) pp.391–393), but the UNCITRAL document acknowledges that "mediation" is often a synonym for the relevant third party assistance to enable parties to reach an amicable settlement. Alexander, *International and Comparative Mediation* (n.4) pp.16–17 notes that the usual connotation is that "conciliation" is more "directive" or "interventionist".

Other systems, including the UNCITRAL Model Law on International Commercial Conciliation 2002,<sup>6</sup> recognise that mediators might sometimes, even habitually, adopt a more pro-active, “directive”,<sup>7</sup> advisory or evaluative role. Alexander comments:<sup>8</sup>

“[in this book] mediation is conceptually defined as an assisted decision-making process which typically — but not invariably — takes the form of a facilitated negotiation or dialogue .... The process is voluntary in so far as parties are not required to make any decisions or to reach agreement. In so far as decisions are made, they are said to reflect the parties’ choices and priorities. This conceptual definition corresponds to the facilitative model of mediation .... [However,] there are variations in the process represented by different models of mediation”.

But the fundamental point is that mediation is radically different from arbitration and court adjudication because the aim of mediation is to reach settlement and not to culminate in an imposed decision (“award” or “judgment”).

There is a range of dispute resolution techniques. The dichotomy of adjudicative and non-adjudicative types of process is useful. But another functional analysis of such techniques is (1) adjudicative (arbitration, adjudication and expert determination), (2) advisory (early neutral evaluation, or other forms of “directive” or evaluative third party intervention) and (3) facilitative (mediation without expressing judgment or making proposals, and simple, non-mediated, negotiation without a neutral, or at least assisted by party representatives, normally lawyers).<sup>9</sup>

Mediation can be accessed in various ways. It can be “purchased” by parties. There is a market for private mediation at most levels of complexity and financial value. In large matters, it can involve specialist commercial mediators of considerable renown. Or mediation can be supplied as a free service as a “court-annexed” facility.<sup>10</sup> Mediation can be experienced face-to-face or at a distance (“remote”).<sup>11</sup> It can be

6 Article 6(4) of the UNCITRAL Model Law states that: “The [mediator] may, at any stage of the [mediation] proceedings, make proposals for a settlement of the dispute”; Alexander, *International and Comparative Mediation* (n.4) p.414.

7 *Ibid.*, pp.16–17.

8 *Ibid.*, p.15.

9 *Ibid.*, p.9; see also the tabular presentation of the characteristics of negotiation, mediation, judicial settlement procedure and arbitration at pp.29–38; and specifically on judicially stimulated settlement or judicial mediation at pp.128–148.

10 On the two main models of “market-based” mediation and the “justice model” of court-annexed mediation, N Alexander, “Harmonisation and Diversity in the Private International Law of Mediation: the Rhythms of Regulatory Reform” in Hopt and Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 2013) pp.158–159; noting also the hybrid form where private mediators are appointed by the court and provided at the court’s expense.

11 M Roth and D Gherdane, “Mediation in Austria: The European Pioneer in Mediation Law and Practice” in Hopt and Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 2013) p.291.

interactive, whether face-to-face or electronically,<sup>12</sup> or non-interactive (organised without direct confrontation, the mediator shuttling to and fro).

Settlement (predominantly non-mediated) and withdrawal of a claim (again, predominantly non-mediated) are the main forms of closure for civil disputes.<sup>13</sup> Certainly, the great majority of disputed civil claims before the English courts end without trial. The main reason for this is a high level of settlement (although some actions will be abandoned by the claimant or the claim or defence might be dismissed pre-trial by the court). English litigants' tendency to be alert to settlement opportunities is reinforced by both the considerable costs risks imposed by the making of settlement offers under Civil Procedure Rules (CPR) Part 36<sup>14</sup> and generous protection of the confidentiality of settlement negotiations (the "without prejudice" head of evidential privilege).<sup>15</sup>

### III. Mediation Principles

#### A. Neil Andrews: six foundations of mediation

This author's suggestion is that the following principles are fundamental to mediation.

##### (i) Andrews 1. The voluntary principle. Participation, process, and outcomes are consensual

There are three elements of the principle of voluntariness: (1) parties should not be compelled to participate in mediation; (2) the process should be under their joint consensual control at all times; and (3) the results should be freely agreed upon.

Thus, mediation presupposes that parties are willing to engage in discussion (interactively or indirectly by use of a go-between). Compulsory participation and discussion will not work. Nor is it the aim of mediation, once the parties attend and discuss, to compel them to reach a compromise. Within mediation, the parties have ultimate control over whether the case ends (but mediators can cut mediation sessions short and thus terminate the process, for good reason).<sup>16</sup> Parties have the

12 For extensive references to electronic mediation, see the sections entitled "'E'-justice" within the national reports collected in Esplugues-Mota et al (eds) *Civil and Commercial Mediation in Europe* (n.1).

13 H Genn, S Riahi and K Pleming, "Regulation of Dispute Resolution in England and Wales: A Sceptical Analysis of Government and Judicial Promotion of Private Mediation" in Steffek and Unberath (eds), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (Oxford: Hart Publishing, 2013) p.157 ("between 85 and 95 per cent of disputes conclude in this way, even after issue of court proceedings"); Genn, *Twisting Arms: Court Linked and Court Referred Mediation Under Judicial Pressure* (n.3) Ch.2.

14 R Jackson, *The Reform of Civil Litigation* (London: Sweet & Maxwell, 2016) Ch.10; Neil Andrews, *Andrews on Civil Processes*, Vol 1 (*Court Proceedings*) (Cambridge: Intersentia Publishing, 2013) pp.18.31ff; David Foskett, *Foskett on Compromise* (London: Sweet & Maxwell, 8th ed., 2015) Chs.14–18.

15 Andrews, *Andrews on Civil Processes* (n.14) pp.12.49ff; Foskett, *Foskett on Compromise* (n.14) Ch.19.

16 On this last point, Alexander, *International and Comparative Mediation* (n.4) p.224.

opportunity to determine the outcome. Parties alone can decide whether they wish to reach a settlement and, if so, on what terms.

### (ii) Andrews 2. Neutrality and even-handedness

The mediator must be, and be seen to be,<sup>17</sup> neutral.<sup>18</sup> More generally, there is a duty to conduct the mediation in an even handed and “fair” manner: “the [mediator] shall seek to maintain fair treatment of the parties and, in so doing, shall take into account the circumstances of the case”.<sup>19</sup>

Although the mediator must treat the parties in an even-handed fashion, there are two elements of the mediation process which offer scope for mediator bias (and the perception of bias): (1) communications between one party and the mediator need not (and very often will not) become known to the opposing party and (2) the mediation system cannot eliminate the fact that mediators might have private and undisclosed prejudices against certain types of party or individuals (conversely, preferences and positive feelings towards the opponent). Such factors might work in favour of one side during the conduct of the mediation. Compared to judges and arbitrators, mediators have greater scope to act on such prejudices. This is because judges are required to communicate in public in the court room, and their decisions are subject to appeal. There is greater public and institutional scrutiny and accountability. Arbitrators, although not functioning in public, are also at risk of procedural challenge if their conduct of a case reveals such a deviation from strict neutrality (this falls under the head of a “serious irregularity” of procedure within s.68 of the Arbitration Act 1996, England and Wales).

### (iii) Andrews 3. Competence and conscientiousness

The mediator must be competent (fit to assume office) and conscientious in discharging his duties.<sup>20</sup>

17 For example, the mediator should not be “conflicted”: P Brooker, “Mediator Immunity: Time for Evaluation in England and Wales?” (2016) 36 LS 464, 482–484.

18 Alexander, *International and Comparative Mediation* (n.4) pp.27 and 219ff, and on duties to disclose potential conflicts, pp.216ff; the flip side is possible attacks on mediated settlements based on alleged lack of impartiality, pp.222ff; mediators are also expected not to operate as legal advisors, p.223.

19 Article 6(3) of the UNCITRAL Model Law; Alexander, *International and Comparative Mediation* (n.4) p.413. The official UNCITRAL Guide to this soft-law Model Law (reproduced in Guiguo and Fan, *Mediation in Asia-Pacific* (n.2) pp.501–502) states that “fair treatment” is “intended to govern the conduct of the [mediation] process and not the contents of [any resulting] settlement agreement”. “Fair treatment” also covers:

“the notion that [mediators] should seek to maintain equality of treatment when dealing with the various parties. However, such equality ... does not mean that equal time should necessarily be devoted to separate meetings with each party”.

Good practice will be to anticipate “time discrepancies” and explain this possibility as benign and not inconsistent with the mediator “taking time to explore all issues, interests and possibilities for settlement”.

20 Brooker, “Mediator Immunity: Time for Evaluation in England and Wales?” (n.17); a mediator’s responsibilities are complex and extensive, eg, the convenient list in Alexander, *International and Comparative Mediation* (n.4) p.216 (13 duties listed); and on the power to terminate mediation proceedings

## (iv) Andrews 4. Party authority

Parties attending the mediation should have authority to settle.<sup>21</sup> Without this, the event will be a pantomime or dress rehearsal.

## (v) Andrews 5. Confidentiality

Confidential communications<sup>22</sup> during mediation are protected by implied, often express, duties of confidentiality (but this protection is qualified in some situations by various “exceptions”).<sup>23</sup> Such communications are furthermore privileged against compulsory production in legal proceedings. But the mediator does not enjoy any personal evidential immunity.<sup>24</sup> (Alexander provides a helpful five-fold analysis of the complex subject.)<sup>25</sup>

## (vi) Andrews 6. Finality

Any mediated settlement, which might be complete or partial, needs to be formalised quickly.

(vii) Analysis of Esplugues and Barona (E and B)<sup>26</sup>

These authors, both professors at Valencia, propose the following five<sup>27</sup> mediation principles.<sup>28</sup>

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because of unsatisfactory participation, p.224; on the liability of mediators and the scope for recognising immunity, pp.240–244; and on mediators’ duties to record, preserve records or report, pp.325ff.

21 The importance of this factor is emphasised in Alexander, *International and Comparative Mediation* (n.4) p.164; generally on the validity of mediated settlements, and the opportunities for legal challenge, pp.301–325.

22 *Ibid.*, on the various categories of protected information, p.248.

23 *Ibid.*, on exceptions to confidentiality, pp.282–285.

24 Allen, *Mediation Law and Civil Practice* (n.3) Ch.9; for non-English material, Alexander, *International and Comparative Mediation* (n.4) Ch.6 (analysis of the various facets of confidentiality in this context); on mediator evidential immunity, Alexander, *International and Comparative Mediation* (n.4) pp.259–266.

25 Alexander, *International and Comparative Mediation* (n.4) pp.290–291: (1) modalities of confidentiality (outsiders, confidentiality as between participants to the mediation and confidentiality vis-à-vis the wider legal process); (2) persons subject to the duty to maintain confidentiality; (3) types of material which are confidential; (4) stages or precursors to mediation which attract protection; and (5) exceptions.

26 The differences between the Andrews list of six and the Esplugues-Mota and Barona-Vilar list of five fundamental features are as follows: (1) Andrews includes competence and conscientiousness (Andrews principle 3), but for Esplugues and Barona competence sits in the shadow of neutrality; (2) Andrews also has party authority (Andrews principle 4); (4) Andrews mentions finality, whereas Esplugues and Barona prefer to emphasise enforceability; (5) Esplugues and Barona separate equality and neutrality, whereas Andrews treats neutrality and even-handedness as sufficient (that is, necessarily including equality), but the latter difference is one of emphasis rather than real substance.

27 In fact, Esplugues and Barona (eds), *Global Perspectives on ADR* (n.1) pp.44–45, separate “voluntariness” and “disposition”. But in the present paper, Andrews has decided to unite these because they share the fundamental feature of avoidance of compulsion and free determination of the decision to participate, the nature of the process and the outcome.

28 *Ibid.*, pp.44–48.

## (a) E and B 1. Voluntariness and the principle of free disposition

Esplugues and Barona suggested that “as a matter of principle no one must be compelled to take their dispute to mediation, nor to remain in the mediation or to reach settlement on the dispute at stake”.<sup>29</sup> Furthermore, the “principle of free disposition” signifies that “the parties are themselves in charge of the process and that they can organise it as they wish and terminate it at any time without any obligation to reach an agreement” and “... parties can withdraw from the mediation at any point”.<sup>30</sup> The authors add: “the parties must always have available the opportunity to take their disputes to State courts in case the mediation does not succeed for any reason”.<sup>31</sup>

Party choice can be exercised in respect of a host of matters, including the following issues: (1) selection of the relevant mediation procedure; (2) the parties enjoy choice over the identity of the neutral third party who will act as a mediator (or a set of third parties); (3) parties also decide by themselves the scope of the issues themselves and the information to be considered within the mediation;<sup>32</sup> (4) agreeing upon its commencement; and (5) as the process develops, the parties can modify, shorten or lengthen this procedure.

The flexibility of mediation, capable of extensive consensual modification and joint design, can be contrasted with the procedural straitjacket of court procedure in matters of scope, pleading, evidence, amendment of pleadings, etc. In practice, arbitral procedure is seldom closely regulated by party agreement, but instead matters of procedure are left to the tribunal or institutional rules.

## (b) E and B 2. Neutrality or impartiality of mediators (ideals and reality)

Esplugues and Barona suggested<sup>33</sup> that “the mediator must conduct the mediation in a neutral, impartial and competent manner”. To this end, the mediator “has a duty of disclosure of any circumstances which may generate a conflict of interest or affect his/her neutrality and impartiality”. However, as discussed in Section III(ii), the mediation process is not as closely regulated as the judicial or arbitral process. Deviation from pure neutrality is a real possibility within mediation, and it would be naive and unconvincing to seek to deny this.

## (c) E and B 3. Equality of treatment

Parties to mediation “must have equality of opportunities fully guaranteed for its entire duration”.<sup>34</sup>

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> For analysis of this sort, Steffek and Unberath (eds), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (n.1) Part 1 (pp.3–61, eg, p.5).

<sup>33</sup> *Ibid.*

<sup>34</sup> Esplugues and Barona (eds), *Global Perspectives on ADR* (n.1) p.45.



(d) E and B 4. Confidentiality<sup>35</sup>

This is regarded as an essential feature of mediation. It requires the parties and mediator(s) to respect the confidential nature of the disclosure made during the mediation and of the result of the process (whether it culminates in a complete or partial settlement or no agreement at all).<sup>36</sup> But jurisdictions can apply this basic requirement in different ways.<sup>37</sup>

## (e) E and B 5. Judicial enforceability of mediated settlement agreements

Article 6 of the European Union (EU) Directive on Mediation (2008)<sup>38</sup> renders it obligatory that EU Member States to have rules which recognise cross-border mediation settlements, provided these have been confirmed in writing with sufficient formality (on this Directive, see Section VII).

## IV. Rise of Mediation

Mediation has enjoyed a global blossoming, for two main reasons: attraction and visibility.

It is capable of being superior to the alternatives, notably it can be better than court proceedings. Second, it is better known, that is, many people, companies or organisations having now used and grown to trust it.

### A. Attractions

Mediation's intrinsic benefits include the following:<sup>39</sup>

- (1) a flexible and consensually controlled process;
- (2) negotiable and flexible outcomes;
- (3) preserving face and avoiding the risk of total defeat;
- (4) promotion of accord and avoidance of hostile confrontation;
- (5) preservation, even strengthening, of relationships;
- (6) inclusion of stakeholders other than the immediate disputants;
- (7) a broadening of considerations beyond local or municipal law;
- (8) putting to one side narrow "Hohfeldian"<sup>40</sup> analysis of rights and liability;

<sup>35</sup> Alexander, *International and Comparative Mediation* (n.4) Ch.6; Allen, *Mediation Law and Civil Practice* (n.3) Ch.9.

<sup>36</sup> Esplugues and Barona (eds), *Global Perspectives on ADR* (n.1) p.46.

<sup>37</sup> *Ibid.*, p.46, fn 187.

<sup>38</sup> Andrews, "The Duty to Consider Mediation: Salvaging Value from the European Mediation Directive" in N Trocker and A De Luca (eds), *La Mediazione Civile alla Luce della Direttiva 2008/52/CE* (Florence: Firenze University Press, 2011) pp.33ff, 18–19.

<sup>39</sup> Some of these points are made by Alexander, *International and Comparative Mediation* (n.4) pp.48, 53–54.

<sup>40</sup> Wesley Newcomb Hohfeld (1879–1918), an American analytical legal theorist, author of *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (1919) (Dartmouth: Ashgate



- (9) mediation is confidential;<sup>41</sup> this suits many parties;
- (10) it can be much cheaper and speedier than traditional court litigation<sup>42</sup> (courts in many systems are overburdened, slow and inefficient);<sup>43</sup> and
- (11) judges are not always sufficiently experienced or expert to cope with specific types of dispute. Mediation in specific areas can help to meet that expertise deficit.

### B. Visibility

News has spread within the legal and beyond that mediation occupies the large space between fruitless negotiation *inter partes* and the dogfight of adversarial arbitral or court proceedings.

This increased awareness is not just the product of multiple hearsay. Mediation has been actively promoted by many national Governments, including some enlightened judiciary systems.<sup>44</sup>

Mediation has also been promoted at the international level, notably in the 2008 EU Mediation Directive. In some jurisdictions, this was received as a lightning bolt of great significance. But in England and Wales, the Directive caused not even a slight stir and was simply implemented as yet another European obligatory text. This is because the Directive did not tell the British anything which they did not already know about this style of dispute resolution (see Section VI).

## V. Governmental Responses to Under-Use

Despite the factors listed in the preceding section, which have increased resort to mediation, there is the “paradox” that this technique remains under-used<sup>45</sup> and the “supply of mediators continues to exceed demand”.<sup>46</sup>

Government can promote mediation by:

- (1) advertising it;
- (2) funding or subsidising it;

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Publishing, 2001), derived from articles and essays. His main contribution is the following sets of jural relations:

|                    | (1)            | (2)                | (3)              | (4)                 |
|--------------------|----------------|--------------------|------------------|---------------------|
| JURAL OPPOSITES    | Right No-right | Privilege Duty     | Power Disability | Immunity Liability  |
|                    | (1)            | (2)                | (3)              | (4)                 |
| JURAL CORRELATIVES | Right Duty     | Privilege No-right | Power Liability  | Immunity Disability |

41 Alexander, *International and Comparative Mediation* (n.4) Ch.6; Allen, *Mediation Law and Civil Practice* (n.3) Ch.9.

42 Alexander, *International and Comparative Mediation* (n.4) pp.49–50.

43 *Ibid.*, p.53.

44 See Section V and Sections IX(G) and (H).

45 Esplugues and Barona (eds), *Global Perspectives on ADR* (n.1) p.52.

46 Alexander, “Harmonisation and Diversity in the Private International Law of Mediation” (n.10) pp.152, 175.

- (3) requiring public authorities to comply with mediation protocols in their own dealings with citizens or businesses, etc;
- (4) rule-making;<sup>47</sup>
- (5) participation in international initiatives to promote mediation; and
- (6) Government or the courts can go further and, in different ways and to varying degrees, insist on resort to mediation.<sup>48</sup>

This last topic recurs in the anthologies, but is most easily tracked in Hopt and Steffek<sup>49</sup> and Esplugues.<sup>50</sup>

47 For rich analysis of the various types of legal support and regulation: Alexander, *International and Comparative Mediation* (n.4) Ch.2.

48 Alexander, "Harmonisation and Diversity in the Private International Law of Mediation" (n.10) pp.152–153, 174–176, calls such elements of compulsion or sanctions, "triggering laws" in the sense that these are measures designed to provoke to induce parties to commit to mediation.

49 Alexander, *International and Comparative Mediation* (n.4) pp.95–97; Hopt and Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (n.1), notably pp.25, 48, 120, 175 (general observations); p.260 (Austria, restricted categories of compulsory mediation); pp.334–335, 341 (Bulgaria, no compulsion possible); p.467 (France: judicial referral to mediation only with consent); pp.525–527 (Germany: stay of proceedings following judicial recommendation that case proceed to mediation); p.591 (Greece: mediation requires party consent); p.610 (Hungary: voluntary resort to mediation); pp.639–640 (Ireland: mediation conference can be ordered by court even if only one party consents); p.679 (Italy: compulsory mediation in specified categories of claim); p.706 (Netherlands, voluntary mediation following judicial recommendation); pp.782, 784 (Poland, voluntary mediation, but opportunity for judicial costs sanctioning); pp.820–821 (Portugal, voluntary but incipient or contemplated system of costs sanctions); pp.872–873 (Australia, Federal statute requiring "genuine steps" to achieve settlement before issue); p.846 (Spain; interruption of judicial proceedings in order to mediate); pp.932–941 (Canada, Ontario, mandatory participation for at least 30 minutes in 1 mediation session within 180 days after defence has been filed, and obligation to provide a statement of the issues; mediation fees shared); pp.970–971 (China: an equivocally "voluntary" process; suggestions that some judges compel mediation before the court); p.1023 (Japan; mandatory mediation in respect of certain banking, financial, insurance claims; customers free to decline proposed settlement); p.1062 (Japan, mandatory mediation in family context); pp.1098, 1106, 1109, 1123 (New Zealand, subject specific and limited mandatory mediation); pp.1141, 1154 (Norway, voluntary except in child custody or visitation matters); pp.1173, 1179 (Russia, judicial recommendations, without sanctions); pp.1273–1275 (United States, surveying mix of approaches in California, Florida, Ohio and Texas).

50 Esplugues-Mota et al (eds) *Civil and Commercial Mediation in Europe* (n.1) Vol 1, p.26 (court does not compel mediation, Austria); pp.64–65 (court can order mediation, Belgium); p.124 (court can order participation in mediation, Czech Republic); pp.153–154 (with parties' consent, court can refer to mediation, France); pp.175–178 (Federal law permitting German states to experiment with pre-issue mandatory mediation, but confined to specific types of dispute); p.237 (mandatory lawyer-led negotiation pre-issue; can include mediation; and in disputes between companies, Hungary); pp.252–281 (evolving position in Italy); pp.294–295 (mandatory mediation in family matters, Malta); p.317 (judicial power to refer to mediation without parties' consent confined to earlier phases of the case, Poland); p.347 (free access to "Courts for the Peace" for claims worth less than 5,000 Euros concerning specific types of dispute and includes mediation, Portugal); p.368 (judicial suggestion of mediation, Romania); p.401 (voluntary submission to mediation, Finland); p.410 (voluntary submission to mediation, Sweden); p.482 (party consent to mediation, but judges can suggest, Spain); pp.496, 510–511 (mediation not to be mandatory, and so parties can decline

The main strands of “mandatory” mediation are gathered in Section IX (G and H). But here are six brief points on the nature and limits of “mandatory” mediation.

### A. *Arguments and counterarguments*

Alexander has suggested that “research indicates that once at the mediation table, skilled mediators can guide even the most reluctant of parties to recognise opportunities for resolution”.<sup>51</sup> Even if true, that prospect of compulsory attendance arouses controversy.

De Girolamo summarised the arguments for and against mandatory mediation:<sup>52</sup>

“Some of the arguments against compulsion include that: (1) it breaches the concept of voluntariness of the process; (2) it does not deliver justice; (3) it prevents the development of the law; (4) it disadvantages the poor and the weak; and (5) it leads to coerced settlement. On the other hand, such arguments are countered with views that: (1) compulsion to the table does not mean compulsion to stay at the table or to accept a settlement; (2) justice has many forms; (3) parties are satisfied with the process once having experienced the process; (4) it helps make efficient a civil justice system that is already about settlement.”

De Girolamo also bemoaned the lack of clarity in the (English and Welsh) “official” promotion of mediation.<sup>53</sup>

“There seems to be a desire by the English courts and government to continue under a façade ... that compulsory mediation is not appropriate for England and Wales. However, the rules and pre-action protocols ... , the statements made by the judiciary in cases and speeches, and the actions of government all point to a regime that seeks to do indirectly what it feels it should not do directly. Furthermore, it supports a system which is ad hoc, opaque and burdensome on litigants. There is a need for clear articulation about the expectations of the civil justice system.”

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judicial referral, Netherlands); pp.538–539 (costs sanctions in respect of unreasonable failure to consider mediation, England).

51 Alexander, *International and Comparative Mediation* (n.4) pp.172–173, including works referred to in note 5.

52 D de Girolamo, “Rhetoric and Civil Justice: A Commentary on the Promotion of Mediation without Conviction in England and Wales” (2016) 35 CJQ 162, 164.

53 *Ibid.*, pp.182–183.

### B. Jackson on mediation

There are important statements of principle in Sir Rupert Jackson's April 2012 speech on mediation (he is a Lord Justice of Appeal and a celebrated expert on civil justice in general):<sup>54</sup>

"I accept that mediation is not, of course, a universal panacea. The process can be expensive and can on occasions result in failure ... [Nevertheless] mediation has a significantly greater role to play in the civil justice system than is currently recognised."

He added:

"nor do I agree with a proposal for 'compulsion' to be exercised [by every] judge. [Instead] judges must have discretion to give case management directions as they deem appropriate in the circumstances of the individual case".

The same judge noted in a 2012 decision:

"... there are many cases where a strict determination of rights and liabilities is what the parties require. The courts stand ready to deliver such a service ... But before embarking upon full blooded adversarial litigation parties should first explore the possibility of settlement".<sup>55</sup>

### C. Costs sanctions<sup>56</sup>

English courts are prepared to use such cost sanctions, where appropriate, to register censure of a party's unreasonable refusal to accede to either the opponent's call for mediation or the court's own suggestion that mediation should be undertaken or "explored". The three forms of costs sanction are as follows: (1) the losing party (the unreasonable mediation *refusenik*) can be ordered to pay indemnity costs rather than (lesser) "standard basis" costs;<sup>57</sup> (2) the winning party (the unreasonable

54 "The Role of Alternative Dispute Resolution in Furthering the Aims of the Civil Litigation Costs Review" (RICS Expert Witness Conference, 8 March 2012), paras.5.2 and 5.4, available at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lj-jackson-speech-eleventh-lecture-implementation-programme.pdf>.

55 *Faidi v Elliot Corp* [2012] HLR 27, [35] (Jackson LJ).

56 Allen, *Mediation Law and Civil Practice* (n.3) Chs.6 and 7; Andrews, *Andrews on Civil Processes* (n.3) paras.1.105–1.127; E Crawford and J Carruthers, "United Kingdom" in Esplugues-Mota et al (eds) *Civil and Commercial Mediation in Europe* (Cambridge: Intersentia Publishing, Vol 1, 2013 and 2014), p.539, n.98, and literature in ensuing notes. See also discussion in Section IX(H)(iii).

57 On these two types of costs calculation, Andrews, *Andrews on Civil Processes* (n.14) pp.18.23ff.

mediation *refusenik*) might not be awarded all or any of its costs as against the other party; and (3) neither party might be awarded costs because each was guilty of unreasonably spurning the other's mediation overtures or the court's suggestion that it should be attempted. The four leading cases on costs sanctions are *Dunnett v Railtrack plc* (2002: appeal; judicial recommendation);<sup>58</sup> *Halsey v Milton Keynes General NHS Trust* (2004: general criteria concerning costs sanctions);<sup>59</sup> *McMillan Williams v Range* (2004: both parties in default);<sup>60</sup> and *PGF II SA v OMFS Co* (2013: silence is reprehensible).<sup>61</sup> In this last case, the Court of Appeal held that silence in the face of an invitation to participate in alternative dispute resolution (ADR) was itself unreasonable, irrespective of the merits of refusing to engage in ADR.

Apart from the special case of total silence, in determining the unreasonableness of a party's refusal to pursue mediation, the Court of Appeal in *Halsey v Milton Keynes General NHS Trust* listed the following criteria:<sup>62</sup>

"... the nature of the dispute; the merits of the case; the extent to which other settlement methods have been attempted; whether the costs of the ADR would be disproportionately high; whether any delay in setting up and attending the ADR would be prejudicial; whether the ADR had a reasonable prospect of success".

Sir Rupert Jackson, in a speech, has made these comments, some of them sceptical, on these criteria:<sup>63</sup>

*Nature of the dispute:* Jackson's sceptical response is that "there are no categories of case which are not capable of mediation, although there are some cases where it is reasonable not to settle in mediation".

*Merits of the case:* Here, Jackson suggests that "there are many cases where a party may reasonably believe that it has a watertight case but they are settled at mediation".

58 [2002] 1 WLR 2434, [13]ff.

59 [2004] 1 WLR 3002, [16]ff.

60 [2004] 1 WLR 1858, [29] and [30].

61 [2014] 1 WLR 1386; noted AKC Koo, "Case Note" (2014) 33 CJQ 261-5; G Meggitt, "Case Note" (2014) 33 CJQ 335-348; M Ahmed, "Case Note" [2014] CLJ 35-37; B Rix, "The Interface of Mediation and Litigation" (2014) 76 Arbitration 21-27; J Sidoli del Ceno and P Barrett, "Comment" (2012) 78 Arbitration 401-404.

62 [2004] 1 WLR 3002, [16]ff; for a strong application of this costs regime, in which the *Halsey* criteria were fully considered, *P4 Ltd v Unite Integrated Solutions plc* [2006] EWHC 2924 (TCC) (Ramsey J). Allen, *Mediation Law and Civil Practice* (n.3) Ch.7. For a helpful list of cases considering costs sanctions in this context, AKC Koo, "Case Note" (2014) 33 CJQ 261, 264, n.12.

63 "The Role of Alternative Dispute Resolution in Furthering the Aims of the Civil Litigation Costs Review" (n.54) para.3.8.

*Other settlement methods have been attempted:* Jackson's comment is that "in principle this should allow the parties to refer to 'without prejudice' negotiations to take account of settlement offers made and rejected".

*Cost of mediation would be disproportionately high:* Jackson's response to this point is that "the costs of mediation are significantly less than litigation, although it must be accepted that those costs may be wasted if mediation fails".

*Delay:* On this topic, Jackson suggests that "whilst late mediation is to be avoided, it should not delay any trial".

*Whether mediation has a reasonable prospect:* Jackson comments that "experience shows that many mediations have a reasonable prospect of settling, regardless of the initial attitude of the parties, but whether they will settle is a matter for agreement between the parties".

Jackson suggests, nevertheless, that *Halsey v Milton Keynes General NHS Trust* had a salutary effect, contending that it stimulated a new pattern of behaviour.

An illustration of a judge applying the criteria of *Halsey v Milton Keynes General NHS Trust* is *Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C4I) Ltd*.<sup>64</sup> Here, Ramsey J concluded that the victorious party (BAE) had unreasonably refused to engage in mediation, which had been suggested by the opponent. But there was the countervailing factor that BAE had made a settlement offer which the opponent had not beaten at trial. Ramsey J held that these factors should be treated as cancelling each other out, with the result that no costs sanction was applied to BAE on these facts. BAE was instead entitled in full to its costs, assessed on the standard basis.

#### ***D. Automatic referral systems***

These have been piloted in some English courts. Under these arrangements, litigants were allowed to opt back into the court system, on giving reasons. Hazel Genn, who made an official study of these experiments, said:<sup>65</sup>

"Automatic Referral to Mediation was not interpreted by most solicitors as compulsory and many regarded opting out [so as to resume litigation] as a mere bureaucratic hurdle. Considered objections for opting out included the timing of the referral, the intransigence of the opponent, the subject matter of the dispute, and a belief that mediation was unnecessary because the case would settle."

<sup>64</sup> [2015] 3 All ER 782 (Ramsey J).

<sup>65</sup> Genn, *Twisting Arms: Court Linked and Court Referred Mediation Under Judicial Pressure* (n.3) p.iii; Genn, *Judging Civil Justice* (n.3) pp.107–108.

### ***E. EU***

The European Court of Justice in *Alassini v Telecom Italia SpA*<sup>66</sup> held that a national law requiring mandatory recourse to a settlement procedure is not contrary to EU law. This is not a recipe for oppression because, as the Court noted, settlements achieved by using this procedure were not binding on the parties.

### ***F. Canada***

The Canadian province of Ontario introduced generic mandatory mediation.<sup>67</sup> However, a study reveals some possible pitfalls: that in many cases this can involve an unnecessary financial burden; that the mediation stage might be premature; that the pool of mediators might be inadequate; and that there can be significant variations in the practice from locality to locality, even within the same jurisdiction.<sup>68</sup>

British Columbia has also introduced mandatory judicial settlement conferences,<sup>69</sup> and the same Province prescribes a system of party-issued notices to mediate which have the effect of requiring the opponent to proceed to mediation.<sup>70</sup>

## **VI. The EU Directive on Mediation<sup>71</sup>**

Substantively, the European Directive on Mediation (2008) is of modest significance, for two reasons: (1) its concrete contents are slight and (2) its “cross-border” scope renders it of marginal significance. Thus, art.2 confines this

66 (C-317/08: 2010); on which, Hopt and Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (n.1) p.175.

67 C Morris, “The Impact of Mediation on the Culture of Disputing in Canada: Law Schools, Lawyers and Laws” in Wang and Yang, *Mediation in Asia-Pacific* (Hong Kong: CCH Publishing Hong Kong, 2013) paras.3.54ff; R Ellger, “Mediation in Canada: One Goal—Different Approaches to Mediation in a State with Federal and Provincial Jurisdictions” in Hopt and Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 2013) pp.932–941 (Canada, Ontario, mandatory participation for at least 30 minutes in 1 mediation session within 180 days after defence has been filed, and obligation to provide a statement of the issues; mediation fees shared).

68 S Prince, “Mandatory Mediation: The Ontario Experience” (2007) 26 CQJ 79; and the summary by Genn, *Twisting Arms: Court Linked and Court Referred Mediation Under Judicial Pressure* (n.3) p.10; Genn, *Judging Civil Justice* (n.3) pp.107–108.

69 Morris, “The Impact of Mediation on the Culture of Disputing in Canada” (n.67) paras.3.37–3.39.

70 *Ibid.*, paras.3.40ff.

71 “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”: Official Journal L 136, 24/05/2008 P 0003–0008; generally, the national reports in Esplugues-Mota et al (eds), *Civil and Commercial Mediation in Europe* (n.1) Vol 2, pp.485ff; Andrews, “The Duty to Consider Mediation: Salvaging Value from the European Mediation Directive” in N Trocker and A De Luca (eds), *La Mediazione Civile alla Luce della Direttiva 2008/52/CE* (Florence: Firenze University Press, 2011) pp.13, 18–19; C Esplugues-Mota, “A New General Legal



instrument to cover only “cross-border” mediations of “civil and commercial” disputes, that is, where the parties are domiciled or habitually resident in different Member States, or the host Member State is different from the parties’ Member State. This is a tiny category. Even approximate figures collected by the English Ministry of Justice (2010) reveal the paucity of such cases:<sup>72</sup> “in 2009, the number of international mediations was 72 and 48 of those mediations had a party based in a Member State”.

England and Wales implemented<sup>73</sup> the European Directive on Mediation (2008) by an addition to the CPR,<sup>74</sup> by Regulations,<sup>75</sup> by amending the Limitation Act 1980<sup>76</sup> and by implementing (in the form of Regulations)<sup>77</sup> the confidentiality regime contained within the Directive.

The European Directive on Mediation (2008)<sup>78</sup> is consistent with the view that the mediator has no personal evidential immunity, because art.7 acknowledges that there will be occasions when the mediator can be compelled to give evidence where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or where disclosure of the content of the agreement resulting from mediation is necessary to implement or enforce that agreement.

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Regime for Mediation in Spain” (2011) 16 *Zeitschrift für Zivilprozess International* 95; F Ferrand, “La transposition en droit français et en droit allemande de la directive no 2008/52/CE du 21 mai 2008...” (2011) 16 *Zeitschrift für Zivilprozess International* 29 (discussion of directive’s reception in Germany and in France).

72 Ministry of Justice, “Implementation of the EU Directive on Mediation: Policy Information Paper” (2010) (a consultation paper) para.12.

73 For implementation of the Directive Cross-Border Mediation (EU Directive) Regulations 2011/1133: Part 2 introduces provisions concerning mediation privilege in the context of cross-border mediation; and Part 3 introduces provisions to ensure interruption of the limitation period, amending the Limitation Act 1980, by inserting a new s.33A; and amending the Foreign Limitation Periods Act 1984 by inserting a new s.1A; A Hildebrand, “The United Kingdom” in De Palo and Trevor (eds), *EU Mediation: Law and Practice* (Oxford: Oxford University Press, 2012) paras.28.19–28.25; 28.40–28.45; 28.46–28.52; 28.53–28.57; 28.58–28.67; 28.115–28.116; J Scherpe and B Marten, “Mediation in England and Wales: Regulation and Practice” in Hopt and Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 2013) Ch.6.

74 CPR Part 78, s.III.

75 Directive Cross-Border Mediation (EU Directive) Regulations 2011/1133, regulation 26.

76 Section 33A of the Limitation Act 1980 (where mediation proceedings are commenced before the limitation period has expired and that period would otherwise elapse during those proceedings, the period is postponed so as to elapse eight weeks after those proceedings have ended). Generally, not confined to European, see Alexander, *International and Comparative Mediation* (n.4) pp.294ff on limitation periods and mediation proceedings.

77 Cross-Border Mediation (EU Directive) Regulations 2011/1133, regulations 9 and 10.

78 “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” (n.71).

In England, this aspect of the Mediation Directive has been incorporated as follows<sup>79</sup> (this provision appears to be confined to cross-border mediation disputes):<sup>80</sup>

10. “A court may order that a mediator or a mediation administrator must give or disclose mediation evidence where — (a) all parties to the mediation agree to the giving or disclosure of the mediation evidence; (b) the giving or disclosure of the mediation evidence is necessary for overriding considerations of public policy, in accordance with article 7(1)(a) of the Mediation Directive; or (c) the mediation evidence relates to the mediation settlement, and the giving or disclosure of the mediation settlement is necessary to implement or enforce the mediation settlement agreement.”

The Directive emphasises the widespread phenomenon of mediation, and it underlines the “voluntary” nature of mediation. This important restatement of fundamental principle occurs in the Preamble to the Directive:

“(13) The mediation provided for in this Directive should be a voluntary process in the sense that the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time. However, it should be possible under national law for the courts to set time-limits for a mediation process. Moreover, the courts should be able to draw the parties’ attention to the possibility of mediation whenever this is appropriate.

(14) Nothing in this Directive should prejudice national legislation making the use of mediation compulsory or subject to incentives or sanctions provided that such legislation does not prevent parties from exercising their right of access to the judicial system ...”.

The Directive acknowledges that mediation cannot be thrust upon parties, but also concedes (para.14) that state-controlled incentives and sanctions, ultimately administered by civil courts, can be used to encourage resort to mediation. Incentives are unproblematic. Sanctions are more controversial and should be cautiously administered. The voluntary principle requires that a sanction should apply only to support a limited duty: the duty to consider mediation, when this possibility is suggested by the other side or by the court: see Sections III and V and Sections IX(G) and (H).

79 Cross-Border Mediation (EU Directive) Regulations 2011/1133.

80 *Ibid.*, regs.3 and 8(i); and the phrase “cross-border disputes” is defined in the European Directive 2008/52/EC in art.2.

## VII. Particular European Jurisdictions

National responses to the Directive (see Section VI) are collected in the four anthologies compiled by De Palo and Trevor,<sup>81</sup> Hopt and Steffek,<sup>82</sup> Steffek and Unberath<sup>83</sup> and Esplugues.<sup>84</sup> Here are some highlighted features (constraints of space preclude full discussion).

### A. Austria

This jurisdiction has been described as the pioneer in mediation in Europe (a claim which, strictly construed, seems doubtful).<sup>85</sup> Leon and Rohraher<sup>86</sup> reported that compulsory mediation, in the sense that participation in mediation is a necessary precursor to formal proceedings, is confined to neighbour disputes and to particular categories of employment issues (involving disability complaints and termination of apprenticeship). The Austrian arrangements are also considered by Mayr and Nemeth<sup>87</sup> and by Roth and Gherdane,<sup>88</sup> the latter commenting on “voluntariness”<sup>89</sup> and by Frauenberger-Pfeiler.<sup>90</sup> Frauenberger-Pfeiler noted that mediation, subject to small exceptions, is a voluntary system.<sup>91</sup> Frauenberger-Pfeiler observed that “take-up” is increased greatly if mediation is funded or compulsory.<sup>92</sup> Contentious legal activity in Austria is court centred, and “ADR has yet to be established as

81 De Palo and Trevor (eds), *EU Mediation: Law and Practice* (n.2); for the sake of brevity, no detailed remarks are collected in this paper to the reports from these jurisdictions: Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, Greece, Ireland, Latvia, Lithuania, Luxembourg, Malta, Portugal, Romania, Slovakia and Slovenia. Nor is it possible here to refer to the reports in Steffek and Unberath (eds), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (n.1), on Denmark, Norway and Switzerland; nor to the reports in Hopt and Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (n.1), on Bulgaria, Greece, Hungary, Ireland, Portugal, Norway, Russia and Switzerland; nor to the reports in Esplugues-Mota et al (eds), *Civil and Commercial Mediation in Europe* (n.1), Vols 1 and/or 2 on the Baltic Countries, Bulgaria, Croatia, Cyprus, Czech Republic, Greece, Hungary, Ireland, Luxembourg, Malta, Portugal, Romania and Slovakia.

82 Hopt and Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (n.1).

83 Steffek and Unberath (eds), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (n.1).

84 Esplugues-Mota et al (eds), *Civil and Commercial Mediation in Europe* (n.1).

85 Roth and Gherdane, “Mediation in Austria” (n.11) p.249.

86 C Leon and I Rohraher, “Austria” in De Palo and Trevor (eds), *EU Mediation: Law and Practice* (Oxford: Oxford University Press, 2012) paras.2.05, 2.22–2.24.

87 P Mayr and K Nemeth, “Regulation of Dispute Resolution in Austria: A Traditional Litigation Culture Slowly Embraces ADR” in Steffek and Unberath (eds), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (Oxford: Hart Publishing, 2013) pp.65–91, including bibliography.

88 Roth and Gherdane, “Mediation in Austria” (n.11).

89 *Ibid.*, pp.251–252, 261.

90 U Frauenberger-Pfeiler, “Austria” in Esplugues-Mota et al (eds), *Civil and Commercial Mediation in Europe* (Cambridge: Intersentia Publishing, 2013 and 2014) Vol 1, pp.1–28; Vol 2, pp.1–28.

91 *Ibid.*, para.2.03.

92 *Ibid.*, para.2.28.

a real alternative”, no doubt because “a lawsuit is more often than not the more lucrative path for lawyers”.<sup>93</sup>

### ***B. Belgium***

Verougstraete<sup>94</sup> reported that conciliation is compulsory in the field of labour law, but it is “an expensive nuisance” and “people go through the motions” with the result that the exercise is largely “unproductive”. More generally, compulsory mediation is not practised.<sup>95</sup> However, there is a tradition of judicially inspired settlement before the courts.<sup>96</sup> It is also suggested that it might be beneficial to introduce costs sanctions and other modes of incentivising parties to resort to mediation.<sup>97</sup> The same author considers this subject in a later work (2013).<sup>98</sup> The Belgian arrangements are also examined by Traest.<sup>99</sup>

### ***C. England and Wales***

See the literature in Note 2 and discussion in Sections V and VI.<sup>100</sup>

### ***D. France***

Betto and Canivet<sup>101</sup> reported that judicial referral of parties to mediation is premised on consent by the parties, except in respect of family or labour disputes. But even then a party’s obligation is confined to meeting a mediator who will explain what the process involves. Parties are not required to proceed to mediation. There are no costs sanctions.<sup>102</sup> Although this jurisdiction has traditionally displayed scepticism towards mandatory mediation, recent experiments have been conducted into requiring (1) consideration of mediation before commencement of proceedings<sup>103</sup>

<sup>93</sup> *Ibid.*, para.2.34.

<sup>94</sup> I Verougstraete, “Belgium” in De Palo and Trevor (eds), *EU Mediation: Law and Practice* (Oxford: Oxford University Press, 2012) para.3.06.

<sup>95</sup> *Ibid.*, paras.3.10 and 3.85.

<sup>96</sup> *Ibid.*, para.3.19.

<sup>97</sup> *Ibid.*, para.3.59.

<sup>98</sup> I Verougstraete, “Regulation of Dispute Resolution in Belgium: Workable Solutions” in Steffek and Unberath (eds), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (Oxford: Hart Publishing, 2013) pp.93–113, including bibliography.

<sup>99</sup> M Traest, “Belgium” in Esplugues-Mota et al (eds), *Civil and Commercial Mediation in Europe* (Cambridge: Intersentia Publishing, 2013 and 2014) Vol 1, pp.45–68, Vol 2, pp.39–54.

<sup>100</sup> Crawford and Carruthers, “United Kingdom” (n.56), Vol 1, pp.515–539; Vol 2, pp.461–484; Genn, Riahi and Pleming, “Regulation of Dispute Resolution in England and Wales” (n.13); Hildebrand, “The United Kingdom” (n.73) paras.28.19–28.25; 28.40–28.45; 28.46–28.52; 28.53–28.57; 28.58–28.67; 28.115–28.116.

<sup>101</sup> J-G Betto and A Canivet, “France” in De Palo and Trevor (eds), *EU Mediation: Law and Practice* (Oxford: Oxford University Press, 2012) paras.10.20–10.40.

<sup>102</sup> *Ibid.*, para.10.68.

<sup>103</sup> *Ibid.*, para.10.69.

or (2) participation in mediation prior to commencement of family litigation.<sup>104</sup> The French arrangements are also considered by Ferrand,<sup>105</sup> Deckert<sup>106</sup> and Guinchard and Boucaron-Nardetto.<sup>107</sup>

### E. Germany

Koenig<sup>108</sup> reported that much mediation is in fact practised by the court itself.<sup>109</sup> Referral to out-of-court mediation is likely to remain occasional, certainly non-mandatory. There are context-specific arrangements for mandatory participation in mediation (labour courts, family affairs, small claims, neighbour conflicts and defamation disputes).<sup>110</sup> Koenig also noted the potentially high impact of a provision which would require (on pain of the claim being inadmissible) a claimant to state at the commencement of proceedings that mediation or other ADR technique(s) have been attempted and why they have not been successful.<sup>111</sup> The German arrangements are also considered by Hess and Pelzer,<sup>112</sup> Tochtermann<sup>113</sup> and Bach and Gruber.<sup>114</sup> Again, reasons of space prevent us from considering details of their discussion.

### F. Italy

Marinari<sup>115</sup> reported that mandatory mediation was introduced by statute in 2010 for large categories<sup>116</sup> of civil claims. This was controversial not just because it

104 *Ibid.*, paras.10.73–10.74.

105 F Ferrand, “Regulation of Dispute Resolution in France: Evolutions and Challenges” in Steffek and Unberath (eds), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (Oxford: Hart Publishing, 2013) pp.175–207, including bibliography.

106 K Deckert, “Mediation in France: Legal Framework and Practical Experiences” in Hopt and Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 2013).

107 E Guinchard and Boucaron-Nardetto, “France” in Esplugues-Mota et al (eds), *Civil and Commercial Mediation in Europe* (Cambridge: Intersentia Publishing, 2013 and 2014) Vol 1, pp.131–158; Vol 2, pp.139–154.

108 S Koenig, “Germany” in De Palo and Trevor (eds), *EU Mediation: Law and Practice* (Oxford: Oxford University Press, 2012) para.11.15.

109 *Ibid.*, para.11.12.

110 *Ibid.*, paras.11.18–11.21.

111 *Ibid.*, paras.11.44–11.46.

112 B Hess and N Pelzer, “Regulation of Dispute Resolution in Germany: Cautious Steps towards the Construction of an ADR System” in Steffek and Unberath (eds), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (Oxford: Hart Publishing, 2013) pp.209–238, including bibliography.

113 P Tochtermann, “Mediation in Germany: The German Mediation Act—Alternative Dispute Resolution at the Crossroads” in Hopt and Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 2013).

114 I Bach and UP Gruber, “Germany” in Esplugues-Mota et al (eds), *Civil and Commercial Mediation in Europe* (Cambridge: Intersentia Publishing, 2013 and 2014) Vol 1, pp.159–192; Vol 2, pp.155–180.

115 M Marinari, “Italy” in De Palo and Trevor (eds), *EU Mediation: Law and Practice* (Oxford: Oxford University Press, 2012) paras.15.01–15.14, 15.38.

116 See the list at *Ibid.*, para.15.40.

challenged professional interests in the litigation system but because there is a long-standing public preference for civil litigation. This sentiment is a sociological curiosity when one notes that the Italian system is chronically slow and congested. Financial sanctions are available (payment of double the filing fee) and/or adverse inferences can be drawn from failure to participate properly in the proceedings, as reported by the mediator to the court.<sup>117</sup> Not surprisingly, mandatory mediation caused the volume of mediation references to swell.<sup>118</sup> Independent of this statutory development, the courts can make non-voluntary referrals to mediation, but this is seldom exercised.<sup>119</sup> Arbitration is a favoured form of dispute resolution in high-value commercial litigation.<sup>120</sup>

The 2010 mandatory system of mediation was invalidated by a constitutional decision, but a revised system was introduced in 2013 (see Trocker and Pailli<sup>121</sup>). Acknowledging the problem of “pathological delay” within the civil procedure system, Trocker and Pailli noted that mandatory pre-commencement mediation was declared constitutional within Italy, provided (1) statutes of limitation are suspended during the period of mediation; (2) the financial burden is not excessive; (3) mandatory mediation must also be conducted by parties who are legally represented<sup>122</sup> (a manifest concession to a powerful national lobbying group); and (4) finally, during the mediation phase, the parties must retain access to the courts to seek the following forms of judicial relief: protective measures, including interim relief, summary debt procedure, landlord’s access to accelerated eviction process or other possessory proceedings.<sup>123</sup>

The 2013 statute also permits courts to issue, in appropriate cases and without application by a party,<sup>124</sup> referrals to out-of-court mediation. Trocker and Pailli (2013) noted various loose ends, including legislative silence on the topic of sanctions for disobedience.<sup>125</sup> The nature of the mediation process is prescribed in some detail.<sup>126</sup> In response to (1) bad faith refusal to participate or (2) bad faith actual participation, sanctions include adverse inferences being drawn against the relevant party by a court and imposition of a penalty (the amount of the filing fee).<sup>127</sup> The mediator’s report on an unsuccessful mediation can determine the recovery of costs by the eventually victorious party (that party having done no better than a mediated

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117 *Ibid.*, para.15.39.

118 *Ibid.*, paras.15.63–15.67.

119 *Ibid.*, paras.15.15–15.17.

120 *Ibid.*, para.15.65.

121 N Trocker and G Pailli, “Italy’s New Law on Mediation in Civil and Commercial Matters: Solutions, Challenges and Unresolved Issues” (2013) 18 *Zeitschrift für Zivilprozess International* 75.

122 *Ibid.*, pp.94–95.

123 *Ibid.*, p.82.

124 *Ibid.*, p.86.

125 *Ibid.*, p.88.

126 *Ibid.*, pp.88–92.

127 *Ibid.*, p.93.

settlement offer).<sup>128</sup> There are also ingenious fiscal incentives.<sup>129</sup> Mediators' fees are regulated.<sup>130</sup> There is extensive resort to mediation, including online process, in consumer matters.<sup>131</sup> Mandatory mediation has also been introduced for family company or family business disputes and in telecommunications, investment and family matters.<sup>132</sup>

The Italian arrangements are also considered by De Palo and Oleson,<sup>133</sup> De Palo and Keller<sup>134</sup> and Queirolo and colleagues (2013).<sup>135</sup> For reasons of brevity, it is not possible here to consider the details of their discussion.

Trocker and Pailli's (2013) concluding remarks include these six reflections on compulsion:

- (1) ““In a system plagued with heavy delay and backlogs in court, mandatory schemes [of mediation] have the potential of improving access to justice and ensuring the disputants are able to resolve their matters within a reasonable time.”<sup>136</sup>
- (2) ‘Mandatory schemes are often criticised because they curtail voluntariness in the mediation process ... A distinction, however, has to be made between voluntariness into and within the process. The form of mandatory mediation adopted [in Italy] compels parties to enter into the mediation process, but does not mandate an outcome. The opt-out provision allows parties to end the ‘mediation experience’ at the preliminary informative meeting, without significant delay and financial burden ...’<sup>137</sup>
- (3) ‘As far as lawyers are concerned, an advantage of compulsory mediation is that it gets more of them [*viz* lawyers] to the mediation table than voluntary mediation, thereby increasing awareness of the Bar toward ADR devices ...’<sup>138</sup> (the background to this point

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128 *Ibid.*

129 *Ibid.*

130 *Ibid.*, p.98.

131 *Ibid.*, p.99.

132 *Ibid.*, p.100.

133 G De Palo and A Oleson, “Regulation of Dispute Resolution in Italy: The Bumps in the Road to Successful ADR” in Steffek and Unberath (eds), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (Oxford: Hart Publishing, 2013).

134 G De Palo and L Keller, “Mediation in Italy: Alternative Dispute Resolution for All” in Hopt and Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 2013).

135 I Queirolo (L Carpaneto, S Dominelli, Vol 1), (C Gambino, Vol 2), “Italy” in Esplugues-Mota et al (eds), *Civil and Commercial Mediation in Europe* (Cambridge: Intersentia Publishing, 2013 and 2014) Vol 1, pp.251–282, Vol 2, pp.221–252.

136 Trocker and Pailli, “Italy’s New Law on Mediation in Civil and Commercial Matters: Solutions, Challenges and Unresolved Issues” (n.121) p.100.

137 *Ibid.*, p.101.

138 *Ibid.*



is that mandatory mediation in Italy requires representation by lawyers).<sup>139</sup>

- (4) ‘With regard to the judiciary, ... court-referred ADR only begins to develop as a real alternative to court proceedings where it is subject to some kind of mandating. Judges [as a result] may become more comfortable with the mediation process.’<sup>140</sup>
- (5) ‘Experience shows that where parties are compelled to mediate, there are still relatively high rates of settlement, and that parties who express reluctance to resort to mediation nevertheless participate in the process, often heading to a successful resolution of the dispute.’<sup>141</sup>
- (6) ‘The authors also note that the Italian experiment with mandatory mediation, although extensive, is not regarded as permanent.’<sup>142</sup>

### G. The Netherlands

Albers<sup>143</sup> reported that court-referred mediation is based on “suggestion”, which can be made in writing by the court or by a judge during a hearing. In Holland, there is no appetite for mandatory mediation.<sup>144</sup> Two thirds of civil mediations involve family law matters.<sup>145</sup> But tax matters are also frequently mediated.<sup>146</sup> The Dutch arrangements are also considered by Pel,<sup>147</sup> Schmiedel<sup>148</sup> and van Hoek and Kocken<sup>149</sup> (and the recurrent brevity-based regret applies).

### H. Poland

Gmurzynska and Morek<sup>150</sup> reported that court-referred mediation cannot occur more than once in a case. Such mediation is confined to the earlier stages of the

139 *Ibid.*, pp.94–95.

140 *Ibid.*, p.101.

141 *Ibid.*

142 *Ibid.*, p.102.

143 P Albers, “The Netherlands” in De Palo and Trevor (eds), *EU Mediation: Law and Practice* (Oxford: Oxford University Press, 2012) para.27.18.

144 *Ibid.*, paras.27.21, 27.41.

145 *Ibid.*, para.27.55.

146 *Ibid.*

147 M Pel, “Regulation of Dispute Resolution in the Netherlands: Does Regulation Support or Hinder the Use of ADR?” in Steffek and Unberath (eds), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (Oxford: Hart Publishing, 2013) pp.297–328, including bibliography.

148 L Schmiedel, “Mediation in the Netherlands: Between State Promotion and Private Regulation” in Hopt and Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 2013).

149 A van Hoek and J Kocken, “The Netherlands” in Esplugues-Mota et al (eds), *Civil and Commercial Mediation in Europe* (Cambridge: Intersentia Publishing, 2013 and 2014) Vol 1, pp.491–514; Vol 2, pp.443–460.

150 E Gmurzynska and R Morek, “Poland” in De Palo and Trevor (eds), *EU Mediation: Law and Practice* (Oxford: Oxford University Press, 2012) paras.10.05–10.11.

litigation. It can occur with or without a party application. Mediated settlements, once ratified by the court, acquire the binding quality of a writ of execution, but not *res judicata* effect so as directly to preclude relitigation (although dismissal of the relitigated claim will probably follow).<sup>151</sup> Gmurzynska and Morek commented on the counterproductiveness of compulsory mediation.<sup>152</sup> But they also noted that “bringing parties to the table” can result in the imparting of valuable information concerning the nature of mediation and its possibilities.<sup>153</sup> The Polish arrangements are also examined by Morek and Rozdeiczner<sup>154</sup> and Grzybczyk, Fraczek and Zachariasiewicz<sup>155</sup> (brevity again precludes full examination).

### I. Spain

Sanchez-Pedreno<sup>156</sup> reported that judges can recommend resort to mediation but cannot compel it. Statute prescribes in detail how mediation sessions should be conducted,<sup>157</sup> as well as the legal duties of mediators.<sup>158</sup> The Spanish arrangements are also examined by Villamarin Lopez<sup>159</sup> and Buhigues and colleagues (2013)<sup>160</sup> (space issues preclude full examination).

### J. Sweden

Ficks<sup>161</sup> reported that there is a tradition of court-room mediation as part of judges’ settlement responsibility. Less commonly, the courts refer the parties to out-of-court mediators. This court-referral power is now to be considered in all cases.<sup>162</sup> Curiously, agreements to mediate are not legally enforceable if made *ex ante* as distinct from mediation commitments agreed post-dispute.<sup>163</sup> In general,

151 *Ibid.*, paras.20.27–20.29.

152 *Ibid.*, paras.20.33–20.34.

153 *Ibid.*, para.20.35.

154 R Morek and L Rozdeiczner, “Mediation in Poland: Time for a Quiet Revolution?” in Hopt and Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 2013).

155 K Grzybczyk and G Fraczek (Vol 1), M Zachariasiewicz (Vol 2), “Poland” in Esplugues-Mota et al (eds), *Civil and Commercial Mediation in Europe* (Cambridge: Intersentia Publishing, 2013 and 2014) Vol 1, pp.299–326; Vol 2, pp.273–304.

156 A Sanchez-Pedreno, “Spain” in De Palo and Trevor (eds), *EU Mediation: Law and Practice* (Oxford: Oxford University Press, 2012) para.25.13.

157 *Ibid.*, paras.25.36–25.56.

158 *Ibid.*, paras.25.64–25.76.

159 ML Villamarin Lopez, “Mediation in Spain: Dealing with Its First National Regulation” in Hopt and Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 2013).

160 J Buhigues et al, “Spain” in Esplugues-Mota et al (eds), *Civil and Commercial Mediation in Europe* (Cambridge: Intersentia Publishing, 2013 and 2014) Vol 1, pp.445–490; Vol 2, pp.419–442.

161 E Ficks, “Sweden” in De Palo and Trevor (eds), *EU Mediation: Law and Practice* (Oxford: Oxford University Press, 2012) paras.26.9–26.17, 26.51.

162 *Ibid.*, para.26.70.

163 *Ibid.*, paras.26.52–26.55.

it is reported that there is no appetite among Swedish legislators for mandatory mediation.<sup>164</sup> The arrangements in Sweden and other Scandinavian countries are also examined in Ervo and Sippel<sup>165</sup> (brevity again preludes details).

## VIII. Non-European Experience

Here are some highlighted features (space constraints prevent full discussion).

### A. Australia

David Bamford noted expansion of mediation, including use of court-annexed mediation, the court having power to direct a reference to a mediator, without the consent of the parties.<sup>166</sup> In some contexts, the law imposes a requirement that a party must make a statement of genuine and reasonable efforts to resolve the dispute before commencement of proceedings.<sup>167</sup> Bamford also noted institutional and educational reinforcement of the new culture of ADR.<sup>168</sup>

Bagshaw (2013) noted the need for family disputants to have displayed a “genuine effort” to resolve matters before they are entitled to file an application before a family court,<sup>169</sup> except in respect of family violence, child abuse or urgency. A certificate can be obtained to exempt particular parties. Bagshaw remarked that to the extent that mediation is rendered compulsory, mediators need to display a high level of professionalism.<sup>170</sup> He also noted that many laypeople suppose that mediators are necessarily an “appendage to the court system”, and this can cause confusion.<sup>171</sup> Problematic outcomes are possible, founded on an uncorrected or perhaps unnoticed, imbalance of covert power.<sup>172</sup> The Australian arrangements are also examined by Magnus (2013)<sup>173</sup> (brevity again preludes details).

164 *Ibid.*, para.26.51.

165 L Ervo and L Sippel, “Scandinavian Countries” in Esplugues-Mota et al (eds), *Civil and Commercial Mediation in Europe* (Cambridge: Intersentia Publishing, 2013 and 2014) Vol 1, pp.371–426; Vol 2, pp.359–384.

166 D Bamford, “Australia” in Esplugues and Barona (eds), *Global Perspectives on ADR* (Cambridge: Intersentia Publishing, 2014) pp.64–65, 68–69.

167 *Ibid.*, pp.66–67.

168 *Ibid.*, pp.77–78.

169 D Bagshaw, “Australia” in Wang Guiguo and Yang Fan (eds), *Mediation in Asia-Pacific* (Hong Kong: CCH Publishing Hong Kong, 2013) para.1.21.

170 *Ibid.*, para.1.22.

171 *Ibid.*

172 *Ibid.*, paras.1.48, 1.62–1.64.

173 U Magnus, “Mediation in Australia: Development and Problems” in Hopt and Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 2013).

## B. Canada

Morris (2013) reported that although mediation is “mainstream”,<sup>174</sup> it has not supplanted the “adversarial, adjudicative norm”.<sup>175</sup> She examined in detail the history of mediation, including the British Columbia systems of mandatory judicial settlement conferences,<sup>176</sup> and party-issued notices to mediate requiring the opponent to proceed to mediation,<sup>177</sup> and on-line (Online Dispute Resolution) neutral case evaluation, etc, for small claims.<sup>178</sup> The Ontario system of mandatory mediation is also explored.<sup>179</sup> The author also comments: “the legal system with its labyrinthine processes and complex forms is not designed for self-representation”.<sup>180</sup> The Canadian arrangements are also examined by Ellger (2013)<sup>181</sup> (brevity again precludes details).

## C. China

Bu (2014) reported on trends and controversies. The position is fluid, and there is little concrete comparative information.<sup>182</sup>

Tang reported that “Chinese courts encourage and support mediation” as well as “themselves mediating civil disputes during court proceedings”; furthermore, “if mediation fails, the same judge will decide the case at the end”; and the system of court mediation is “generally believed to be very effective”.<sup>183</sup> Extracurially mediated settlements are unenforceable unless ratified by the court.<sup>184</sup>

Wang reported that extracurial mediation occurred in 8.94 million cases in 2011, with a success rate of 96.9 per cent; and in the same year, 2.67 million cases were mediated in court and 1.75 million of these went no further.<sup>185</sup> There is a cultural disinclination to engage in “face-to-face” mediation. Instead, so-called back-to-back mediation, using the mediator to communicate points, is preferred.<sup>186</sup> Mediators often have prior knowledge of the parties and the facts.<sup>187</sup>

174 Morris, “The Impact of Mediation on the Culture of Disputing in Canada” (n.67) para.3.79.

175 *Ibid.*, para.3.80.

176 *Ibid.*, paras.3.37–3.39.

177 *Ibid.*, paras.3.40ff.

178 *Ibid.*, paras.3.41–3.42.

179 *Ibid.*, paras.3.54ff.

180 *Ibid.*, para.3.75.

181 Ellger, “Mediation in Canada” (n.67).

182 Y Bu, “China” in Esplugues and Barona (eds), *Global Perspectives on ADR* (Cambridge: Intersentia Publishing, 2014) pp.79–101.

183 H Tang, “China” in Wang Guiguo and Yang Fan (eds), *Mediation in Asia-Pacific* (Hong Kong: CCH Publishing Hong Kong, 2013) para.4.1.21.

184 *Ibid.*, para.4.1.29.

185 C Wang, “China” in Wang Guiguo and Yang Fan (eds), *Mediation in Asia-Pacific* (Hong Kong: CCH Publishing Hong Kong, 2013) para.4.2.17.

186 *Ibid.*, para.4.2.33.

187 *Ibid.*, para.4.2.35.

The system of court conciliation is also described by Yao, who reported a settlement rate of over 60 per cent in civil and commercial courts of first instance since 2008.<sup>188</sup> This type of judicial intervention is declared to promote “simplicity, effectiveness, and efficiency”.<sup>189</sup> Parties are at liberty to decide whether to participate in this mode of proceeding and whether to accede to a proposed settlement.<sup>190</sup> Judges also find mediation of their cases to be a convenient opportunity for disposal because mediated settlements reduce backlogs. Furthermore, settlements are not subject to appeal.<sup>191</sup> Yao also criticised the practice of the settlement judge remaining the trial judge,<sup>192</sup> and this point is elaborated by Zou<sup>193</sup> (who also reported<sup>194</sup> lawyers’ dissatisfaction with judicial mediation).

As for the appropriateness of mediation for different kinds of dispute, Zhang suggested this three-fold division: (1) matrimonial property, succession, neighbour disputes and partnership agreement claims; (2) contract or commercial cases; and (3) cases involving the interests of the state, the general public or third parties. Zhang then suggested that mediation is the preferable method for (1), rather than adjudication; as for (2), Zhang’s view is that mediation should be attempted first; as for (3) Zhang declared that mediation is not appropriate.<sup>195</sup>

Zou noted that courts are required to conduct pre-trial mediation in these types of cases: marital disputes and other family matters, succession issues, traffic and work accidents, partnership agreements and low-value claims.<sup>196</sup> Zou’s recommendation is to separate the mediation and adjudicative functions of judges.<sup>197</sup>

The Chinese arrangements are also examined by Pissler<sup>198</sup> (brevity again preludes details).

#### D. Hong Kong

Denton and Kun (2014) noted statutory provisions which intensify the system of costs sanctions for unreasonable failure to engage in mediation.<sup>199</sup> There is also a statutory regulation on mediation confidentiality.<sup>200</sup>

188 J Yao, “China” in Wang Guiguo and Yang Fan (eds), *Mediation in Asia-Pacific* (Hong Kong: CCH Publishing Hong Kong, 2013) para.4.3.16.

189 *Ibid.*, para.4.3.17.

190 *Ibid.*

191 *Ibid.*, para.4.3.20.

192 *Ibid.*, para.4.3.19.

193 T Zou, “China” in Wang Guiguo and Yang Fan (eds), *Mediation in Asia-Pacific* (Hong Kong: CCH Publishing Hong Kong, 2013) para.4.5.19.

194 *Ibid.*, para.4.5.21.

195 J Yao (n.188) paras.4.4.15–4.4.16.

196 T Zou, “China” (n.193) para.4.5.26.

197 *Ibid.*, paras.4.5.22–4.5.25.

198 K Pissler, “Mediation in China: Threat to the Rule of Law?” in Hopt and Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 2013).

199 G Denton and Fan Kun, “Hong Kong” in Esplugues and Barona (eds), *Global Perspectives on ADR* (Cambridge: Intersentia Publishing, 2014) pp.156–157.

200 *Ibid.*, pp.157–158.

Ali and Koo (2013) noted that procedural rules require parties to consider mediation and to take steps to organise it. Case law has placed the onus on the party who refuses mediation to justify that refusal, otherwise costs sanctions are available.<sup>201</sup>

More detail on costs sanctions is supplied by Zhao,<sup>202</sup> including the statutory notion of a “minimum level of participation”.<sup>203</sup>

### *E. India*

Khambata, Mehta and Jejeebhoy (2014) noted that court-directed mediation is one of a range of strategies which might alleviate a chronically overburdened judicial system. But party consent to a mediation referral is required.<sup>204</sup> There is a detailed examination of the Indian experience by Sharma,<sup>205</sup> who also noted that there is acute court congestion.<sup>206</sup>

### *F. Indonesia*

Simandjuntak, Suroto and Resti Nurhayati reported (2014) that court-annexed mandatory mediation has been adopted, and a powerful pro-mediation culture has arisen.<sup>207</sup>

Mills<sup>208</sup> examined critically introduction in 2003, amended significantly in 2008, of mandatory early phase mediation for civil litigants. She reported problems caused by parties’ lack of good faith in compliance with this requirement and some cynicism among legal practitioners.

### *G. Japan*

Haga noted the very low level of the lawyer-to-citizen ratio in Japan (one lawyer for 71,500 citizens).<sup>209</sup> Consistent with this, there is a mature tradition and extensive network of ADR provision, including mediation and conciliation (here taking the

201 S Ali and A Koo, “Hong Kong” in Wang Guiguo and Yang Fan (eds), *Mediation in Asia-Pacific* (Hong Kong: CCH Publishing Hong Kong, 2013) paras.6.1.12–6.1.13.

202 S Zhao, “Hong Kong” in Wang Guiguo and Yang Fan (eds), *Mediation in Asia-Pacific* (Hong Kong: CCH Publishing Hong Kong, 2013) paras.6.2.16; 6.2.23ff.

203 *Ibid.*, paras 6.2.26, 6.2.50–6.2.54.

204 D Khambata, A Mehta and N Jejeebhoy, “India” in Esplugues and Barona (eds), *Global Perspectives on ADR* (Cambridge: Intersentia Publishing, 2014) pp.167, 199–200.

205 R Sharma, “India” in Wang Guiguo and Yang Fan (eds), *Mediation in Asia-Pacific* (Hong Kong: CCH Publishing Hong Kong, 2013) Ch.7.

206 *Ibid.*, paras.7.01 and 7.57.

207 M Simandjuntak, V Suroto and B Resti Nurhayati, “Indonesia” in Esplugues and Barona (eds), *Global Perspectives on ADR* (Cambridge: Intersentia Publishing, 2014) pp.214–218.

208 K Mills, “Indonesia” in Wang Guiguo and Yang Fan (eds), *Mediation in Asia-Pacific* (Hong Kong: CCH Publishing Hong Kong, 2013) Ch.8.

209 M Haga, “Japan” in Esplugues and Barona (eds), *Global Perspectives on ADR* (Cambridge: Intersentia Publishing, 2014) p.256.

form of settlement proposals made by a conciliation committee).<sup>210</sup> Conciliation is (1) provided by the courts;<sup>211</sup> (2) supported by Government with respect to various forms of dispute, such as consumer disputes,<sup>212</sup> or (3) provided by private ADR organisations or individuals.<sup>213</sup> There has been enthusiasm for speedy mediation in clinical negligence claims<sup>214</sup> and mass tort cases.<sup>215</sup>

Japanese mediation arrangements are also noted by Baum<sup>216</sup> and Sakai,<sup>217</sup> whose discussion includes references to traffic damage claims,<sup>218</sup> real estate disputes<sup>219</sup> and contentious matters arising within the sectors of financial services, insurance and banking.<sup>220</sup>

The Japanese arrangements are also considered by Kakiuchi<sup>221</sup> (brevity again preludes details).

## H. Korea

Hwang explained that in 2011 direct mediation by trial courts accounted for 76 per cent of all Korean mediations.<sup>222</sup>

Yi confirmed that court-conducted mediation does not require the parties to consent to the judge's decision to use this technique, although any settlement must be based on true agreement.<sup>223</sup> That mandatory process of engagement is criticised.<sup>224</sup> Yi's study included discussion of copyright<sup>225</sup> and medical disputes mediation<sup>226</sup> (this last category lasting 90–120 days,<sup>227</sup> conducted before a mediation panel of 5<sup>228</sup> and yielding a 88 per cent success rate).<sup>229</sup>

210 *Ibid.*, pp.271ff.

211 *Ibid.*, p.258.

212 *Ibid.*, p.258.

213 *Ibid.*, pp.259 ff.

214 *Ibid.*, pp.284–285.

215 *Ibid.*, p.285.

216 H Baum, "Mediation in Japan: Development, Forms, Regulation and Practice of Out-of-Court Dispute Resolution" in Hopt and Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 2013).

217 H Sakai, "Japan" in Wang Guiguo and Yang Fan (eds), *Mediation in Asia-Pacific* (Hong Kong: CCH Publishing Hong Kong, 2013) Ch.9.

218 *Ibid.*, para.9.04.

219 *Ibid.*, para.9.04.

220 *Ibid.*, paras.9.07–9.08.

221 S Kakiuchi, "Regulation of Dispute Resolution in Japan: Alternative Dispute Resolution and Its Background" in Steffek and Unberath (eds), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (Oxford: Hart Publishing, 2013) pp.269–296, including bibliography.

222 D-N Hwang, "Korea" in Wang Guiguo and Yang Fan (eds), *Mediation in Asia-Pacific* (Hong Kong: CCH Publishing Hong Kong, 2013) para.10.1.57.

223 *Ibid.*, para.10.2.14.

224 *Ibid.*, para.10.2.44.

225 *Ibid.*, paras.10.2.26–10.2.28.

226 *Ibid.*, paras.10.2.29–10.2.35.

227 *Ibid.*, para.10.2.32.

228 *Ibid.*, para.10.2.30.

229 *Ibid.*, para.10.2.35.



## I. New Zealand

Hart noted that “there are approximately 50 statutes in New Zealand that encourage mediation by either recommending it or making it a mandatory process”.<sup>230</sup> She reported on a jurisdiction which has pragmatically embraced mediation in a range of contexts, including pasturing disputes between farmers, earthquake disasters and defective building work. The New Zealand arrangements are also examined by Berg<sup>231</sup> (brevity again precludes details).

## J. The Philippines

Calimon noted that there is a mechanism for summary enforcement of mediated settlements which have been lodged with the court.<sup>232</sup> More generally, in an effort to “de-clog”<sup>233</sup> the lists of pending cases, the courts have promoted mandatory mediation.<sup>234</sup> Mediation can also be attempted by a judge. If unsuccessful, a different judge will become the eventual trial judge.<sup>235</sup>

## K. Singapore

Lee in 2013<sup>236</sup> and 2014 noted governmental efforts to broaden awareness of mediation’s possibilities.<sup>237</sup> Road accident claims which do not involve personal injury are regularly referred to mediation by the court system, whereas other types of claims are referred only if a party requests or the parties consent.<sup>238</sup> Lee suggested that the need to avoid futility requires that only suitable cases should be mediated.<sup>239</sup> There is co-ordinated provision of mediation by a public organisation which charges fees.<sup>240</sup> Procedural rules require that, during the case-management phase of a pending case, parties’ lawyers must discuss the prospects of mediating the case.<sup>241</sup> At this same stage, the judicial officer can recommend or direct the appropriate form

230 D Hart, “New Zealand” in Wang Guiguo and Yang Fan (eds), *Mediation in Asia-Pacific* (Hong Kong: CCH Publishing Hong Kong, 2013) para.11.29.

231 H Berg, “Mediation in New Zealand: Widely Accepted and Successful” in Hopt and Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 2013).

232 D Calimon, “Philippines” in Esplugues and Barona (eds), *Global Perspectives on ADR* (Cambridge: Intersentia Publishing, 2014) p.372.

233 *Ibid.*, p.373.

234 *Ibid.*, pp.373ff.

235 *Ibid.*, p.373, n.195, p.375.

236 J Lee, “Singapore” in Wang Guiguo and Yang Fan (eds), *Mediation in Asia-Pacific* (Hong Kong: CCH Publishing Hong Kong, 2013).

237 Esplugues and Barona (eds), *Global Perspectives on ADR* (Cambridge: Intersentia Publishing, 2014) pp.403–405.

238 *Ibid.*, p.400.

239 *Ibid.*, p.403.

240 *Ibid.*, pp.405–409.

241 *Ibid.*, p.413.

of dispute resolution.<sup>242</sup> There is also a system of presumptive referral of lower value cases to mediation. A party can opt out of such a referral only in cases where “ADR” has already been attempted, or a point of law is in issue, or there is some other good reason.<sup>243</sup> Costs sanctions are applied if there has been a failure to respond reasonably or in good faith to the other party’s request to consider or pursue mediation.<sup>244</sup> In general, there is an interesting tilting of the Singaporean system towards greater resort to mediation, founded upon the notion of proportionality<sup>245</sup> and supported by a national and co-ordinated decision to encourage amicable resolution of disputes.<sup>246</sup>

### *L. Thailand*

Ariyanuntaka<sup>247</sup> and Vongkiatkachorn reported extensive legislation providing the framework for out-of-court mediation by state officials or representatives of public bodies in a variety of contexts.<sup>248</sup> As for disputes where formal legal proceedings have already commenced (so-called post-issue disputes, potentially involving “court-annexed mediation”),<sup>249</sup> mediation can be ordered by the court.<sup>250</sup> The effect of this order is that attendance at the relevant mediation session is required.<sup>251</sup> Tax disputes can be mediated.<sup>252</sup>

As for the role of legal representatives, Ariyanuntaka added:<sup>253</sup>

“Lawyers must venture to think of themselves not as mere mechanics but as engineers or architects whose task is not merely to win the case at hand, but to work in the best interest of the client.”

### *M. United States of America*

There is detailed examination by van Ginkel,<sup>254</sup> covering the United States generally but with particular attention to California. There are references to statistics on the

242 *Ibid.*, pp.413–414.

243 *Ibid.*, p.414.

244 *Ibid.*, pp.414–415.

245 *Ibid.*, Implicit in the rules summarised at p.414.

246 *Ibid.*, pp.415–420.

247 V Ariyanuntaka, “Thailand” in Wang Guiguo and Yang Fan (eds), *Mediation in Asia-Pacific* (Hong Kong: CCH Publishing Hong Kong, 2013) Ch.13.

248 S Vongkiatkachorn, “Thailand” in Esplugues and Barona (eds), *Global Perspectives on ADR* (Cambridge: Intersentia Publishing, 2014) pp.423–427.

249 *Ibid.*, pp.429–431, 458–460.

250 *Ibid.*, p.459.

251 *Ibid.*

252 *Ibid.*, pp.473–474.

253 V Ariyanuntaka (n.251) para.13.22.

254 E van Ginkel, “United States of America” in Wang Guiguo and Yang Fan (eds), *Mediation in Asia-Pacific* (Hong Kong: CCH Publishing Hong Kong, 2013) paras.14.19–14.21.

“vanishing trial”<sup>255</sup> and the rate of success for private mediation (c. 80 per cent)<sup>256</sup> and court-annexed mediation (45–72 per cent).<sup>257</sup> Where the claim is brought under a contingent fee arrangement, the plaintiff’s attorney will be economically induced to try mediation earlier compared with hourly paid attorneys.<sup>258</sup> Mediation can be (1) “*pro bono*”, (2) “low-cost” or (3) “market rate”.<sup>259</sup> Disillusionment can be triggered by premature court directions to mediate cases which are not “ripe” for such treatment.<sup>260</sup>

Specter and Pearlman provided a survey of the modern history of mediation in America,<sup>261</sup> notably the acceleration of mediation projects since 1970s.<sup>262</sup> Post-issue mediation has become a major feature within both the Federal Court and State Court systems.<sup>263</sup> It can be even “mandatory”.<sup>264</sup> For example, the civil courts within the Southern District of Florida impose this requirement in almost a blanket fashion so that mediation is generally required, subject only to a “few narrowly defined exceptions”.<sup>265</sup> Furthermore, in the same jurisdiction, a mediator is obliged to file a statement to the trial court “advising of the status of settlement negotiation”. By contrast, “most district courts”, for example, in Pennsylvania, grant judges the discretion to order mediation on a case-by-case basis.<sup>266</sup> Matters of confidentiality are treated in the Uniform Mediation Act (2001, amended 2003). It has been adopted in 10 States and has been influential in many others.<sup>267</sup> Specter and Pearlman provided insights into the tactics of participation in mediated negotiations.<sup>268</sup> The authors concluded that mediation in the United States has become entrenched as “big business”. They predict that it will “continue to grow” not just as an “alternative” to litigation but as a “prominent tool” within the context of litigation.<sup>269</sup>

The American arrangements are also considered by Menkel-Meadow<sup>270</sup> and by Kulms<sup>271</sup> (brevity again precludes details).

255 *Ibid.*, para.14.22.

256 *Ibid.*, para.14.22.

257 *Ibid.*, Ch.14.

258 *Ibid.*, para.14.27.

259 *Ibid.*, para.14.35.

260 *Ibid.*, para.14.37.

261 S Specter and J Pearlman, “United States: Mediation” in Esplugues and Barona (eds), *Global Perspectives on ADR* (Cambridge: Intersentia Publishing, 2014) p.549.

262 *Ibid.*, pp.544–547.

263 *Ibid.*, pp.548–549.

264 *Ibid.*; see p 549, n.73 on the position in State courts.

265 *Ibid.*, p.548, n.69.

266 *Ibid.*

267 *Ibid.*, pp.551–552.

268 *Ibid.*, pp.553–554.

269 *Ibid.*, p.554.

270 C Menkel-Meadow, “Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the ‘Semi-formal’” in Steffek and Unberath (eds), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (Oxford: Hart Publishing, 2013) pp.419–454, including bibliography.

271 R Kulms, “Mediation in the USA: Alternative Dispute Resolution between Legalism and Self-Determination” in Hopt and Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 2013).

## IX. Concluding Remarks

The following points have emerged from this survey.

### A. *Expansion*

Mediation has grown in importance and visibility. It is now seldom dismissed as a sign of a party's weakness. Government is attracted to mediation's expansion for budgetary reasons (the court system and ordinary civil proceedings being more expensive) and because the mediation process (when it works) confers a deeper and more flexible style of resolving disputes than the rigid and narrow technique of adjudication (or indeed arbitration) (see the list of "intrinsic benefits" conferred by mediation in Section IV).

### B. *Under-use*

The scope for resort to mediation is far from being exhausted. It is in fact still significantly under-used.

### C. *Flexibility*

Mediation is a flexible technique: (1) it can be experienced face-to-face; (2) the parties can start the process separated; (3) remain throughout separated; or (4) it can be conducted at a distance (the parties not being physically in the same mediation space). It can be (1) high-tech (video-conferencing, etc), (2) low-tech (telephone or letters) or (3) zero-tech (face-to-face meetings).

### D. *Not exclusive*

Mediation is not sufficient; there must be provision for disputes to be taken to the courts or to public tribunals if (1) mediation is not available; (2) mediation opportunities are legitimately avoided by the disputants; (3) mediation was attempted but it failed to resolve the matter fully or at all, for any reason; (4) mediation resulted in an agreement which, however, is not rendered legally binding; or (5) a dispute arises concerning the validity, interpretation or enforcement of an ostensibly binding-mediated settlement.

### E. *Timing*

Mediation can (1) precede formal proceedings (whether those proceedings are to take place before a court, public tribunal, or involve arbitration or some other formal process); (2) mediation can take place after commencement (with or without a formal pause or "stay" of those proceedings); or (3) take place after judgment (whether pending an appeal or enforcement).

### F. *Who is going to pay?*

Mediation can be free (or at least subsidised), because it is (1) state financed, or provided by other public funds or by charity, or (2) provided *pro bono* by

mediators. If (3) mediation is not free, it can be (a) paid jointly; (b) financed by one party (perhaps as part of the loser-pay principle, if there is a costs decision within associated civil proceedings); or (c) provided as an “industry tax” on a business party (in the sense that businesses active in that field fund the provision of mediation concerning disputes in that economic sector and do not charge individuals).

### ***G. The central dilemma: to compel or not to compel?***<sup>272</sup>

In general, there is predominant international respect for all three elements of the voluntary principle (see Section III(A)(i); more generally Sections III and V): (1) parties should not be compelled to participate in mediation; (2) the process should be under their joint consensual control at all times; and (3) the results should be freely agreed upon.

The principled and pragmatic approach to this issue is perhaps best summarised by the Belgian commentator, Ivan Verougstraete,<sup>273</sup> who says simply:

“In the early stages of a conflict the parties should enter into negotiations rather than involve a neutral. This is particularly true in the business world. Less invasive methods are to be preferred over mandatory ADR. Pre-trial compulsory methods have not worked out very well in systems in which the courts work reasonably well. The parties do not see the point of avoiding the court system at all costs.”

However, there is some countermovement (see Section IX(H)).

### ***H. Default, sanctions and other adverse consequences***

Default can occur at the following four stages:

- (1) refusal to *consider* mediation (*viz*, each party has a duty to consider whether to mediate but there is no further obligation to pursue mediation if that party does not believe mediation is appropriate in this instance);
- (2) failing to help to *appoint a mediator*;
- (3) *absence*: that is failure to *attend* either (a) mediation information “introductions” or (b) substantive mediation “sessions” (physically or online); or

<sup>272</sup> Alexander, *International and Comparative Mediation* (n.4) pp.95–97 for a succinct summary of triggering devices; and for a rich discussion of the criteria for selective judicial referral to mediation, and on the process of such referrals, pp.148–169.

<sup>273</sup> Verougstraete, “Regulation of Dispute Resolution in Belgium” (n.98) p.112.

- (4) *non co-operation or obstruction in discussion*: that is, a failure to *engage co-operatively or adoption of obstructive tactics* in negotiations during mediation sessions.<sup>274</sup>

(Lawyers representing each party are also obliged in various ways.)<sup>275</sup>

The following *four* sanctions or adverse consequences might be suffered by, or imposed on, one or both parties if their conduct, omission or silence is regarded as an inexcusable default in any particular case.

### (i) Inadmissibility of claims or stays of proceedings

(1) Inadmissibility is the more severe form of gate-keeping. It involves removing a party's option to take a case to court if that party has inexcusably failed to adhere to a mandatory<sup>276</sup> element of mediation. (2) A variation is a stay of pending proceedings for such a failure, including breach of a mediation clause.

### (ii) Nullity of court proceedings

It might be that declarations can be obtained that purported proceedings before the courts were in fact a nullity because there had not been compliance with mediation requirements. Ferrand<sup>277</sup> reported that this possibility exists in France when proceedings have been brought in violation of a mediation clause. In Indonesia, an even more drastic possibility is that court proceedings will be a nullity if mandatory pre-court procedure has not been conducted, as noted by Mills.<sup>278</sup>

### (iii) Costs sanctions

(See also Section V(C).) These sanctions involve modification of costs results or orders, the court making such an adjustment to reflect censure of a party, sometimes of both parties.<sup>279</sup> Such a "costs sanction" might be imposed for failure to participate in mediation or for unreasonable failure to engage in this opportunity, or for unreasonable steps or non-co-operation displayed during the mediation or perhaps following the conclusion of the mediation.

274 Alexander, *International and Comparative Mediation* (n.4) pp.225ff for comparative sources on this requirement; and at pp.231–232 tabulating the various possible grounds of defective participation.

275 On this dimension, Alexander, *International and Comparative Mediation* (n.4) pp.233–239.

276 Some jurisdictions adopt this approach *vis-à-vis* failure to comply with a mediation clause: Alexander, *International and Comparative Mediation* (n.4) pp.178, 186.

277 Ferrand, "Regulation of Dispute Resolution in France" (n.105) p.192, nn.80–82.

278 K Mills (n.208) para.8.06.

279 Alexander, *International and Comparative Mediation* (n.4) pp.331–335.

## (iv) Other financial consequences

Where the failure to adhere to a mandatory element of mediation has been committed by the defendant, that party might suffer increased financial burdens, such as interest payments or even “additional payments”, on the analogy of failure by (English) defendants to accept CPR Part 36<sup>280</sup> settlement offers.

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280 See works referred to in note 14.