

## Mandatory Online Mediation for European Consumers: Legal Constraints and Policy Issues

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*Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser in fees, expenses, and waste of time.<sup>1</sup>*

### 1. Introduction

Mediation is the fastest growing dispute resolution method. It represents an alternative to “win-lose” adjudicative processes. Mediation also offers a particular benefit; it permits parties to resolve disputes raised by the international and borderless nature of the Internet circumventing many complex legal issues, such as conflicts of laws.<sup>2</sup> Moreover, mediation has many other advantages; for instance, disputing parties are more likely to comply with an agreement crafted by themselves than decisions rendered by the court system. It is also a less formal procedure, and it is a less expensive dispute resolution process than litigation. The expansion of mediation is being supported by judicial referrals, legislative efforts to encourage its use, and in some countries, such as the UK, it has even been a priority for governments.<sup>3</sup> This has impacted in mediation services. An example of this is the Chartered Institute of Arbitrators (CIArb), where 84 percent of all its services (between 2001 and 2006) were on consumer arbitration, yet, it is expected that in the

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<sup>1</sup> Abraham Lincoln, Note for Law Lecture. *Circa* 1 July 1850.

<sup>2</sup> Rudolph Cole, S., “Online Mediation: Where We Have Been, Where We Are Now, And Where We Should Be” (2006) 38 *University of Toledo Law Review* 205.

<sup>3</sup> See Green Paper on Alternative Dispute Resolution in Civil and Commercial Law (2002) 196 final p.22. For the US see “Two More States Enact New Uniform Mediation Act” 3 February 2005. Available at <http://www.nccusl.org/nccusl/DesktopModules/NewsDisplay.aspx?ItemID=129> (Hereinafter, accessed 1 August 2008); See also HMCS Annual Report, “A Year of Change and Achievements” 24 July 2007. Available at <http://www.hmcs-courts-service.gov.uk>. Prince, S., “Institutionalising Mediation? An Evaluation of the Exeter Court Claims Mediation Pilot” (2007) 5 *Web Journal of Current Legal Issues* 1.

next few years consumer mediation will take the lead. Consequently, the use of arbitration is expected to drop to less than 20 percent by 2010.<sup>4</sup>

At present, mediation is predominantly carried out face to face, but there is an increasing interest in complementing mediation with ICT.<sup>5</sup> Albeit online mediation is still in its infancy, many people are sceptical about its implementation in our society.<sup>6</sup> The reality is that online dispute resolution (hereinafter ODR) technology will be easily embraced by the new generations which are increasingly interacting online through the use of online networking.<sup>7</sup> The drastic increase in the last few years of social networking sites, such as FaceBook or MySpace, and the parallel growth of mass collaboration sites, such as Wikipedia, are clearly levelling the path for the introduction of ODR technology.<sup>8</sup>

The use of online mediation is possible if there is a need for it, technology permits it and the law allows it.<sup>9</sup> The aim of this paper is to examine from an EU perspective the current legal context on mediation in order to evaluate if the present rules and practices allow the use of consumer online mediation -*i.e.* doctrinal legal analysis. Furthermore, this paper evaluates to which extent parties should be encouraged or even compelled in using online mediation for the resolution of their disputes -*i.e.* policy analysis. If mediation is to have a real impact in our society, its education and promotion need to be pursued as a matter of public policy. Accordingly, mediation is being regulated at regional level, and also promoted by the national courts. The Directive on Mediation in Civil and Commercial Matters, which is due to be implemented by 21 May 2011, assures the direct recognition and enforcement of cross-border settlements.<sup>10</sup> However, the law and policy of mandatory mediation is not clear. It seems that in the EU B2C mandatory mediation is banned by the Unfair Terms Directive 93/13/EC and the Recommendation 2001/310/EC, which oppose procedures that deny access to justice, currently understood as access to a legal procedure. But mediation may be the only choice for those unable to afford the risks and costs of litigation. This paper examines whether the EU should reformulate the concept of access to justice. It posits that it should not be understood as the right to participate in an adversarial judicial process, but the right to obtain

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<sup>4</sup> Hunt, G., Consumer ADR in the UK, conference on Consumer ADR in Spain and the EU, delivered in Madrid 11-12 December 2006.

<sup>5</sup> Directive, recital 9.

<sup>6</sup> Eisen, J., "Are We Ready For Mediation In Cyberspace" (1998) 4 *Brigham Young University Law Review* 1305; Cf. Gillieron, P., "From Face-to-Face to Screen-to-Screen: Real Hope or Fallacy?" (2008) 23(2) *Ohio State Journal on Dispute Resolution* 301-343.

<sup>7</sup> Susskind, R., "ODR in Context" 5<sup>th</sup> ODR Forum, Liverpool, 20 April 2007; Larson, D. A. "Technology Mediated Dispute Resolution (TMDR): A New Paradigm for ADR" (2006) 21 *Ohio State Journal on Dispute Resolution* 629.

<sup>8</sup> [www.myspace.com](http://www.myspace.com), [www.wikipedia.com](http://www.wikipedia.com), [www.facebook.com](http://www.facebook.com).

<sup>9</sup> Gibbons, L.J., Kennedy, R. & Gibbs, J.M., "Cyber-mediation: Computer-mediated Communications medium massaging the message" (2002) 27 *New Mexico Law Review* 27.

<sup>10</sup> 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 2008 O.J. (L. 136) Articles 6 and 12. (Hereinafter, the Directive).

redress through the most suitable mechanism, which for many disputes, such as those arising from e-commerce, may well be ODR. It is necessary to clarify whether and to which extent courts can require participation in a mediation process or enforce its results. This paper finally discusses a number of court rulings dealing with mediation aspects, with particular attention of those emanated from the English courts; including the rulings deciding to stay proceedings when there are mediation clauses and those imposing legal costs to the parties who unreasonably refuse to participate in mediation.<sup>11</sup>

This paper is divided into five parts. Part I introduces this paper. Part II analyses the transition from traditional mediation to online mediation. It starts by defining online mediation and the appropriate cases for this dispute resolution method. It also considers the main challenge in the use of online mediation: how to convince disputants in using mediation. Lastly, it reviews two ODR service providers: SmartSettle and SquareTrade. Part III contemplates the interaction between the courts and the mediation procedure. To that end, the purpose of regulating mediation within the EU is first discussed. Subsequently, this part focuses on the enforceability of mediation clauses under the existing regulation. Part IV considers the rule of costs in England, which encourages parties to engage in mediation by condemning the legal costs onto the parties who unreasonably refuse to engage in mediation. Finally, Part V concludes by summarising the findings of this paper.

## **2. From Offline to Online Mediation**

### **➤ Difference Between Online and Offline Mediation**

Online mediation is generally considered as a broad concept, which includes everything from automated blind-bidding procedures and e-mediators, to online mediation platforms with a human facilitator and case management programs.<sup>12</sup> In online mediation the role of the mediator remains the same, but the selection of techniques changes. In fact, the flexibility that features the mediation procedure makes it particularly appropriate for being conducted primarily online. ODR platforms are designed to facilitate the negotiation among their users by encouraging the discovery of positive common points that may result in agreements. Thus, online mediation is any dispute resolution process that is directed by a third neutral party (generally a human mediator) which does not impose the resolution, but assists the parties in resolving their dispute by communicating largely through the Internet.

Online mediation is often carried out through written exchanges, which lacks the main factors of offline mediation -*i.e.* the face to face communications. Yet,

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<sup>11</sup> *Cable & Wireless* [2002] EWHC 2059 Comm Ct; *Dunnett* [2002] 2 ALL ER 850; and *Halsey v Milton* [2004] EWCA (Civ) 576.

<sup>12</sup> Nadja, A., "Fall 2005 Dispute Resolution Institute Symposium: Mobile Mediation: How Technology is Driving the Globalization of ADR" (2006) 27 *Hamline Journal of Public Law and Policy* 245.

like offline mediation, the efficiency of online mediation depends to a large extent on the skill of the mediator and the parties' will to resolve their disputes. In addition, an important component is added in online mediation, the ODR software or fourth party,<sup>13</sup> which may assist in delivering a smooth mediation or, if badly designed, may hinder the mediation process.

Mediators should identify at the beginning of the mediation which approach is the most appropriate for the type of dispute at stake.<sup>14</sup> When there is an imbalance of power between the parties (B2C) it appears that some type of direction may be positive, but the situation may be different in other cases (B2B or C2C). Accordingly consumer disputes that arise from e-commerce are of small monetary value, so the mediators tend to use an evaluative approach focusing on uncovering the source of the problem and identifying conditions under which agreements could be completed, rather than in finding creative solutions.<sup>15</sup> Conversely, in those cases where the disputants feel that they have been wronged, lied to or cheated, or where one party seeks a sincere apology, a transformative approach seems more effective.<sup>16</sup> In this regard, an online mediator from SquareTrade, an ODR provider that dealt with many eBay disputes, observes that

“it might be impossible to get an agreement on a settlement that addresses only the substantive issues in the dispute but ignores psychological or procedural dimensions of the conflict.”<sup>17</sup>

## ➤ **Two ODR Examples of Online Mediation: SmartSettle and SquareTrade**

- **Complex mediation: SmartSettle**

SmartSettle is an ODR privately owned company established in Canada. It offers an online negotiation tool based on algorithm analyses that assist parties to resolve complex disputes. This ODR service supports face to face mediation and online mediation sessions.<sup>18</sup> SmartSettle acts as a mediator between the parties assisting them in the resolution of their conflicts. It first requires the parties to identify the issues at dispute and to rank them in terms of priority by giving a nominal value to the different issues. Then, the algorithm analysis suggests various proposals to help the parties reach the most efficient

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<sup>13</sup> Katsh, E. and Rifkin, J., *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (San Francisco, Jossey-Bass, 2001) 93.

<sup>14</sup> Raines, S.S., Can Online Mediation Be Transformative? *Tales from the Front*, (2005) 22(4) *Conflict Resolution Quarterly* 441. Cf. O. M. Fiss “Against Settlement” (1984) 93 *Yale Law Review* 1073. This article questions the appropriateness and effectiveness of ADR in many disputes because of imbalances in power in many disputes.

<sup>15</sup> Rabinovich-Einy, O., “Technology’s Impact: The Quest for a New Paradigm for Accountability in Mediation” (2006) 11 *Harvard Negotiation Law Review* 258.

<sup>16</sup> Cf Folger, J. P. and Baruch, B. A. “Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Mediation” (1996) 13 *Mediation Quarterly* 236

<sup>17</sup> Raines (2005) *Op. cit.* 441

<sup>18</sup> Conley Tyler and McPherson (2006) *infra* 20

resolution. SmartSettle apply some techniques from game theory with the aim of producing an optimum outcome. SmartSettle uses a six-step process where parties, with the help of an independent facilitator, express the value of their preferences.<sup>19</sup> The six steps are:

- 1) Preparation: the ODR process is explained and parties agree to follow SmartSettle Guidelines.
- 2) Qualify interests: parties identify the disputes.
- 3) Quantity satisfaction: demands and the value of them are entered by the parties.
- 4) Establish Equity: the software makes settlement packages based on parties' preferences.
- 5) Maximize Benefits: the software keeps proposing new settlements even over the minimum acceptable by the parties.
- 6) Secure Commitment: parties sign the Framework for Agreement.

SmartSettle has been referred to as the bridge between online mediation and software assistance because it is able to facilitate multi-party negotiation cases with any number of quantitative or qualitative issues.<sup>20</sup> According to Rule,

"[CyberSettle ensures that parties] distribute the pie as efficiently as possible. The algorithms allowed parties to claim value that might have been left on the table without the accurate calculations of the computer."<sup>21</sup>

However, this method may be too complicated and time consuming for the majority of B2C disputes, working better when resolving complex and high value disputes (B2B). SmartSettle, on one hand, has a great potential since it delivers mathematically optimal solutions to the dispute, but on the other hand, this ODR platform may initially be of difficult technical use. For this reason SmartSettle advises disputants to work with a human mediator who administers the program. Therefore, this is not an insuperable obstacle. Indeed, it is believed that in a near future, once this type of technology becomes user friendly it will revolutionize the ODR market,<sup>22</sup> and it could then be applied to mainstream consumer disputes.

- **Simple mediation: SquareTrade**

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<sup>19</sup> Thiessen, E. and Zeleznikow, J., "Technical aspects of ODR: Challenges and opportunities" in M. Conley Tyler, E. Katsh and D. Choi (Eds.), *Proceedings of the Third Annual Forum on Online Dispute Resolution*. International Conflict Resolution Centre, University of Melbourne in collaboration with the United Nations Economic and Social Commission for Asia and the Pacific. Available at <[http://www.odr.info/unforum2004/thiessen\\_zeleznikow.htm](http://www.odr.info/unforum2004/thiessen_zeleznikow.htm)>; See also <<http://www.smartsettle.com/more/mini/tour.html>>

<sup>20</sup> Gibbons *et al.* (2002) *Op. cit.* 66

<sup>21</sup> Rule, C., *Online Dispute Resolution for Businesses. B2B, E-Commerce, Consumer, Employment, Insurance, and Other Commercial Conflicts* (San Francisco, Jossey Bass, 2002) 24

<sup>22</sup> Rule (2002) *Ibid* 59

The leading ODR provider for consumer mediation was SquareTrade. However, due to changes in the eBay feedback system in May 2008, SquareTrade decided to stop resolving eBay feedback disputes from June 2008.<sup>23</sup> SquareTrade continues to provide services to eBay users, such as warranty services and the trustmark program. This section examines SquareTrade since it operated successfully for a number of years. It appears that in the last few months these services have been taken over by eBay and PayPal dispute resolution services.

SquareTrade resolved small value disputes using a process in which an in-person mediator assists disputants through asynchronous email and web communications. SquareTrade employed around two hundred mediators from over fifteen countries.<sup>24</sup> The online mediator has a similar role to the offline mediator: manage the process, uncover parties' underlying interests, and lead the parties toward a mutually acceptable resolution.<sup>25</sup> Once the disputants reached an agreement, the mediator drafted the memorandum of understanding and both parties click "I accept".<sup>26</sup>

SquareTrade ODR tool was designed to resolve disputes arising from online transactions, particularly from eBay, thus it has been designed *ad hoc* to deal with specific type of disputes. The advantage of eBay disputes is that the vast majority of disputes arise over a limited number of issues, *e.g.* the item bought on eBay arrived late, or it did not fit the description, and so on. An additional advantage is that eBay disputants have incentives to want their dispute resolved as quickly as possible, as the buyer wants economic compensation and seller wants positive feedback. Furthermore, the immense majority of eBay disputes could not be resolved offline.

It is however necessary to be aware of the limitations of SquareTrade. Its main limitation is that SquareTrade relied on written communications that were conducted with each party separately. SquareTrade did not use video communications, although it appears that video communications are increasingly playing a role adding another dimension to online mediation.<sup>27</sup> SquareTrade used a fairly limited vocabulary and resolved a fairly limited range of disputes. Although some credit should be given to SquareTrade, which claimed a success rate of 80 percent in online mediation with the average dispute resolved in two weeks.<sup>28</sup> SquareTrade mediation service was available in 5 languages and it has resolved over 2 million disputes with parties situated in over 120 different countries.<sup>29</sup> It is arguable whether SquareTrade relies on

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<sup>23</sup> SquareTrade "ODR Is No Longer Offered by SquareTrade" <<http://www.squaretrade.com>>

<sup>24</sup> Rabinovich-Einy (2006) *Op. cit.* 258

<sup>25</sup> *Ibid.* 259

<sup>26</sup> Raines (2005) *Op. cit.* 440

<sup>27</sup> Patten, J., "eBay, Resolution of Disputes Online" Newsletter, Mediation, International Bar Association Legal Practice Division, (July 2007) p. 26

<sup>28</sup> Abernethy, S., "Building Large-Scale Online Dispute Resolution and Trustmark Systems" Proceedings of the UNECE Forum on ODR 2003, Available at <<http://www.odr.info/unece2003>>

<sup>29</sup> This data was available in the site until May 2008 at <<http://www.squaretrade.com/pages/about-us>> SquareTrade does not share more detailed information. E-mail from Steve Abernethy, President and CEO SquareTrade, to author (10

sophisticated ODR software or not. But what is not, is that SquareTrade uses a database and a precedent system that recognizes patterns to better assist the parties in resolving their disputes via the Internet without imposing a settlement against the will of one of the parties.<sup>30</sup>

### ➤ **Appropriate Cases for Online Mediation**

In order to assess the type of cases that would be suitable for online mediation it is easier to start by referring to those which are clearly unsuitable for online mediation. These are cases involving criminal matters, disputes where an important legal precedent is sought, or where there is a matter of policy which needs to be addressed. In addition, a major difficulty is to mediate with someone who does not want to be in the mediation process.<sup>31</sup> By contrast, online mediation is the best candidate to resolve those disputes where parties “want” to resolve the dispute but they are unable or reluctant to meet the other party, such as most cases involving e-commerce disputes.<sup>32</sup>

Mediation is well established with insurance disputes, construction disputes, employment disputes, personal injury claims and medical negligence claims. It appears that mediation is now expanding to new fields such as financial services, competition disputes, small value claims and electronic commerce disputes.<sup>33</sup> Conducting mediations wholly online provides the opportunity to extend the benefits of mediation to many disputes that otherwise would not be able to be resolved, particularly disputes between parties who are geographically distant. Also disputes where the value of the controversy is not sufficiently high to justify face to face meetings. Disputes where a particular conduct may not reflect well on an individual or business may be better addressed through mediation, *i.e.* B2C where the business wants to avoid publicity or where it involves sensitive material. In those cases where there is a potential ongoing business relationship, a consensual method will offer a solution without disrupting a relationship. When both parties seek a settlement but they failed to find one through negotiation. Mediation will be also appropriate to deal with those disputes where parties need an expeditious settlement since adjudicative procedures, in particular litigation, are generally slower in resolving disputes.

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January 2008 - on file with author) stating that SquareTrade does not publish statistics on its negotiation and mediation program.

<sup>30</sup> Dyson, E., “Do you see a pattern?” 28 August 2006. Available at <<http://www.squaretrade.com/pages/about-us-news?vhostid=daffy&stmp=squaretrade&cntid=3ja18a4y81>>

<sup>31</sup> Sue Prince observes this issue on the feedback of one party after using mediation: “...We are both of the opinion that in theory mediation is good, but if you have someone stubborn on the other side, who is not willing to talk, negotiate or compromise then it is a total waste of time, and I would not [then do it again].” See Prince, S., Institutionalising Mediation? An Evaluation of the Exeter Court Claims Mediation Pilot [2007] 5 *Web Journal of Current Legal Issues*

<sup>32</sup> Michaelson J. & Maples J., “Taking clients to ADR” (2005) *New Law Journal* 725

<sup>33</sup> Wood (2007) *Infra* 313

## ➤ **Building Trust in Online Mediation**

The first challenge when using mediation is to convince both parties to participate in the mediation process. It seems that parties' decision not to engage in mediation is generally a disbelief in a successful settlement. For this reason as well, when parties decide to use mediation there is a good chance that they will settle their dispute. The use of incentives, such as trustmarks, feedbacks, blacklists and legal fees can be effective tools in obtaining redress for consumers against recalcitrant businesses.<sup>34</sup> What is essential is that parties understand what mediation has to offer. As shown by the English pilot projects in the small claims court and by SquareTrade, consumer parties often arrive to mediation without knowing what is it about, even expecting an adjudicatory procedure.<sup>35</sup> It is very challenging to deliver appropriate mediation services for small claims within a short time span and limited economic resources.<sup>36</sup>

Moreover, when parties come from different backgrounds, as it frequently happens in the online context, they may have different expectations when engaging in online mediation. For instance, one party may take a competitive perspective, while the other party may enter with a more collaborative approach.<sup>37</sup> In these cases, if parties are not well guided, they will quickly become disappointed and may drop out of the mediation.<sup>38</sup> In addition, according to Ponte and Cavenagh, the lack of face to face contact bring to ODR "new challenges in that parties are more likely to be strangers to each other, so it may be more difficult to create an environment of trust and open communication".<sup>39</sup>

All the above difficulties must be solved with the assistance of the ODR software and the mediator, which have to enhance trust on the parties by helping them to put aside their personal feelings and focusing on problem solving. Fisher and Ury affirm that this is achieved through mutual understanding (without necessarily agreeing) of the point of views of each disputant and reflecting on possible solutions.<sup>40</sup> For instance, the ODR software (*i.e.* the fourth party) or the mediator (*i.e.* the third party) may start by asking

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<sup>34</sup> Consumers International "Disputes in Cyberspace 2001: Update of Online Dispute Resolution for Consumers in Cross-Border Disputes" *Consumers International Office for Developed and Transition Economies*. November 2001. Available at <[http://www.consumersinternational.org/Publications/ViewADocument\\_search.asp?langid=1&egid=135&ID=35](http://www.consumersinternational.org/Publications/ViewADocument_search.asp?langid=1&egid=135&ID=35)>

<sup>35</sup> Prince, S. and Belcher, S. "Small Claims Dispute Resolution Pilot Project at Exeter County Court" The UK Department of Constitutional Affairs, Research Series September 2006. Rabinovich-Einy (2006) *op. cit.*

<sup>36</sup> Brady, A., "Small Claims, Big Impact" *Law Society Gazette* (24 April 2008)

<sup>37</sup> Femenia, N., "ODR And The Global Management Of Customers' Complaints: How Can ODR Techniques Be Responsive To Different Social And Cultural Environments?" Paper presented at the Joint Conference of the OECD, HCOPII, ICC, The Hague, Holland, 12 December 2000.

<sup>38</sup> Raines, S.S (2006) *op. cit.* 361.

<sup>39</sup> Ponte, L.M. & Cavenagh, T.D., *Cyberjustice, Online Dispute Resolution for E-Commerce*, (New Jersey, Parson Prentice Hall, 2005) 19.

<sup>40</sup> Fisher, R., Ury, W., & Patton, B. *Getting to YES: Negotiating Agreement Without Giving In*. 2<sup>nd</sup> ed. (New York, Penguin, 1991).

the parties about undisputed facts so they will both agree, thus setting the parties in a positive and cooperative set of mind.

### **3. Interaction between Courts and the Mediation Procedure**

#### **➤ The Purpose of Regulating Mediation: The EC Directive**

Since mediation is an informal process, it is first necessary to consider why and to which extent mediation needs to be regulated. In the field of dispute resolution one of the functions of the law is to ensure compliance with the fundamental procedural principles, such as confidentiality, transparency, impartiality, fairness, and protection of the weaker party.<sup>41</sup> In addition, regulation has the role of promoting and legitimising mediation. Nonetheless, regulation may also have a negative effect on the flexibility of mediation, especially if it incorporates strict rules. Accordingly, any regulation on mediation needs to balance two aspects, due process and procedural flexibility. Within the EU there are a number of laws governing mediation and issues related to B2C mediation, such as civil procedures and consumer protection laws.<sup>42</sup> The EU has as an objective to harmonise, whenever necessary, the law of the Member States in the area of dispute resolution with the purpose of improving the competence of the interior market.

The Mediation Directive is applied in civil and commercial mediations where parties are domiciled in different Member States with the exception of Denmark.<sup>43</sup> This includes consumer mediation, which is complemented by the principles set out in the EC Recommendation for consensual resolution of consumer disputes.<sup>44</sup> The Recommendation does not apply to pre-contractual negotiations, consumer complaint schemes or processes where the third party issues a decision, recommendation, or evaluation, whether or not such outcome is legally binding. The Mediation Directive excludes from its application civil and commercial matters where parties do not have disposal of their rights under their national law, e.g. matters related to family law and employment law.<sup>45</sup> Although the Directive applies exclusively to cross-border agreements, its application is also recommended for domestic cases.<sup>46</sup> In this sense, the

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<sup>41</sup> László Szöke, G., "The Possibility of Online Mediation under the Hungarian Mediation Act in Comparison with a Number of International, Including European, Documents on Mediation" (2006) 15(2) *Information and Communications Technology Law* 131.

<sup>42</sup> Cf. Hörnle, J., "Alternative Dispute Resolution in the European Union" (2003) 5 *Electronic Business Law*.

<sup>43</sup> Article 1.

<sup>44</sup> Commission Recommendation 2001/310/EC of 4 April 2001 on the Principles for Out of Court Bodies Involved in the Consensual Resolution of Consumer Disputes, COM(2001) 161 Final. These principles are impartiality, transparency, effectiveness and fairness. See also Communication of 4 April 2001 on Widening Consumer Access to Alternative Dispute Resolution, European Commission, COM(2001)161 Final.

<sup>45</sup> Mediation Directive 2008/52/EC recital 10 and art. 1.

<sup>46</sup> Mediation Directive 2008/52/EC recital 8 and article 2. See Explanatory Statement of the European Parliament amendment (2007) p.22.

Directive does not have a broad application, since the majority of mediations presently deal with domestic disputes.

The Directive does ensure that online mediation could take place, although its application does not bind domestic mediation. Recital 9 of the Directive encourages the use of ICT stating that:<sup>47</sup>

“This Directive should not in any way prevent the use of modern communication technologies in the mediation process”

The Directive mandates Member States to introduce legal reform whenever necessary in order to implement a number of provisions. The new text sets out when mediators can be called upon to give evidence to explain the basis of the parties' agreement to the resolution at issue.<sup>48</sup> The Directive states that the mediators and parties can be compelled to give evidence in judicial or arbitral proceedings only in two cases. Firstly, whenever this is necessary due to considerations of public policy, particularly in order to ensure the protection of the best interests of children.<sup>49</sup> Secondly, when the disclosure is necessary to implement or enforce the mediation agreement. The Directive reinforces the principle of confidentiality which limits were not very clear in some Member States. For instance, in the UK, the National Criminal Intelligence Service initially required mediators to notify any form of fraud or criminality.<sup>50</sup> This requirement was later removed in *Bowman v Fels*.<sup>51</sup>

The Directive enables parties the obtaining of an agreement with similar status to that of a court judgment by rendering it enforceable.<sup>52</sup> This will allow mutual recognition and enforcement of settlement agreements throughout the EU under the same conditions as those for court judgments and arbitral awards. This provision also ensures that the court will not consider a mediation agreement inadmissible as a confidential communication.<sup>53</sup> It is expected that online agreements will have the same treatment, at least when they derive from bodies approved by the Member States.<sup>54</sup> It is still unclear the procedural form of this recognition, although it seems that judicial approval or notarial certification would be sufficient to allow such agreements to be enforceable in

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<sup>47</sup> Mediation Directive 2008/52/EC recital 9.

<sup>48</sup> Mediation Directive 2008/52/EC article 7.

<sup>49</sup> Mediation Directive 2008/52/EC article 4.

<sup>50</sup> Except when the breach of confidentiality is “required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person” Mediation Directive 2008/52/EC article 7.1.a.

<sup>51</sup> [2005] EWCA Civ 226; See also Law Society Guidelines of *Bowman v Fels* [2005] EWCA Civ 226 at <<http://lawsociety.org.uk/documents/downloads/BowmanvFelsGuidance0905.pdf>>.

<sup>52</sup> Article 6.

<sup>53</sup> See *Ryan v Garcia* (1994) 27 Cal. App. 4<sup>th</sup> 1006, 1011. See also M. P. Carbone “Enforcing Agreements Made at Mediation” December 2001. Available at <<http://www.mediate.com>>.

<sup>54</sup> The Member States have a national process to approve mediation providers. The list is published by the European Commission and the European Consumer Centre Network (ECC-Net). See list at <[http://ec.europa.eu/consumers/redress/out\\_of\\_court/database/index\\_en.htm](http://ec.europa.eu/consumers/redress/out_of_court/database/index_en.htm)>.

the Member States under existing Community rules.<sup>55</sup> The European Commission will make available information on the competent courts and authorities to enforce mediated agreements by November 2010.<sup>56</sup>

The mediation Directive requires that Member States allow courts to suggest mediation or to invite the parties to attend an information session on the use of mediation.<sup>57</sup> It has been observed that the Directive does not go far enough, because it should be more explicit by giving the national courts the duty to inform parties of the availability of mediation.<sup>58</sup> The court's power to refer cases to mediation is effective, *i.e.* convincing disputants that mediation will assist them in settling their dispute.<sup>59</sup> However, more research is needed to evaluate whether the above statement is true, and if so, to which degree.<sup>60</sup>

A stable and predictable legal framework would contribute towards setting mediation on an equal footing with judicial proceedings. But to which extent does the Mediation Directive achieve this? The Directive points out the advantages of using a means of resolving conflicts that is more economical and simpler than judicial or quasi-judicial remedies, such as arbitration. The Directive was created with the aim of promoting the use of mediation and of increasing legal certainty about the way courts in all EU countries deal with issues arising out of mediation. There is a mandate in the Directive which requires the Member States to "ensure that information is available to citizens, in particular on Internet sites, on how to contact mediators and organisations providing mediation services."<sup>61</sup> This information should contain data on the experience of mediators; this would make easier for parties to choose their mediator, *e.g.* Uniform Domain Name Dispute Resolution Policy (UDRP) approved service providers. Research found that when parties select the mediator they are more likely to settle than when the mediator is selected otherwise.<sup>62</sup>

Additionally, the obligation to inform about the existence of mediation is extended to legal practitioners.<sup>63</sup> This role should also be taken by the law societies. This is particularly necessary in those Member States, which are facing a crisis in the effectiveness of justice. Awareness can also be raised through different channels such as universities and European bodies, such as

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<sup>55</sup> Europa Press Release IP/08/628 "A Boost for Mediation in Civil and Commercial Matters: European Parliament Endorses New Rules" 23 April 2008.

<sup>56</sup> Mediation Directive 2008/52/EC articles 10 and 12.

<sup>57</sup> Article 5.2.

<sup>58</sup> See *Chambre de Commerce et d'Industrie de Paris (2004) Op. cit.*

<sup>59</sup> Some statistics have shown that mandatory mediation programs produced high settlement rates and client satisfactions. *Cf.* Keet, M. and Salomone, T. B., "From Litigation to Mediation: Using Advocacy Skills for Success in Mandatory or Court Connected Mediation" (2001) 64 *Saskatchewan Law Review* 57.

<sup>60</sup> See Campbell, J., and Opie, T., "Mandatory Mediation" (2002) Available at <<http://www.findlaw.com.au/article/6190.htm>>.

<sup>61</sup> Mediation Directive 2008/52/EC article 9.

<sup>62</sup> Prince (2007) *Infra* 87.

<sup>63</sup> *Ibid.*

the European Judicial Network, Eurochambers and the European Consumer Centres.<sup>64</sup>

### ➤ **Mediation clauses**

Mediation is a consensual process whereby parties voluntarily agree to participate.<sup>65</sup> However, mediation may also take place when decided by a court or when parties introduce a clause in their contract agreeing to use mediation. It is debatable whether such agreement or court mandate could be enforced against the will of one of the parties.<sup>66</sup> In general terms, mandatory mediation is considered less problematic than mandatory arbitration given the fact that access to courts is only temporarily suspended and that parties cannot be forced into an agreement.<sup>67</sup> In this regard mandatory mediation does not contradict either article 6 of the European Convention of Human Rights (ECHR) or article 47 of the Charter of Fundamental Rights of the European Union -*i.e.* right to fair trial. The American Arbitration Association (AAA) considers that the courts should be only allowed to impose mandatory mediation when the cost of mediation is publicly funded and the mediation is of high quality.<sup>68</sup> The Directive opted for allowing mandatory mediation, although Member States may restrict its use. The Directive states that

"[this Directive] is without prejudice to national legislation making the use of mediation *compulsory or subject to incentives or sanctions*, whether before or after judicial proceedings have started, provided that such legislation does not prevent parties from exercising their right of access to the judicial system."<sup>69</sup>

Consequently, the Directive mandates Member States to ensure that parties who choose mediation are not prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription

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<sup>64</sup> Summary of responses (2003) *Op. cit.* 2. Also, *Chambre de Commerce et d'Industrie de Paris*, Response to the Proposal for a Directive of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters, 22 October 2004.

<sup>65</sup> Directive, recital 10.

<sup>66</sup> There is a legal uncertainty within the EU as well as within US. This was reflected in the European policy, where in the 1998 EC recommendation stated that mediation should in principle not be mandatory, this statement was left out in the 2002 Recommendation. For an overview on the enforceability of mediation clauses in the US see Stipanowich, T., "The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution" (2007) 8 *Nevada Law Journal* 427.

<sup>67</sup> European Commission, SANCO, The Study Centre for Consumer Law, Centre for European Economic Law Katholieke Universiteit Leuven, Belgium, "An Analysis and Evaluation of Alternative Means of Consumer Redress other than Redress through Ordinary Judicial Proceedings" Leuven, (January 2007) <[http://ec.europa.eu/consumers/redress/reports\\_studies/index\\_en.htm](http://ec.europa.eu/consumers/redress/reports_studies/index_en.htm)>117; Summary of responses (2003) *Op. cit.* 3-4.

<sup>68</sup> American Arbitration Association (2007) Consumer Due Process Protocol.

<sup>69</sup> Art. 5.2. However, courts cannot impose it to the parties or denying them access to court procedures as stated in Article 47 Charter of Fundamental Rights of the European Union (2000/C 364/01).

periods during the mediation process.<sup>70</sup> Furthermore, a party's right to seek injunctive or declaratory relief or to avoid a prescription time is also preserved.

It must be noted that under the EU law a contractual clause cannot oust the jurisdiction of the court by inserting a consensual clause, but in certain circumstances, particularly in B2B disputes, the court may stay proceedings to allow parties to honour their agreement to mediate.<sup>71</sup> Thus, in theory, when a mediation clause is mandatory a party can be obliged to start the mediation procedure. However, in practice, this is not very common, as mediation in those circumstances may find difficulties in succeeding, given the unwillingness of one party.<sup>72</sup> The Directive states that the court may invite the parties to use mediation or, whenever it is available, to attend an information session on the use of mediation.<sup>73</sup> In these scenarios consumers should be only obliged to participate when the session is free of costs.<sup>74</sup>

According to Hörnle the agreement is not about co-operation or consent but about participation in a process where co-operation and the momentum that leads to settlement may come.<sup>75</sup> The essential requirement for its success is good faith participation.<sup>76</sup> According to Lightman LJ

"Such is the impact of mediation that parties who enter it unwillingly often become infected with the conciliatory spirit and settle. Even if only a small percentage of those who have been forced to mediate settle, it is better than never giving the process a chance."<sup>77</sup>

Research has shown that when parties are informed in court that they have the option of using mediation, they often decide to opt out.<sup>78</sup> However, when parties are compelled to use mediation, the results are not dissimilar to those who engage in mediation voluntarily.<sup>79</sup> Although, there should be some limits in

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<sup>70</sup> Article 8.

<sup>71</sup> See Mediation Directive 2008/52/EC article 5.2. See also the interpretation of English courts in *Cable & Wireless plc v IBM* [2002] EWCH Ch 2059 and *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576. These cases will be discussed below.

<sup>72</sup> Leuven (2007) *Op. cit.* 122.

<sup>73</sup> Art. 5.1.

<sup>74</sup> Summary of Responses to Green Paper (2003) *Op. cit.* 4.

<sup>75</sup> Hörnle (2003) *Op. cit.* p.3 Sanctions may be imposed by the courts in the event of non-compliance. The Commercial Court in England in *Cable & Wireless v. IBM United Kingdom* [2002] 2 ALLER 1041 froze the judicial proceedings till parties had referred their disputes to ADR. English courts have also condemned in a number of times costs to the party who refused the use of ADR, even in cases where parties had not agreed to participate in ADR schemes i.e. *Halsey v. Milton Keynes General NHS Trust* [2004] EWCA Civ 576. See also Yves Heijmans, European Briefings 'Effective Cross-border Mediation in Europe' ACC Docket June 2006.

<sup>76</sup> Anonymous author (1990) *op. cit.* 1096.

<sup>77</sup> Lightman, J., "Mediation: An Approximation to Justice" S. J. Berwins (28 June 2007).

<sup>78</sup> Macfarlane, J., "Court-Based Mediation for Civil Cases: An Evaluation of the Ontario Court (General Division ADR Centre)" Ministry of the Attorney General, November 1995, p. 8.

<sup>79</sup> Prince, S., "Mandatory Mediation: The Ontario Experience" (2007) 26(1) *Civil Justice Quarterly* 86

enforcing contractual clauses opting for mediation since it is important to take into account the intention of the parties. According to Stipanowich

“In the case of agreement to mediate, parties are conveying their intent to sit down at table and informally explore opportunities for consensual resolution; it is doubtful that the legal enforceability of the provision is prominent in their minds -the emphasis is on voluntary participation. [...] The obligation may result in attendance at no more than a single meeting, and pending litigation may be suspended only briefly”<sup>80</sup>

In some cases the refusal to participate in mediation could be interpreted as a violation of the obligation to good faith.<sup>81</sup> But, when it clearly appears that negotiation would be useless, would the denial to access to courts be unfair? This control could only be feasible on a case-by-case analysis, either by the courts or by a public supervisory body.<sup>82</sup> It seems reasonable to compel the parties to attend in good faith to a single meeting, but in exceptional circumstances, subject to parties agreement, the mediator must be allowed to prolong the meetings when the nature of the disputes so requires it.<sup>83</sup> A pilot project on mediation in England proved that administrative costs of letting parties to litigate on whether or not it is appropriate to mediate is not cost effective.<sup>84</sup> In my view, it would be more cost effective to advise litigants to consider the use of mediation, and have an *ex post* analysis –i.e. if a party unreasonably refuses to participate in mediation, the judge in his discretion may impose legal fees on that party whether or not he succeeds in his legal claims.<sup>85</sup>

The European Parliament has pronounced in favour of the legality of consumer clauses but only when appointed ADR bodies had been approved by the Commission.<sup>86</sup> Mandatory mediation needs to be regulated in order to establish limits to this mandate. The Commission however did not follow in the Green Paper the Parliament’s proposal due to various reasons.<sup>87</sup> First, it considered that validating ADR clauses could create disparities with the constitutions of some Member States. Furthermore, it was argued that in the light the Unfair Terms Directive and of article 6 of the ECHR, a mandatory mediation clause

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<sup>80</sup> Stipanowich (2007) *Op. cit.* 431.

<sup>81</sup> Green Paper (2002) *Op. cit.* para. 65; Rifleman, J., “Mandatory Mediation, Implications and Challenges” (Oct. 2005) Available at <<http://adrr.com/adr9/jeff.htm>>.

<sup>82</sup> *Ibid.*

<sup>83</sup> See also anonymous author (1990) *op. cit.* 1094.

<sup>84</sup> Genn *et al.* (2007) *Infra*; Wood (2007) *Infra*.

<sup>85</sup> In fact this is advised in The English Small Claims Track which has taken a more direct approach by stating this in its leaflet EX301.

<sup>86</sup> OJ C 146, 17 May 2001, p. 94(4b) states that the “incorporation in consumer contracts of a clause under which the consumer and the trader agree that any dispute is to be referred to an extrajudicial dispute resolution system accredited under a scheme approved by the Commission, provided that specific conditions ensuring that the consumer makes an informed decision to acquiesce to such a clause are satisfied.”

<sup>87</sup> Note that the Parliament proposal was referred to ADR generally including arbitration and the Commission’s Green Paper (2002) p. 45 refers exclusively to consensual ADR.

could deprive consumers of their right to go to court.<sup>88</sup> This approach is, to say the least, debatable because consumers' mediation clauses do not deny consumers' access to courts but only a temporary delay, which would probably be a short one, particularly when using ODR schemes.<sup>89</sup> Moreover, in most cases mandatory mediation allows parties to initiate parallel legal proceedings at any stage.<sup>90</sup>

It appears however that a mediation clause should not be enforced when the mediation procedure might be a burden to consumer access to justice. Thus far, in the EU, the legality of mandatory ODR clauses in B2C contracts has not been fully tested in courts since analogies with ADR may not be valid.<sup>91</sup> These clauses should be enforceable as long as they do not intend to reduce the capacity of the consumer to access to justice, such as introducing new barriers -*i.e.* unreasonable costs, geographic barriers, and linguistic limitations.<sup>92</sup> Therefore, mandatory mediation should not create new barriers to consumer redress; *e.g.* it should not be more expensive than the small claims procedure, or exclude consumers from taking class actions<sup>93</sup> since this might be considered unfair under the Directive 13/93.

As a matter of policy, legal harmonization should recognise the enforceability of mediation clauses, provided that the clauses are drafted in good faith, and they do not obstruct later access to courts.<sup>94</sup> It is regrettable that the forthcoming Directive did not take the opportunity to clarify what constitutes equitable mandatory clauses in consumer contracts.<sup>95</sup>

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<sup>88</sup> Directive 93/13/EC Annex 1[q]. Also, article 6.1 of the ECHR provides: "In determination of his civil rights and obligations [...] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

<sup>89</sup> Hörnle (2003) *Op. cit.*

<sup>90</sup> *Ibid*

<sup>91</sup> For instance, the Court of Justice of the European Communities in the *Océano* case (European Court of Justice, *Océano Grupo Editorial SA and Salvat Editores SA v. Rocio Murciano Quintero*, 27 June 2000, Cases C-240/98 to C-244/98, reported in [2000] ECR I4941) held that a jurisdiction clause changing from consumer's to business's jurisdiction was regarded as unfair under Article 3 of the Directive 13/93 because it caused a significant imbalance in the parties' rights and obligations to the detriment of the consumer. According to Kaufmann-Kohler and Schultz this case does not apply to ODR clauses because ODR does not create an imbalance given the absence of a physical place where the consumer might have to travel to. Kaufmann-Kohler, G. & Schultz, T., *Online Dispute Resolution: Challenges for Contemporary Justice* (The Hague, Kluwer Law International, November 2004) 204.

<sup>92</sup> Ponte and Cavenagh (2005) *Op. cit.* 157; Kaufmann-Kohler and Schultz (2004) *Op. cit.* 100

<sup>93</sup> Thornburg, E., "Privatisation and Power: Dispute Resolution for the Internet" in Rickett & Telfer, (eds.), *International Perspectives on Consumers' Access to Justice* (New York, Cambridge University Press, 2006) 303

<sup>94</sup> Hörnle (2003) *Op. cit.*

<sup>95</sup> Edwards, L. & Wilson, C., *Redress and Alternative Dispute Resolution in Cross-Border E-Commerce Transactions*, DG Internal Policies of the Union, Policy Department Economic and Scientific Policy, Briefing Note, January 2007 (IP/A/IMCO/IC/2006-206) Edwards, L. & Wilson, C. "Redress and Alternative Dispute Resolution in EU Cross-Border E-Commerce Transactions" (2007) 21(3) *International Review of Law, Computers & Technology* 328.

## 4. Regulatory approach at the domestic level

### 4.1. Mediation under National Law

Mediation is encouraged in many different ways in each jurisdiction. For instance, mediation may be recommended during an arbitral procedure. In Spain, under the institutionalised Spanish consumer arbitration program, mediation is set as a default stage in all B2C arbitral proceedings before the arbitral oral hearing takes place. The new Spanish regulation on consumer arbitration includes online arbitration and sets mediation within the arbitral procedure.<sup>96</sup> The online procedure will take place entirely online.<sup>97</sup> The use of mediation, as a previous step before the use of the arbitral procedure, will only be used when parties voluntarily agree to engage in mediation –*i.e.* it is not mandatory. Thus, if parties refuse to participate, the arbitral tribunal cannot impose a sanction. In the case that both parties accept mediation, the mediator will not be the same person as the arbitrator. If an agreement is reached, it will have the force of an arbitral award. Therefore, the agreement is legally binding and the courts cannot review it as long as there is not a legal flaw or a violation of the due process principles.

Mediation referrals may also come from the courts. In Portugal, magistrates' courts encourage parties during the pre-trial stage to use in-court mediation when they consider it appropriate.<sup>98</sup> Also, in Germany the courts recommend the use of mediation and judges take the role as mediators. In England and Wales, where family disputes benefit from public funding, parties are obliged to attend a compulsory information session on mediation.<sup>99</sup>

Private or public initiatives may also promote the use of online mediation. In France, Mediateur du Net has settled more than 4,000 B2C disputes between September 2004 and December 2006.<sup>100</sup> However, in France, a recent statute explicitly included mandatory clauses in the indicative list of abusive consumer clauses.<sup>101</sup> By contrast, the French Supreme Court has enforced contractual mediation clauses, as long as they do not impede a contracting party from

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<sup>96</sup> See articles 51-55 and fourth final disposition RD 231/2008. Orozco Pardo, G., and Pérez-Serrabona González, J., "Estudio Crítico y Propuestas de Reforma del Arbitraje de Consumo" (2007) 5 *Aranzadi Civil* 19 Cf. Marín López, M. J., "La Nueva Regulación del Arbitraje de Consumo: el Real Decreto 231/2008, de 15 de Febrero" *Diario La Ley*, 17 March 2008; Cf. Marín López, M. J., "Presente y Futuro del Arbitraje de Consumo: 43 Cuestiones Controvertidas" (2006) 90 *Revista de Derecho Privado* 3-76; Cf. Marín López, M. J., "Medios Alternativos de Solución de Controversias" (2007) 11 *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid* 123.

<sup>97</sup> Art. 51 RD 231/2008.

<sup>98</sup> Paterson, L., "Mediation Innovation" (2007) 52(11) *Journal of the Law Society of Scotland* 27

<sup>99</sup> *Infra*.

<sup>100</sup> See <<http://www.mediateurdunet.fr>> See also Traesch, B. A., and Ferrali, L., "Mediateurdunet Case Study of an ODR Success in France" in Lodder, A. R., and Rule, C., and Zeleznikow, J., (eds.) *Proceedings of 4<sup>th</sup> International ODR Workshop*, Palo Alto, California, 8 June 2007. p. 39.

<sup>101</sup> Loi n° 2005-67 of 28 January 2005, *J.C.P. G* 2005, act. 92. q).

bringing an action before the courts when mediation fails.<sup>102</sup> The *Chambre de Commerce et d'Industrie de Paris* also considers that a valid mediation clause constitutes a ground for inadmissibility of a claim.<sup>103</sup>

This tendency, although no uniformed, can also be appreciated in the US.<sup>104</sup> In the recent case of *Advanced Bodycare v. Thione* the 11<sup>th</sup> Circuit held that a mediation clause (as well as a clause that requires the parties to mediate *or* arbitrate) does not fall within the meaning of the Federal Arbitration Act, and therefore, the court cannot stay litigation and compel the parties to mediate.<sup>105</sup> However, according to McLean and Wilson, this case would not apply to Med-Arb clauses, *i.e.* where mediation is a pre-condition to the arbitration process.<sup>106</sup>

The debate in the US has been focused on good faith mediation. Its critics, on one hand, argue that the good faith requirement leads to coerced settlements and it places at risk the principle of confidentiality in mediation. On the other hand, its advocates argue that the good faith requirement is necessary for obtaining effective mediation where parties may not abuse its process.<sup>107</sup> Lande observes that claims for costs or other relief have been based on failure to attend mediation sessions, failure to send a representative with settlement authority and failure to participate substantively in the mediation.<sup>108</sup> Similarly, in England and Wales the Civil Procedural Rules (CPRs) and a number of court rulings have opened the debate on how mediation should be encouraged.

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<sup>102</sup> Leuven Report (2007) *op. cit.*

<sup>103</sup> *Chambre de Commerce et d'Industrie de Paris*, (2004) *op. cit.*

<sup>104</sup> The most cited case is *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456 (S.D.N.Y. 1985) where the court mandated the parties to comply with a contractual clause to submit their dispute regarding advertising claims to the National Advertising Division, which issues no legally binding decisions. This case has underpinned the rationale for judicial enforcement of agreements to mediate under arbitration law. Stipanowich, (2008) *op. cit.* 430.

<sup>105</sup> *Advanced Bodycare Solutions, LLC v. Thione International, Inc.*, No. 07-12309 (11<sup>th</sup> Cir. 21 April 2008).

<sup>106</sup> McLean, D. J., and Wilson, S.-M., "Putting the Horse before the Cart: Compelling Mediation in the Context of Med-Arb Agreements" (2008) Available at: <[http://works.bepress.com/sean\\_patrick\\_wilson/1](http://works.bepress.com/sean_patrick_wilson/1)>

<sup>107</sup> Boettger, U., "Efficiency versus Party Empowerment-Against a Good-Faith Requirement in Mandatory Mediation" (2004) 23 *Rev. Litig.* 1; Weston, M., "Confidentiality's Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation" (2003) 8 *Harv. Negot. L. Rev.* 29; Lande, J., "Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs" (2002) 50 *UCLA L. Rev.* 69; Carter, R. L., "Oh, Ye of Little (Good) Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations," [2002] *J. Disp. Resol.* 367; Zylstra, A., "Privacy: The Road from Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled" (2001) 17 *J. Am. Acad. Matrim. Law.* 69; Alfini, J. J., and McCabe, C. G., "Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law," (2001) 54 *Ark. L. Rev.* 171. Anonymous author (1990) *op. cit.* 1096.

<sup>108</sup> Lande (2002) *Ibid* 82-84.

The CPRs in England and Wales have pressed the courts to encourage litigants towards settling and using mediation.<sup>109</sup> This trend has also been taken in other common law jurisdictions, *e.g.* s. 651(b) of the US Alternative Dispute Resolution Act of 1998 requires federal district courts to recommend litigants in civil litigation that they consider the use of ADR, subject to some restrictions, such as where the discussion on the merits includes constitutional rights.<sup>110</sup>

In England, Part 36 of the CPRs provides that the defendant may offer a settlement to the claimant by lodging it in the court, thus if the claimant refuses the defendant's offer, and if the judge awards the claimant the same or an inferior amount of money, then the claimant will have to pay the legal cost of the defendant.<sup>111</sup> In Ireland the rule is very similar under Order 22.<sup>112</sup>

## 4.2. The Approach of the Judiciary in England and Wales

In England there have been cases where courts enforced a mediation agreement, even against the will of one of the parties. This occurred in *Cable & Wireless v IBM United Kingdom*, where the court decided to stay proceedings until the parties had referred all their disputes to CEDR mediation procedure.<sup>113</sup> In this case, the High Court held that had the clause only provided vaguely for an attempt in good faith to resolve any dispute by mediation, it would have been unenforceable. It must be noted that this case was B2B and it would unlikely apply to B2C; however it evidences the punctual support by the court in using mediation. Currently, these practices are not common since more often than not judges do not stay proceedings in order to enforce mediation agreements.<sup>114</sup> In addition, Court of Appeal in *Burchall v Bullard* condemned on legal costs the party who unreasonably refused to mediate.<sup>115</sup>

In some cases, it might seem justified for the court to press in favour of mediation taking into account the cost analysis of litigation. A recent decision of the Court of Appeal, *Egan v Motor Services (Bath)*, dealt with a consumer claim where the claimant was unsatisfied with his new car, and the defendant (the car dealer) refused to refund the full price of the car.<sup>116</sup> The parties fought

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<sup>109</sup> Particularly the introduction of r. 44.3 CPR and the decision of *Dunnett v Railtrack plc* [2002] 2 ALL ER 850. See also Roberts, S., & Palmer, M., *Dispute Processes, ADR and the Primary Forms of Decision-Making* (2<sup>nd</sup> ed) (Cambridge University Press 2005) 359.

<sup>110</sup> See Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (1998).

<sup>111</sup> See Part 36 and its amendment Schedule 1 to the Civil Procedure (Amendment No. 3) Rules 2006 which came into effect from 6 April 2007. Under the new amendment sums offered under Part 36 do not have to be paid into court.

<sup>112</sup> See Rules of the Superior Courts Order 22. See *Harrison v Ennis* 1967 IR 286 at 291, and *Superwood Holdings plc. v Alliance* (unreported, SC 12 April 2002)

<sup>113</sup> *Cable & Wireless v IBM United Kingdom Ltd* [2002] EWHC 2059 Comm Ct.

<sup>114</sup> Paysner, J., and Seneviratne, M., "The Management of Civil Cases: The Courts and the Post-Woolf Landscape" Department of Constitutional Affairs UK (2005).

<sup>115</sup> See relevant rules 26(4) and 44(5) of the Civil Procedure Rules for England and Wales, of 26 April 1999. See also *Burchell v Bullard* [2005] EWCA Civ 358.

<sup>116</sup> [2007] EWCA Civ 1002.

the case through litigation and spent a disproportionate amount in legal costs. In his ruling, Ward L.J. delivered the following comments:

“What I have found profoundly unsatisfactory, and made my views clear in the course of argument, is the fact that the parties have between them spent in the region of £100,000 arguing over a claim which is worth about £6,000. In the florid language of the argument, I regarded them, one or other, if not both, of them, as completely cuckoo to have engaged in such expensive litigation with so little at stake [...] This case cries out for mediation.”<sup>117</sup>

Under the law in England and Wales the loser pays the winner’s legal costs, which often makes the losing party’s detriment “immeasurably greater than the benefit of winning”.<sup>118</sup> Disproportionate legal costs are not unusual, particularly when claims are appealed and conditional fees are involved. For instance, in *Campbell v MGN Ltd* the House of Lords ordered the Daily Mirror newspaper to pay £3,500 in damages to Naomi Campbell for the publication of pictures of her leaving a rehabilitation centre (*i.e.* this violated her right to privacy) and over £1 million in legal costs.<sup>119</sup> This disproportional result was in part due to a conditional fee arrangement between the claimant and her lawyers that practically doubled her legal fees. To these legal costs it must be added the insurance premium that the claimant paid to cover an eventual liability of losing the case. In addition, in this case parties escalated up to the highest court in the UK because the newspaper was reluctant, as a matter of policy, in admitting liability as this could have generated a precedent which could open a flood-gate of complaints.

In spite of that, the legal fees are generally so high that English mediators, in order to encourage parties to be co-operative during the mediation process, start the mediation by writing up the amount of money that disputants have already spent on the dispute and the amount of money they would spend if the dispute escalates to be resolved in the courts.<sup>120</sup>

The CPRs, similar to the Mediation Directive, state that the court has the role of “encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate.”<sup>121</sup> It is not clear which are the circumstances that would make courts to send parties to participate in mediation, but it appears that the chances of success and a cost analysis will be key elements for the courts’ decision.<sup>122</sup> Further, the CPRs provide that

“if the court decides to make an order about costs (a) the general rule is that the unsuccessful party will be ordered to pay the cost of the

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<sup>117</sup> *Ibid.*

<sup>118</sup> Phillips (2008) *op. cit.* 2.

<sup>119</sup> [2005] UKHL 61, on appeal from [2002] EWCA Civ 1373.

<sup>120</sup> Wood, W. (2007) *Infra.*

<sup>121</sup> Rule 1.4 (2) (e) CPR.

<sup>122</sup> Campbell and Opie (2002) *Infra.*

successful party; but (b) the court may make a different order. In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including the conduct of the parties [...] in particular the extent to which the parties followed any relevant pre-action protocol."<sup>123</sup>

This rule implies that a party who refuses to consider whether a case is suitable for mediation may be at risk of having to pay the legal costs of the other party, particularly so where the court has made an order requiring the parties to consider mediation.<sup>124</sup> In *Dunnett v Railtrack plc* the court held that mediation is not mandatory, but if it is refused unreasonably by one party the courts will impose the costs to the party that refused to engage in mediation.<sup>125</sup> In several judgments English courts recommended legal practitioners to consider mediation. In *Burchell v Bullard*, Ward L.J. stated,

"the court has given its stamp of approval to mediation, and it is now the legal profession which must become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediation"<sup>126</sup>

Also, in *Hurst v Leeming*, Lightman L.J. stated that "all members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR."<sup>127</sup> The suitability of a case for mediation is ultimately decided by the court. In *Hurst*, Lightman L.J. stated that on the facts of that case he was persuaded that "quite exceptionally" the successful party was justified in taking the view that mediation was not appropriate because it had no realistic prospects of success.<sup>128</sup> However, in *Burchell v Bullard* the Court of Appeal considered unreasonable the party's refusal of the court recommendation to mediate on the basis that the issues in dispute were too technically complex for mediation and that there was not a reasonable prospect of success.<sup>129</sup>

Nevertheless mediation may not be appropriate for all cases. The most authoritative precedent guiding on what is unreasonable refusal to mediation is

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<sup>123</sup> Rule 44.3(2) CPR.

<sup>124</sup> [2004] EWCA (Civ) 576, para. 33; In Ireland the situation is similar to the English CPR, where a party fails to comply with a direction to take part in the mediation, the rules allow the judge to order to that party the payment of the legal costs. However, unlike in England and Wales, this rule applies only for claims of over one million euros, which excludes practically all B2C disputes. For the reasoning see Oriachtas Debates, 26 February 2004 at 84.

<sup>125</sup> *Dunnett v Railtrack* [2002] 2 ALL ER 850. Railtrack won the initial case and appeal, but the court declined to order that the defeated claimant pay Railtrack's costs because Railtrack refused to consider an earlier suggestion from the court to attempt mediation. The Court of Appeal followed *Dunnett's* reasoning in *Leicester Circuits Ltd v Coats* [2003] EWCA Civ 333 and in *Royal Bank of Canada v Ministry of Defence* [2003] EWCA 1479.

<sup>126</sup> [2005] EWCA Civ 358.

<sup>127</sup> [2004] EWCA (Civ) 576, para.11.

<sup>128</sup> *Hurst v Leeming* [2001] EWHC 1051 (Ch), [2003] 1 Lloyds Rep 379.

<sup>129</sup> [2005] EWCA Civ 358.

*Halsey v Milton Keynes General NHS Trust*.<sup>130</sup> In this case the claim arose from the allegedly negligent treatment of a hospital patient, which might have died because the tube from where he was being fed was incorrectly fitted, and instead of going to his stomach it directed food to his left lung. The claimant proposed mediation a number of times but the defendant refused it on the grounds that there was not negligence in this case since they claimed that the food got to the lung when the patient inhaled his own vomit. The court assessed whether this refusal to mediate was or was not unreasonable. In the end, the Court of Appeal dismissed the case finding the refusal to mediate reasonable. The *Halsey* ruling set a check-list for deciding when the refusal to mediate is unreasonable.<sup>131</sup>

- The nature of the dispute and its inherent suitability for mediation. For instance a dispute where the parties want the court to set a binding precedent on a point of law. However, in the view of the Court of Appeal, most cases are not by their very nature unsuitable for mediation.
- The merits of the case and the parties' reasonable belief that they have a strong case.
- Whether other settlement methods have previously been made but rejected.
- Whether the cost of mediation would be disproportionately high. This is a factor of particular importance where there is little money at stake. Thus, unless mediation is publicly funded, it would be difficult to find an affordable mediation service that would be cheaper than the Small Claims Court.
- Whether the mediation will result in an unacceptable delay to the trial - *i.e.* where it is suggested late in the day.
- Whether mediation would have reasonable prospects of success.

It must be noted that this is not a *numerus clausus* list. In *Halsey*, and in a more recent decision of the High Court, *P4 Limited v United Integrated Solutions plc*, an important factor to consider the refusal as reasonable was the fact that the request for mediation seemed more tactical than a genuine desire to resolve the dispute in question.<sup>132</sup> This reasoning was applied in more recent cases, such as *Rowallan Group Ltd v Edgehill Portfolio* and *Palfrey v Wilson*.<sup>133</sup>

The Court of Appeal in *Halsey* stated that "the court's role is to encourage, no to compel [mediation]. The form of encouragement may be robust".<sup>134</sup> The Court of Appeal created two new rules with regards to mediation. Firstly, the court held that if a litigant is ordered to proceed to mediation against his will,

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<sup>130</sup> [2004] EWCA (Civ) 576.

<sup>131</sup> *Ibid* para. 26.

<sup>132</sup> Cooke, A., "The Overriding Objective and the *Halsey* Guidelines: a Cautionary Tale" Newsletter, Mediation, International Bar Association Legal Practice Division, July 2007. p. 21.

<sup>133</sup> *Rowallan Group Ltd v Edgehill Portfolio No. 1* [2007] EWCA Ch 32 and *Palfrey v Wilson* [2007] EWCA Civ 94.

<sup>134</sup> [2004] EWCA (Civ) 576 para. 11.

this would be regarded as an unacceptable constrain on the right of access to the courts, and therefore, a breach of Article 6 of the European Convention of Human Rights, which protects the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law;<sup>135</sup> and secondly, that a litigant seeking the imposition of costs on his opponent on the ground that the latter refused to give mediation a chance has the burden of proving that the refusal was unreasonable.<sup>136</sup>

In relation to the first rule, as argued above, it seems that requiring parties to go to mediation could barely delay, if at all, litigation. Hence, to consider mandatory mediation as a restriction to the right of access to justice, *i.e.* infringement of human rights, is mistaken.<sup>137</sup> According to Lightman L.J.,<sup>138</sup>

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

Indeed, article 5 of the Mediation Directive allows for the use of mandatory mediation as long as it does not prevent the parties from accessing to the court after unsuccessful mediation.<sup>139</sup> In England, this happens within the courts, where parties pursuant to a divorce are compelled to mediate with a judge in the Financial Dispute Resolution hearing.<sup>140</sup> In the case that a settlement cannot be reached, a different judge will decide the matter. The Family Act 1996 also states that those seeking public funding for legal representation in family proceedings are required to participate in an information session on mediation.<sup>141</sup> Prior to *Halsey*, in *Shirayama* and in *Cable & Wireless* the Court ordered the parties to go to mediation over the objection of one of the parties.<sup>142</sup> In addition, the county courts in the England carried out a pilot project whereby many disputes were automatically sent to mediation through

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<sup>135</sup> Dyson L.J. [2004] EWCA (Civ) 576.

<sup>136</sup> *Ibid.*

<sup>137</sup> Wood, W., “Mediation: the Next Ten Years - the Master's Lecture of the Worshipful Company of Arbitrators” (2007) 73(3) *Arbitration* 313; See also anonymous author (1990) *op. cit.* 1094

<sup>138</sup> G. Lightman L.J. “Braking Down the Barriers” Times Online, 31 July 2007. Available at <<http://business.timesonline.co.uk/tol/business/law/article2166092>>

<sup>139</sup> Article 5.2 states that “This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.”

<sup>140</sup> Rule 2.61E of the Family Proceedings Rules 1991.

<sup>141</sup> Elliot, C., and Quinn, F., *English Legal System* (9<sup>th</sup> ed.) (Harlow, Pearson Longman, 2008/09) 548

<sup>142</sup> *Shirayama Shokusan Co. Ltd. V. Danova Ltd.* [2003] EWCA Ch 3006 *Cable & Wireless v IBM United Kingdom Ltd* [2002] EWHC 2059 Comm Ct

the Automatic Referral to Mediation (ARM) pilot project.<sup>143</sup> Although it has been argued that the ARM project failed largely as a result of *Halsey* decision.<sup>144</sup>

Furthermore, other signatories of the ECHR, such as Greece, have introduced compulsory ADR schemes without being challenged for violating Article 6.<sup>145</sup> The same happens in other common law countries, *e.g.* Australia and U.S. where courts may order the parties to participate in mediation against their will.<sup>146</sup> However, this is not often a full mandate, but frequently one of persuading litigants who as a matter of tactics may not propose or accept mediation, though they are contend to go if directed by the judge. Also, negotiations may be mandatory in some cases, *e.g.* between employers and workers representatives before going on a strike.<sup>147</sup>

In *Halsey*, the Appeal Court relied on the decision of the European Court of Human Rights (ECtHR) in *Deweere v Belgium*.<sup>148</sup> In this case a Belgian butcher was facing a criminal prosecution for over-charging pork. The Belgian authorities threatened a provisional closure of his premises until the conclusion of the criminal proceedings (a matter of months) unless the butcher agreed to an economic settlement. The butcher agreed to it but brought a successful legal action to the ECtHR for violation of Article 6. The ruling of the ECtHR acknowledged that waiving the right to fair trial is compatible with Article 6, but it warns caution when that right is waived in proceedings substituting the court, *i.e.* arbitration.<sup>149</sup> It seems that an arbitration agreement or a coerced settlement may violate Article 6, but not mandatory mediation. According to Phillips L.J., the Lord Chief Justice in England and Wales, this could only happen in extreme cases, such as condemning in contempt a party who does not follow a court order to go to mediation or striking down a legal action for not having

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<sup>143</sup> Cf. Genn, H., Fenn, P., Mason, M., *et al.* "Twisting Arms: Courts Referred and Court Linked Mediation Under Judicial Pressure" Ministry of Justice Research Series 1/07, May 2007

<sup>144</sup> *Ibid.*

<sup>145</sup> Article 214 of the Greek Civil Code.

<sup>146</sup> *E.g.* Section 652 of the Alternative Dispute Resolution Act (28 US California). Cf. M. Conley Tyler and M. McPherson "Online Dispute Resolution and Family Disputes" (2006) 12(2) *Journal of Family Studies* 1-40; Anonymous author, "Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes" (1990) 103 *Harvard Law Review* 1090-1091. In relation to Australian cases Cf. Campbell, J., and Opie, T., Mandatory Mediation (2002) Available at <<http://www.findlaw.com.au/article/6190.htm>> This paper discusses three cases where mediation was order by the court against the will of the parties (*Waterhouse v Perkins* [2001] NSWSC 13; *Idoport Pty Ltd v National Australian Bank Ltd* [2001] NSWSC 427 and *Dickenson v Brown* [2001] NSWSC 714). In these cases the main reasons were that the dispute was suitable for mediation, and if effective it would reduce costs and time. This paper goes on by discussing three cases where the court refused to order mandatory mediation (*Kilthistle No 6 Pty Ltd v Austwide Homes Pty Ltd* [Unreported, Federal Court of Australia, 10 December 1997] *Morrow v Chinadotcom* [2001] NSWSC 209, *Harrison v Schipp* [2002] NSWCA 27). In these cases it was argued that mediation would only cause increase costs and delays for the resolution of the disputes.

<sup>147</sup> Cf. Vida Soria, Monereo Pérez y Molina Navarrete, *Manual de Derecho del Trabajo* (4th ed.) (Comares, Granada, 2006).

<sup>148</sup> *Deweere v Belgium* (1980) 2 EHRR 439.

<sup>149</sup> Clarke (2008) *Op. cit.* 13.

recourse to mediation.<sup>150</sup> The same could not be applied by a mere sanction of facing legal costs.<sup>151</sup> Clarke L.J., Master of Rolls, observed that “there may well be grounds for suggesting that *Halsey* was wrong on the Article 6.”<sup>152</sup> Equally, Phillips L.J. stated that there is a need for “legislation to alter the effect of the decision in *Halsey*.”<sup>153</sup>

After *Halsey* there have been subsequent court interpretations considering mandatory mediation as contrary to Article 6, e.g. *Hickman v Blake Laphorn*.<sup>154</sup> Notwithstanding, according to Clarke L.J. and Phillips L.J. the comments in *Halsey* on mandatory mediation were *obiter dicta* since the question before the court was not on whether mandatory mediation is appropriate but whether costs could be imposed on a successful litigant for refusing to engage in mediation.<sup>155</sup> Thus, it appears that the English courts still retain the power of compelling parties to participate in mediation.

With regards to the second issue ruled in *Halsey*, the onus of proof of reasonableness, the Court of Appeal held that it rests on the party seeking legal costs relief. Lightman L.J. strongly disagrees with this view. According to him, the onus imposed a hurdle in access to justice, thus, he exhorts the judiciary to reverse the current burden of proof. This view is supported by the Phillips L.J, who stated, “[t]here is much to be said for the robust attitude that a party who refuses to attempt mediation should have to justify his refusal.”<sup>156</sup> Conversely, other supporters of mediation believe that the *Halsey* ruling sets an appropriate balance of persuasion with the use of mediation and it avoids extra litigation.<sup>157</sup>

Nonetheless, judges must be cautious in condemning a party in costs for refusing unreasonably to participate in mediation as depriving the winning party of the legal costs should remain the exception to the general rule, *i.e.* the principle that costs follow the event.<sup>158</sup>

The Court of Appeal in *Halsey* stated that “forcing people to go to mediation before a trial is a recipe for a mediation disaster”.<sup>159</sup> This statement has not been fully explored. The settlement rate during the pilot projects of the county court, which sent litigants who initially objected to use mediation, does not reveal a significant difference rate in settlements between those who initially

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<sup>150</sup> Phillips (2008) *Op. cit.* 13.

<sup>151</sup> *Ibid.*

<sup>152</sup> Clarke (2008) *Op. cit.* 16.

<sup>153</sup> Phillips (2008) *Op. cit.* 15.

<sup>154</sup> *Hickman v Blake Laphorn* [2006] EWHC (QB) 12.

<sup>155</sup> Phillips (2008) *Op. cit.* 12 and Clarke (2008) *Op. cit.* 6.

<sup>156</sup> Phillips (2008) *Op. cit.* 14

<sup>157</sup> According to Wood, “the current level of encouragement (broadly speaking Dunnett fleshed out and modulated by *Halsey*) sets the level of encouragement about right. Essentially, encouragement consists of a costs sanction for those who unreasonably refuse to participate in mediation.” Wood (2007) *Op. cit.*; Clarke (2008) *Op. cit.* 19

<sup>158</sup> Clarke (2008) *Op. cit.* 19. *Cf.* K. Kirmayer and J. Wessel “An Offer One Can’t Refuse: Mediate” *National Law Journal* 18 October 2007

<sup>159</sup> [2004] EWCA (Civ) 576, para.10 *Cf.* Sander (1996) *Op. cit.* 885

agree to mediation and those who did not.<sup>160</sup> While the benefits of mediation are apparent, it is necessary to explore how to balance the costs of those who do not reach a settlement in mediation with those who do.<sup>161</sup> Indeed, many complain about the costs of unsuccessful mediation. Clarke L.J., proposes a general principle whereby the costs of mediation will be treated as ordinary costs, thus the party with the strong case who succeeds in court will be protected against the costs of a failed mediation.<sup>162</sup>

According to Genn *et al.* "Facilitation and encouragement together with selective and appropriate pressure are likely to be more effective and possibly more efficient than blanket coercion to mediate."<sup>163</sup> Perhaps, fewer efforts should be put in pressuring unwilling parties to mediate and more in identifying which cases are suitable for mediation and how to encourage parties in using mediation. Thus, the legislature and the judiciary in certain circumstances must compel parties to participate in mediation, although certain limits and opt outs must be established,<sup>164</sup> *e.g.* new legal issues, unsettle precedents, constitutional matters, particularly when dealing with low value disputes and with parties with unequal bargaining power. In these cases, as well as when mediation becomes mandatory, it is generally understood that regulation is needed to set boundaries, legal standards and a public monitoring system.<sup>165</sup>

In general terms, mediation should not be mandatory unless the refusal of mediation by one of the parties would cause a barrier to access to justice for other party, who could not afford the risks and costs of cross border litigation. In the rest of the cases the reasonableness of refusing mediation in civil and commercial cases should be examined *ex post*, *i.e.* the judge must take the refusal of mediation when deciding onto whom impose legal costs. Moreover, the parties and the judge should consider the use of mediation, not just at early stages of proceedings, since this may not be the best time for using it, but also at later stages of proceedings.<sup>166</sup> This is because often attorneys are apprehensive about showing weakness by proposing or accepting mediation at

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<sup>160</sup> The settlement rate in the Automatic Referral to Mediation pilot project for those who initially agree to mediation was 55%, while those who did not agree initially the rate was 48%. It must be noted that according to Genn there is a correlation between the pressures put on litigants the reduction of chances for reaching a settlement. See Genn *et al.* (2007) *op. cit.* iii Other empirical studies reached the conclusion that the difference between mandatory and voluntary mediation is not significant. Rifleman (2004) *op. cit.*; McEwen, C. A. and Maiman, R. J., "Small Claims Mediation in Maine: An Empirical Assessment" (1981) 33 *Maine Law Review* 252. See also anonymous author (1990) *Op. cit.* 1094

<sup>161</sup> Rifleman (2004) *Op. cit.*

<sup>162</sup> Clarke (2008) *Op. cit.* 21

<sup>163</sup> Genn *et al.* (2007) *Op. cit.* v

<sup>164</sup> *Cf.* Anonymous author, "Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes" (1990) 103 *Harvard Law Review* 1086-1104

<sup>165</sup> Wood, W. (2007) *Op. cit.* According to Stempel the judiciary will take the role of encouraging ADR and levelling the playfield between disputants. *Cf.* Stempel, J. W. "Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?" (1996) 11 *Ohio State Journal on Dispute Resolution* 297

<sup>166</sup> Genn, H. *et al.* "Court Based ADR Initiatives for Non Family Civil Disputes: The Commercial Court and the Court of Appeal" (2002) London, Lord Chancellor Department.

an early stage of the legal proceeding. Also, disputants are frequently hostile to the idea of compromise, particularly in early stages of litigation.<sup>167</sup> It is not surprising why over 90 percent civil cases terminate by agreements between the disputants,<sup>168</sup> though these agreements do not often occur at an early stage of the litigation process.

### 4.3. Online mediation

In the context of this paper, it is important to question whether these judgments could be applied to online mediation. It may be expected that one day, when the consumer initiates a cross-border legal action in his/her domicile, under the Brussels Regulation, an e-business could require staying temporarily the proceedings for the use of online mediation. This may happen if there is a contractual clause or the judge advises the use of online mediation. In either case the referral to online mediation should be only allowed when mediators are accredited by the national authorities and when the referral does not create new barriers to consumers' access to justice, *e.g.* increasing consumer costs.

Although, while commentators argue that associating mediation with compulsion could erode the legitimacy of mediation,<sup>169</sup> the use of mandatory mediation may change the view of the people who may perceive it as a legitimate process, equal to a court process.<sup>170</sup> It is necessary that disputants are aware of the existence of mediation and that they find legal and practical incentives for using it. Mediation is an interest based dispute resolution rather than right based orientated. This allows parties to reach original solutions outside legal provisions, but it raises issues when applied to B2C in relation to imbalance of power and accountability.

Online mediation may also be court supported. The Ministry of Justice for England and Wales has begun a pilot project using the TheMediationRoom.com as a platform for online mediation to assisting in the resolution of cases waiting for the final hearing of the Small Claims Court.<sup>171</sup> The ODR system can be used to carry out the mediation entirely online or just as an extra support tool for court mediators where parties may clarify or narrow issues before or after the mediation.

There is still perhaps a need to understand that there is a difference between compelling or robustly encouraging parties to go to mediation from requiring their continued attendance or requiring them to settle.<sup>172</sup> Moreover, when parties withdraw from mediation, the confidentiality of the process does not allow the parties to inform the judge about the discussions.<sup>173</sup> But when

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<sup>167</sup> *Ibid.*

<sup>168</sup> Phillips (2008) *Op. cit.* 2.

<sup>169</sup> Leuven (2007) *Op. cit.* 170.

<sup>170</sup> Anonymous author (1990) *op. cit.* 1093.

<sup>171</sup> See the platform at <<http://v2.theclaimroom.com/index.lxp?host=294>>.

<sup>172</sup> Allen, T., "Whither Halsey or Will Halsey With? A Passage from India" CEDR (May 2008).

<sup>173</sup> *Ibid.*

considering online mediation as a mandatory step, it is important to question whether consumers would settle for less than their entitlements and whether the use of litigation is economically accessible for both parties. It is necessary to develop policies that set the appropriate balance between self-determination and persuasion to mediation. When dealing with mandatory (or rather persuasive) online mediation it must be assured that ODR providers comply with legal minimum standards.<sup>174</sup> For instance, parties may receive some pressure from the mediator to settle their disputes. This does not justify to reach a settlement through coercion, or to allow the misrepresentation of mediators by making parties believe that the judge wants a settlement, to the extent that if one party refuses to reach a settlement, the judge will be inclined to rule against the other party.<sup>175</sup> This should be avoided by warning the parties that they cannot be coerced to settle, and that if this occurs, they may report such coercion to the relevant authority.<sup>176</sup> Whether the mediation is carried out online or offline the mediator code of ethics must expressly forbid not only coercion but also more informal pressures.<sup>177</sup>

## 5. Conclusion

Online mediation is often appropriate for resolving online consumer disputes, since it combines the effectiveness of mediation with the comfort of the Internet.<sup>178</sup> Online mediation has the potential to increase access to justice because it bypasses conflicts of law, is cheaper, quicker and less stressful than litigation, and it does not remove the right to go to court as a last resort. Online mediation seems particularly suitable for resolving B2C disputes between consumers and SMEs where there is a genuine dispute and the power imbalance is not insuperable. Some people remain sceptical about the potential of online mediation, but, as a matter of fact, mediation providers are increasingly moving part of the mediation process to the online realm.<sup>179</sup> This trend is not likely to diminish, on the contrary, as the increase of e-commerce and cross-border disputes continues; the use of online mediation will undoubtedly grow.

Hence, a question arises, if online mediation is so beneficial, why it is not more extensively used? Likely, the main challenge to mediation is attracting disputants. Before online mediation can gain credibility offline mediation must

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<sup>174</sup> Cortés Diéguez, J. P., "A European Perspective on Consumer Online Dispute Resolution" (2008) 14 *Computer and Telecommunications Law Review* Forthcoming.

<sup>175</sup> McEwen and Maiman (1981) *Op. cit.* 237

<sup>176</sup> See Anonymous author (1990) *Op. cit.* 1098

<sup>177</sup> Plapinger, E., and Menkel-Meadow C., "ADR Ethics: Model Rules Would Clarify Lawyer Conduct When Serving as a Neutral" (Summer 1999) *Dispute Resolution Magazine* 20

<sup>178</sup> Lodder, A. R. and Zeleznikow, J., "Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in a Three-Step Model" (2005) 10 *Harv. Negotiation L. Rev.* 336.

<sup>179</sup> Raines (2005) *Op. cit.* 450.

be better understood and valued by the public.<sup>180</sup> Indeed, the best indicator for success is the parties' willingness to enter into mediation and well-trained mediators. Persuasive incentives may come from self-regulation, for instance trustmarks and feedback reviews, or from regulations, such as imposing legal costs.

Mediation should be provided through a flexible procedure, where parties are allowed to discuss their dispute in a confidential manner. Although, confidentiality concerns decrease when using online mediation for consumers disputes since there are less probabilities that the dispute will escalate to court. Thus, confidentiality issues lose weight with respect to the need of transparency, which is of key importance in B2C disputes. The reasons to publish mediation agreements are to guarantee a higher level of impartiality and fairness, check possible conflicts of interest, correct the imbalance of power between the parties and eliminate bias concerns of businesses acting as repeat players. Furthermore, since mediation is conducted on a case-by-case basis, there is the danger that similar disputes will be handled differently or that errors will go unrecognized. These potential problems could be reduced by establishing effective accountability mechanisms. In addition, online mediation requires new skills to be mastered by professionals, so it appears that it would be positive to establish guidelines from the EU and Member States suggesting minimum training skills.

Mediation systems are still in its early years in the EU; however, it projects a promising future. Up until now legislatures have taken a hands-off approach in order to promote the development and flexibility of mediation. Nevertheless, on one hand an effective regulation at the regional level will harmonise national laws, allowing and promoting the use of online mediation. On the other hand, there is a concern that any attempt to regulate mediation could stifle its development. The purpose of the Mediation Directive has been to balance the harmonisation of the existing regulation within the EU.

This paper has however focused on the incentives that can be taken to encourage parties to mediate those disputes that are better solved through online mediation. The following incentives are suggested:

Firstly, the many benefits of online mediation to resolve online B2C disputes are strong arguments for legitimating mandatory mediation within clear limits. This can be done throughout statutes, rules of courts and contractual agreements. In my view, mediation must become part of the litigation system. But, if courts and lawyers are going to recommend the use of mediation, it will be first necessary to raise awareness by educating them on the features of mediation. The same applies to online mediation. When the court attendance is not practical for the parties –*i.e.* for e-commerce disputes- online mediation could be imposed as a preliminary and mandatory step. It is unlikely that mandatory

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<sup>180</sup> Ponte, L. M. "Throwing Bad Money After Bad: Can Online Dispute Resolution (ODR) Really Deliver the Goods for the Unhappy Internet Shopper?" (2001) 3 Tul. J. Tech. & Intell. Prop. 91.

mediation violates the fundamental right to access a court. The *Halsey* ruling is an attempt to draw the line on what is a reasonable request to mediate but it has attracted too many criticisms and it is expected to be changed by a new precedent or by new legislation. A European legal framework should establish clear limits for mandatory mediation, especially to mediate B2C disputes. For instance, parties should be only compelled to participate in one information session, which must be free of cost for the consumer. Also consumers must be allowed to opt out when a small claims procedure is available to them.

Secondly, legal standards for online mediation are needed. To that effect the existing directive should be complemented with the 2001 EC Recommendation, which should be mandatory and supplemented with additional provisions for online mediation. Furthermore, an accreditation EC body should monitor compliance of these legal principles to those ODR providers which are eligible for mandatory mediation. This can be delegated at a national level -*e.g.* law societies or national ECC bodies. Courts should also exercise some type of monitoring.

Thirdly, the courts and governments should encourage parties to use mediation. A challenge that governments and courts have to overcome is to convince the legal profession that mediation may be the most suitable dispute resolution method for many disputes.<sup>181</sup> In addition, disputants must be well informed about the different dispute resolution methods. The rules of courts should follow the English example, allowing for staying legal proceedings and imposing legal costs when a party unreasonably refuse to participate in mediation. However, the imposition of legal costs must be very cautious. In relation to ODR, we are still in an early stage, but it appears that given the imbalance of power between consumers and businesses, it would be more likely that a business is imposed legal costs for unreasonable refusal than the same would happen to a consumer. When mediation emerged in the late 1970s, its growth was accelerated by the recommendation of its use by judges as well as its use in the courts. It is suggested that online mediation may expect to follow a similar path in the near future.<sup>182</sup>

Fourthly, enforcement of mediated settlements must be assured when using mandatory mediation in order to avoid bad faith participation, *i.e.* where one of the parties attends to mediation with the intention of not complying with a settlement, or just has the purpose of obtaining information for the litigation stage. Under the Mediation Directive, all Member States must ensure that cross-border agreements are directly enforceable. It is expected that online agreements will have the same treatment, at least when they derive from bodies approved by the Member States. It is still unclear the procedural form of this recognition, although it has been suggested that mediation agreements

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<sup>181</sup> Genn *et. al.* (2007) *Op. cit.* v.

<sup>182</sup> Katsh, E., Cyberweek 2007. Proceedings available at <<http://www.odr.info/cyberweek2007/>>.

could be empowered with the same enforceability as that given to arbitral awards.

Mandatory mediation is still in its early years in the EU; however, it projects a promising future. Up until now legislatures have taken a hands-off approach in order to promote the development and flexibility of mediation. Nevertheless, in certain cases it will be appropriate to exhort parties to listen to each other with the assistance of a mediator. Some argue that forcing parties to be cooperative it would be like 'forcing horses to drink water'. Nevertheless, those of us in favour of mandatory mediation argue that 'if you take a horse to water it usually does drink'. It is the role of the mediator to encourage the parties to be cooperative and to be opened for reaching an agreement that satisfies both. In the case that the mediator cannot change the attitude of the non-cooperative party, it will be necessary to suspend the mediation and refer the parties to litigation or an otherwise adjudicative procedure.