

# Counting the Cost of Enlarging the Role of ADR in Civil Justice

Dorcas Quek Anderson\*

## Abstract

Singapore, a common law jurisdiction, recently implemented radical changes to its civil procedure regime in order to ensure affordability of the civil justice process. The reforms include the imposition of a duty on parties to consider alternative dispute resolution (ADR) before commencing and during legal proceedings and the empowerment of courts to order the parties to use ADR. This paper discusses the implications of increasing the justice system's emphasis on the use of ADR with reference to Singapore's civil justice reforms and comparable reforms in the United Kingdom. It demonstrates how the historical inclusion of ADR in the justice system has shaped the concept of access to justice, resulting in an emphasis not only on cost-effective justice but also on tailoring the characteristics of each case to the appropriate dispute resolution process. An excessive association of ADR with cost savings will thus neglect other significant dimensions of access to justice. The paper argues that the question of whether ADR is an appropriate process for each dispute assumes greater complexity as both the parties and the court have to engage in detailed cost-benefit analyses to determine whether any refusal to attempt ADR or order to use ADR is justified. Cost concerns also have to be delicately balanced with other factors relevant to determining the appropriate dispute resolution process. The author proposes adopting a more nuanced approach that does not deem mediation as automatically decreasing the overall cost of justice and recognises the importance of encouraging appropriate dispute resolution.

**Keywords:** access to justice, alternative dispute resolution, mandatory ADR, cost sanctions, proportionality.

## 1 Introduction

Access to civil justice in many countries has been plagued by the common challenges of the high cost of litigation, inequality in parties' financial resources, differing risk appetites and limited judicial resources. Singapore, a common law jurisdiction, recently implemented radical changes to its civil justice regime with effect from 1 April 2022 in order to ensure affordability and

timeliness of the civil justice process.<sup>1</sup> As in the United Kingdom, these civil justice reforms are premised on the proportionality principle: they seek to achieve procedure that is proportionate to the claim value and the means of the parties, without unduly compromising justice.<sup>2</sup> The recommended reforms include the imposition of a duty on parties to a dispute to consider amicable or alternative dispute resolution (ADR) before commencing and during legal proceedings. Apart from continuing the use of cost sanctions against unreasonable refusals to attempt ADR, the court may also be empowered to order the parties to use ADR.<sup>3</sup>

This paper discusses the implications of increasing the civil justice system's emphasis on the use of ADR with reference to Singapore's recent civil justice reforms and comparable reforms in the United Kingdom. Section II examines how the inclusion of ADR in the Singapore and UK justice systems has shaped the concept of access to justice, resulting in an emphasis not only on cost-effective justice but also on tailoring the characteristics of each case to the appropriate dispute resolution process. An excessive association of ADR with cost savings will thus neglect other significant dimensions of access to justice. Section III reviews the efforts in the United Kingdom and Singapore to enlarge ADR's role in the civil justice system through the reliance on adverse cost orders and the recent focus on mandating the use of ADR. Section IV discusses the likely cost implications of expanding the use of ADR. The threshold question of whether ADR is an appropriate process for each dispute assumes greater complexity as both the parties and the courts have to engage in detailed cost-benefit analyses to determine whether any refusal to attempt ADR or order to use ADR is justified. In this regard, the cost-effectiveness of using ADR instead of litigation may not be readily evident in Singapore because of the drastically modified litigation process that front-loads discovery

- 1 Rules of Court 2021 <https://sso.agc.gov.sg/SL-Supp/S914-2021/PublishEd/20211201?DocDate=20211201>; Supreme Court of Singapore, 'New Rules of Court 2021' [www.judiciary.gov.sg/new-rules-of-court-2021](http://www.judiciary.gov.sg/new-rules-of-court-2021) (last visited 13 January 2022).
- 2 Report of the Civil Justice Review Committee (2018), at 6. [www.supremecourt.gov.sg/news/media-releases/public-consultation-on-proposed-reforms-to-the-civil-justice-system](http://www.supremecourt.gov.sg/news/media-releases/public-consultation-on-proposed-reforms-to-the-civil-justice-system) (last visited 6 October 2021).
- 3 Courts (Civil and Criminal Justice) Reform Bill s 71; Rules of Court 2021 (S 914/2021), Order 5 rule 3; Ministry of Law, 'Public Consultation on Civil Justice Reforms: Recommendations of the Civil Justice Review Committee and Civil Justice Commission' (26 October 2018), at 9. [www.supremecourt.gov.sg/news/media-releases/public-consultation-on-proposed-reforms-to-the-civil-justice-system](http://www.supremecourt.gov.sg/news/media-releases/public-consultation-on-proposed-reforms-to-the-civil-justice-system) (last visited 6 October 2021).

\* Dorcas Quek Anderson, LL.M., is an Assistant Professor, Singapore Management University.

and other legal work. Section V further highlights that cost concerns have to be delicately balanced with other factors relevant to access to justice, including the need to tailor the appropriate dispute resolution process to the parties' needs. The paper proposes the adoption of a more nuanced approach that does not automatically deem mediation as decreasing the overall cost of justice and recognises the importance of other dimensions of access to justice. This will be made possible only with clear guidelines on when ADR may or may not be suitable and the judicious use of mandatory ADR orders. Above all, the cost of civil justice must be evaluated not only in financial terms but also other aspects of justice relating to the quality of dispute resolution.

## 2 ADR's Role in Access to Civil Justice

### 2.1 Re-conceptualising Justice as Entailing Proportionality of Costs

The question of funding of ADR is inextricably linked to the larger issue of ADR's relationship with access to civil justice. In many jurisdictions, ADR has grown in prominence as a counterpoint to the traditional litigation process. As noted by Cappelletti and Garth, the access-to-justice movement in the late 1970s focused on addressing the procedural obstacles associated with traditional litigation, resulting in a search for alternative ways of resolving disputes, including the mediation process.<sup>4</sup> The growth of court-connected mediation in the United States thus coincided with growing dissatisfaction over the administration of justice in the courts, while the early discussion of ADR in the United Kingdom was precipitated by criticism of the costly and lengthy litigation process.<sup>5</sup> The multidimensional nature of civil justice has emerged amidst recognition of the practical obstacles to accessing the civil courts. While the primary duty of the courts used to be the pursuit of accurate judgments, the costs and time of obtaining justice have been gradually perceived as critical components of the definition of justice, thus transforming the very concept of justice.<sup>6</sup> Describing the changes brought about by the Woolf Reforms, a UK commentator noted that the commitment to the principle of accuracy has been replaced by a more balanced commitment to

other principles.<sup>7</sup> Others have similarly noted that cost and time considerations are integral to the definition of procedural justice, and not separate from it.<sup>8</sup> There 'is never a need to choose between justice and proportionate cost' as '[j]ustice requires proportionality'.<sup>9</sup> Commenting on the international changes to civil justice systems, another commentator emphasised the growing desire to distribute the means of the national justice systems proportionally, on the basis of the importance and social value of the matters at stake.<sup>10</sup> The concern with cost and time considerations has been embodied in procedural rules and civil justice reforms. The UK's Civil Procedure Rules have underscored the need to deal with cases 'justly and at proportionate costs'. Proportionality between parties entails costs being proportionate to the value and nature of the claim.<sup>11</sup> In addition, proportionality involves spending the appropriate amount of judicial resources on each case so as to ensure availability of resources for other litigants.<sup>12</sup> ADR has played an integral role in furthering the goal of proportionate justice since the Woolf Reforms. Lord Woolf, when advocating an obligation to deal with cases justly, noted that the principles of equality, economy, proportionality and expedition were fundamental to an effective contemporary justice system. The new civil justice landscape should, therefore, avoid litigation wherever possible, through the courts' encouragement of the use of ADR at case management conferences, provision of legal aid funding for pre-litigation ADR and the introduction of pre-action protocols facilitating the early exchange of information and exploration of settlement.<sup>13</sup> Lord Justice Jackson's subsequently proposed reforms reiterated that ADR 'has a vital role to play in reducing the costs of civil disputes, by fomenting the early settlement of cases' but was currently underused.<sup>14</sup> In a similar vein, Lord Justice Briggs called for the courts to manage cases such that 'a trial is statistically unlikely to be its conclusion'.<sup>15</sup> Hence, ADR in the UK civil justice

4 M. Cappelletti and B. Garth, 'Access to Justice: the Newest Wave in the Worldwide Movement to Make Rights Effective', 27 *Buffalo Law Review* 181 (1978); M. Cappelletti, 'Alternative Dispute Resolution Processes Within the Framework of the Worldwide Access-to-Justice Movement', 56 *Modern Law Review* 282 (1993).

5 D. Quek Anderson, 'The Evolving Concept of Access to Justice in Singapore's Mediation Movement', 16 *International Journal of Law in Context* 128, at 129 (2020), referring to the Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice in the US in 1976 and to The Rt Hon Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996).

6 R. Assy, 'The Overriding Principles of Affordable and Expeditious Adjudication', in A. Higgins (ed.), *The Civil Procedure Rules at 20* (2021) 280, at 282.

7 J. Sorabji, 'Prospects for Proportionality: Jackson Implementation', 32(2) *Civil Justice Quarterly* 213 (2013), at 221; J. Sorabji, 'Late Amendment and Jackson's commitment to Woolf: Another Attempt to Implement a New Approach to Civil Justice', 31(4) *Civil Justice Quarterly* 393 (2012).

8 R. Assy, 'Brigg's Online Court and the Need for a Paradigm Shift', 36 *Civil Justice Quarterly* 70, at 84 (2017); A. Higgins, 'Keep Calm and Keep Litigating', in A. Higgins (ed.), *The Civil Procedure Rules at 20* (2021) 44, at 52-3.

9 Higgins, above n. 8, at 54.

10 A. Uzelac and C.H. Van Rhee, 'The Metamorphoses of Civil Justice and Civil Procedure: The Challenges of New Paradigms - Unity and Diversity', in A. Uzelac and C.H. Van Rhee (eds.), *Transformation of Civil Justice* (2018) 3, at 13.

11 Civil Procedure Rules 1.1(2)(c).

12 Civil Procedure Rules 1.1(2)(e) referring to the objective of "allotting ... an appropriate share of the court's resources, while taking into account the need to allot resources to other cases"; *Arrow Nominees Inc & Another v. Blackledge & Others* (2020) CP Rep 591; (2001) BCC 591 at para. 69.

13 The Rt Hon Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996), at para. 9.

14 Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (14 January 2010), at 361-62.

15 Lord Justice Briggs, *Chancery Modernisation Review: Final Report* (December 2013), at 67-8; see also M. Ahmed, 'Bridging the Gap Between Alternative Dispute Resolution and Robust Adverse Costs Orders' 66(1) *North-ern Ireland Legal Quarterly* 71, at 73 (2015).

regime has been deemed instrumental to cost reduction and has, consequently, been encouraged as a cost-effective alternative to the conventional court process. This has resulted in a re-conceptualisation of justice as entailing proportionality of costs.

## 2.2 Contributing to a Wider Conceptualisation of Justice

Apart from being a cost-reduction tool for the courts, ADR also has the potential to transform the nature of civil justice. In this respect, Master of Rolls Sir Geoffrey Vos highlighted that mediated interventions should be part and parcel of resolving disputes in society. He suggested that the 'alternative' aspect should, therefore, be taken out of ADR, so that dispute resolution is holistically conceived as 'an integrated process in which parties feel that there is a continuing drive to help them find the best way to reach a satisfactory solution'.<sup>16</sup> From this perspective, ADR is not merely instrumental to reducing the obstacles to access to justice but is instead integral to a wider conceptualisation of justice that includes a variety of dispute resolution methods. However, this broader understanding of access to justice has not been uniformly embraced. By way of illustration, Lord Justice Briggs depicted the civil courts as existing primarily to 'provide a justice service rather than merely a dispute resolution service', which entails recourse to an 'expert, experienced and impartial court for the obtaining of a just and enforceable remedy'. Access to civil courts has been deemed 'an essential guarantor of the rule of law' because the civil courts develop, declare, and strictly uphold the law, while ADR systems may use different criteria.<sup>17</sup> Lord Neuberger has similarly associated the delivery of justice with access to courts, in comparison with the delivery of a service such as mediation. As such, 'mediation must not be invoked and promoted as if it was always an improved substitute for litigation'.<sup>18</sup>

By contrast, Australia has conceived the justice system as including a broad range of dispute resolution services within and outside the courts, before and after the commencement of litigation.<sup>19</sup> This perspective perceives ADR as complementing court adjudication. Both facilitative and adjudicatory processes are co-equal within the broader justice system.<sup>20</sup> In a similar vein, ADR processes are increasingly seen as supplementing litigation. While a resolution may not be arrived at after at-

tempting ADR, ADR could narrow down the number of disputed issues to the essential ones that parties realise cannot be amicably resolved and require the court's determination.<sup>21</sup> As hybrid processes are increasingly explored in many jurisdictions,<sup>22</sup> it is likely that ADR will no longer be seen as antithetical to adjudication but as contributing to the justice system's efforts to resolve a dispute in the most appropriate manner.

In sum, ADR in some jurisdictions is associated with the broader civil justice system, placing consensual and adjudicatory processes on an equal footing, with either method to be appropriately relied on by parties to resolve disputes satisfactorily. Under this vision, ADR assumes more than an instrumental role in advancing access to justice: it is also central to widening the scope and nature of civil justice beyond legal forums and remedies.

## 2.3 ADR's Instrumental and Intrinsic Value in Advancing Access to Justice in Singapore

ADR's value, both instrumental and intrinsic, in advancing access to justice has been evident within its development in Singapore. The development of mediation in Singapore was primarily driven by the judiciary, the government and the commercial sector. Within the courts, former Chief Justice Yong Pung How was an early advocate of mediation. Under his leadership, a court-connected mediation programme for civil disputes was created in 1994 and, subsequently, extended to other disputes, including minor criminal complaints and matrimonial matters. Notably, the introduction of the mediation process into the landscape was connected to the intrinsic value of conciliatory resolution of disputes. Chief Justice Yong emphasised then that Singapore was developing mediation not as a means to reduce case backlog – a problem the courts had already resolved in the early 1990s – but as a non-confrontational way of resolving disputes to preserve relationships. He elaborated that the preservation of relationships was an important value in an Asian society like Singapore.<sup>23</sup> Echoing these sentiments, the Attorney General in 1996 called for mediation to be institutionalised through the

16 The Rt Hon Sir Geoffrey Vos, *The Relationship between Formal and Informal Justice* (26 March 2021), at 7-8. [www.judiciary.uk/wp-content/uploads/2021/03/MoR-Hull-Uni-260321.pdf](http://www.judiciary.uk/wp-content/uploads/2021/03/MoR-Hull-Uni-260321.pdf) (last visited 6 October 2021).

17 Lord Justice Briggs, *Civil Courts Structure Review Interim Report* (December 2015), at 28-9.

18 Lord Neuberger, *Keynote Address: A View From On High* (Civil Mediation Conference, 12 May 2015), at para. 9. [www.supremecourt.uk/docs/speech-150512-civil-mediation-conference-2015.pdf](http://www.supremecourt.uk/docs/speech-150512-civil-mediation-conference-2015.pdf) (last visited 6 October 2021).

19 T. Sourdin and N. Burstyn, *Australia's Civil Justice System: Developing a Multi-Option Response*. In *National Centre for State Courts, Trends in State Courts* (2013). <https://ssrn.com/abstract=2723670> or <http://dx.doi.org/10.2139/ssrn.2723670> (last visited 22 June 2022).

20 J.F. Roberge and D. Quek Anderson, 'Judicial Mediation: From Debates to Renewal', 19 *Cardozo Journal of Conflict Resolution* (2018) 613.

21 Lord Justice Jackson, *Review of Civil Litigation Costs: Preliminary Report* (May 2009) at 318, referring to a survey by King's College showing that 10% of respondents found mediation beneficial to the litigation by helping to narrow issues in dispute, and 25% found mediation helpful in gaining a greater understanding of issues in dispute.

22 See for example Queen Mary University of London, '2021 International Arbitration Survey: Adapting Arbitration to a Changing World' [https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021\\_19\\_WEB.pdf](https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf) (last visited 12 January 2022), at 5 showing that 59% of respondents preferred international arbitration together with ADR in resolving cross-border disputes; and Singapore International Dispute Resolution Academy, 'SIDRA International Dispute Resolution Survey: 2020 Final Report' <https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey/index.html> (last visited 12 January 2022), at 14 indicating 27% preference for hybrid dispute resolution.

23 Former Chief Justice Yong Pung How, 'Speech at the Opening of the Legal Year 1996', in Hoo Sheau Peng (ed.), *Speeches and Judgments of Chief Justice Yong Pung How* (1996); Former Chief Justice Yong Pung How, 'Speech at the Official Opening of the Singapore Mediation Centre on 16 August 1997', in Hoo Sheau Peng (ed.), *Speeches and Judgments of Chief Justice Yong Pung How* (1996). See also Anderson, above n. 5, at 131-32.

setting up of a commercial mediation centre. Having observed that litigation had affected harmonious relationships, he urged Singaporeans to resolve their disputes amicably. This call eventually resulted in the setting up of a commercial mediation centre in 1997. Hence, in its nascent stage of development in Singapore, ADR was conceived as changing the complexion of civil justice to adopt a less contentious approach to resolving disputes consonant with Asian culture. This development coheres with Cappelletti's observation that many non-Western societies have embraced mediation because of its focus on achieving consensus rather than determining fault. ADR in these jurisdictions plays a role in the qualitative transformation of justice – from rights based to consensus driven and for preserving relationships rather than adopting a confrontational approach.<sup>24</sup>

At the same time, the cost-effectiveness of ADR has also been part and parcel of the mediation movement narrative. Some Singapore commentators have opined that 'the initial impetus to the development of ADR originate[d] from the recognition of a need to improve the productivity and efficiency of the courts'.<sup>25</sup> More recently, it was observed that the massive backlog in the 1990s was a catalyst for the mediation movement in Singapore.<sup>26</sup> Hence, although the judiciary stressed that there was no acute crisis in the administration of justice, efficiency concerns have still been perceived as forming the backdrop for the introduction of ADR.

In the past two decades, ADR – notably mediation – has also been connected with a user-centric conceptualisation of access to justice. The current chief justice, Sundaresh Menon, proposed a broader vision of the Rule of Law that includes access to justice as an essential ingredient. The disputant's needs, rights and interests should be at the centre of this consideration, resulting in the adoption of a user-centric approach to define the ideals of the legal system. He contended that the Rule of Law should not be rooted exclusively in an adjudicative setting because mediation has proven valuable in addressing access to justice concerns such as affordability, efficiency, accessibility, flexibility and effectiveness. Developing a diversified suite of dispute resolution options within the legal system would enhance its ability to deliver justice that is 'customised to the particularities of each case' and most appropriate for the parties' needs.<sup>27</sup> In order to have appropriate dispute resolution, the jus-

tice system requires 'a broader philosophical shift... which moves beyond from the rather narrow view of resolution as necessarily entailing an adjudicated outcome...towards a more holistic view that conceives of resolution as an open-ended process which embraces non-adjudicated outcomes such as settlement'.<sup>28</sup> There has, therefore, been unequivocal judicial endorsement of a broader justice system comprising consensual and adjudicative processes, and the need for the individual disputant to be referred to the most appropriate dispute resolution mode.

The different aspects of ADR's relationship with access to justice – cost-effectiveness, the qualitative transformation of justice from rights based to consensus driven, contribution to a broader justice system with a diverse suite of dispute resolution options and finding the appropriate process to suit the parties' needs – have recently been synthesised as collective goals. Referring to the aforementioned attributes of a user-centric approach to access to justice, Chief Justice Menon added two more overarching values to this approach: proportionality and peacebuilding. The inclusion of the proportionality principle clarifies that cost-effectiveness has to be considered not only from the disputants' perspective but also that of the overall justice system and future court users. Alluding to similar concerns articulated by the UK judiciary, Chief Justice Menon stated that 'proportionate justice...is about fairly, equitably and responsibly distributing scarce judicial resources, so as to promote the interests of all who require justice'.<sup>29</sup> The second principle, peacebuilding, underscores the importance of the preservation of relationships and the furthering of peace. Mediation contributes to peacebuilding by 'transform[ing] society's notion of justice from an adversarial, hierarchical...process geared towards zero-sum outcomes, to one that is more consensual, flexible, and interest-based, and thus more open to outcomes that focus on the parties moving forward constructively'.<sup>30</sup> ADR is, thus, intimately connected with the judiciary's goal of achieving lasting peace by repairing relationships and transforming the qualitative nature of justice into a more consensus-based one.<sup>31</sup> Chief Justice Menon further elaborated that a justice system with the aforementioned values would recognise that adjudication is part of a wider universe of dispute reso-

24 Anderson, above n. 5, at 130.

25 N.T. Tan et al., 'ADR – Current and Future Prospects', in N.T. Tan and J.E. Lee-Partridge (eds.), *Alternative Dispute Resolution in Business, Family and Community: Multidisciplinary Perspectives* (2000), at 134.

26 E. Chua and G. Lim, 'Development of Mediation in Singapore' in D. McFadden and G. Lim (eds.), *Mediation in Singapore: A Practical Guide* (2017) 3.

27 Chief Justice Sundaresh Menon, 'Mediation and the Rule of Law' (10 March 2017), at 18 [www.supremecourt.gov.sg/Data/Editor/Documents/Keynote%20Address%20-%20Mediation%20and%20the%20Rule%20of%20Law%20\(Final%20Edition%20after%20delivery%20-%20090317\).pdf](http://www.supremecourt.gov.sg/Data/Editor/Documents/Keynote%20Address%20-%20Mediation%20and%20the%20Rule%20of%20Law%20(Final%20Edition%20after%20delivery%20-%20090317).pdf); Chief Justice Sundaresh Menon, 'Mass Call Address: The Legal Profession Amidst the Pandemic: Change and Continuity' (23 August 2021), at 9 [www.supremecourt.gov.sg/docs/default-source/default-document-library/mediaroom/cj-s-speech-mass-call-2021.pdf](http://www.supremecourt.gov.sg/docs/default-source/default-document-library/mediaroom/cj-s-speech-mass-call-2021.pdf) (last visited 6 October 2021).

28 Chief Justice Sundaresh Menon, 'International Commercial Courts in the Post-Pandemic Era' (10 March 2021), at 8 [www.supremecourt.gov.sg/docs/default-source/default-document-library/sicc-symposium-2021---cj-s-opening-address-\(final\)-\(2\).pdf](http://www.supremecourt.gov.sg/docs/default-source/default-document-library/sicc-symposium-2021---cj-s-opening-address-(final)-(2).pdf) (last visited 6 October 2021).

29 Chief Justice Sundaresh Menon, 'Technology and the Changing Face of Justice' (14 November 2019), at 38 <https://beta.judiciary.gov.sg/docs/default-source/news-docs/ncmg---keynote-lecture.pdf> (last visited 6 October 2021).

30 Chief Justice Sundaresh Menon, 'Setting the Stage for Mediation's Golden Age' (17 July 2021), at 15 [www.supremecourt.gov.sg/docs/default-source/default-document-library/india-singapore-mediation-summit---setting-the-stage-for-mediation-s-golden-age-\(final2\).pdf](http://www.supremecourt.gov.sg/docs/default-source/default-document-library/india-singapore-mediation-summit---setting-the-stage-for-mediation-s-golden-age-(final2).pdf) (last visited 6 October 2021).

31 Chief Justice Sundaresh Menon, 'Response by Chief Justice, Opening of the Legal Year 2020' (6 January 2020), at 19-20 [www.supremecourt.gov.sg/docs/default-source/module-document/speech/oly-2020---speech-by-cj-\(checked-against-delivery\).pdf](http://www.supremecourt.gov.sg/docs/default-source/module-document/speech/oly-2020---speech-by-cj-(checked-against-delivery).pdf) (last visited 6 October 2021).

lution methods<sup>32</sup>; ADR, therefore, contributes to a wider scope of the justice system that ‘depart[s] from a traditionally reactive approach to proactively resolving disputes in the most appropriate manner’(emphasis added).<sup>33</sup>

In summary, the early ascendance of ADR in many legal systems stemmed principally from time and cost obstacles in the achievement of access to justice. ADR emerged as a counterpoint and alternative to litigation, which has remained the primary means of delivering justice in some jurisdictions. The role played by ADR in advancing access to justice is more multifaceted in Singapore. ADR has been promoted not merely because of its instrumental value in alleviating prohibitive costs and time but also for its inherent value in creating a justice system with diverse dispute resolution options, bringing a consensual dimension to the quality of justice and helping disputants find the most suitable forum for their needs. As such, counting the cost of providing ADR in the justice system is necessarily a complex task. It has to take into account the multiple dimensions of ADR’s relationship with access to justice, of which cost-effectiveness is but one aspect.

### 3 Enlarging ADR’s Role Through Procedural Reforms

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Given the multiple ways in which ADR has been perceived to enhance access to justice, many jurisdictions have made concerted efforts to embed mediation within the civil justice regime. The reforms in the United Kingdom include the introduction of pre-action protocols to oblige parties to consider and engage in ADR processes and the empowerment of the courts to make adverse cost orders against a party deemed to have unreasonably refused to engage in ADR.<sup>34</sup> The adverse costs orders could take two forms: cost deprivation orders and paying orders. The former entails restricting the party that is successful in its claim or defence from recovering all of its costs from the unsuccessful party. The latter obliges the successful party to reimburse some of the unsuccessful party’s costs arising from the failure to attempt ADR.<sup>35</sup> Beginning with *Halsey v. Milton Keynes General NHS Trust*, the courts have developed and refined guidelines to determine whether a refusal to attempt ADR will be perceived as unreasonable.<sup>36</sup> However, *Halsey* has been criticised as failing to provide guidance on the range of adverse costs orders at the court’s disposal, resulting in the judiciary’s reluctance to impose paying orders on successful parties. Such a cautious approach

32 *Ibid.*, at 21.

33 *Ibid.*

34 Civil Procedure Rules 44.2(2)(a).

35 Ahmed, above n. 15, at 72.

36 [2004] 1 WLR 3002.

to impose robust costs sanctions seems to run counter to the judicial endorsement of ADR.<sup>37</sup>

One common way of institutionalising mediation within the justice system is to mandate mediation. This question has ignited considerable controversy within and beyond the UK judiciary. Lord Dyson maintained in *Halsey* that the courts’ compulsion of ADR would pose ‘an unacceptable constraint on the right of access to the court’ and, consequently, violated Article 6 of the European Charter of Human Rights.<sup>38</sup> Dissenting views were later expressed by other members of the judiciary. Lord Phillips suggested that a court order mandating ADR might infringe Article 6 only if it prevented a party from continuing with its case,<sup>39</sup> while Lord Clarke Master of Rolls called for a review of *Halsey*’s position in light of the introduction of compulsory ADR schemes in European states and the United States.<sup>40</sup> In response, Lord Dyson subsequently conceded that mandatory mediation per se did not breach Article 6, but also argued that compulsion orders could be objectionable if accompanied by a denial of access to the court or high costs of mediation.<sup>41</sup> Having comprehensively reviewed these arguments in 2021, the Civil Justice Council opined that the parties could be lawfully compelled to participate in ADR provided that there was no obligation to settle and a return to the normal adjudicative process was available. It further recommended the imposition of sanctions for breaches of mandatory mediation orders, including the striking out of a claim or defence.<sup>42</sup> The council’s recommendations have decisively addressed the 17-year-old controversy since *Halsey* and paved the way for the future use of compulsory ADR orders. There have, however, been deeper concerns over the desirability of mandating mediation. There is the fear of undermining the role of adjudication in the justice system. Professor Genn underscored the importance of having civil adjudication to provide the ‘credible threat of judicial determination’, without which mediation would be ‘the sound of one hand clapping’.<sup>43</sup> She argues that the courts should not indiscriminately attempt to drive litigants away or compel them to unwillingly participate in mediation in light of the social and economic value of the civil courts.<sup>44</sup>

Having a common law system, Singapore’s civil justice regime has drawn inspiration from many UK reforms. ADR for civil disputes has been institutionalised through a reliance on adverse costs orders and a limited number of mandatory ADR programmes. Several mechanisms

37 Ahmed, above n. 15, at 83-4, 86.

38 [2004] 1 WLR 3002 at [9].

39 Lord Phillips, ‘Alternative Dispute Resolution: An English Viewpoint’ (29 March 2008), at 13-15.

40 Sir Anthony Clarke Master of Rolls, ‘The Future of Civil Mediation’, 74(4) *Arbitration: The International Journal of Arbitration, Mediation and Dispute Resolution*, at 421 (2008).

41 Lord Dyson, ‘A Word on *Halsey v. Milton Keynes*’, 77(3) *Arbitration: The International Journal of Arbitration, Mediation and Dispute Resolution* 338-39, at 337 (2011).

42 Civil Justice Council, *Compulsory ADR* (June 2021), at 30-1.

43 Hazel Genn, *Judging Civil Justice* (2010), at 125.

44 *Ibid.*, at 123.

have been introduced to facilitate the courts' evaluation of the parties' decision whether to attempt ADR. Parties in the Supreme Court may file an ADR Offer, indicating their willingness to participate in ADR. The recipient of the ADR Offer is given 14 days to file a Response to the ADR Offer, stating whether they agree to the proposal and providing detailed reasons for any refusal. Failure by a party to file a Response to an ADR Offer within the stipulated time is taken to mean that the party is unwilling to participate in ADR without providing any reasons.<sup>45</sup> A similar system has been instituted in the State Courts for civil claims below S\$250,000. A 'presumption of ADR' applies to all civil disputes, resulting in disputes being routinely referred to a mode of ADR unless any party chooses to opt out.<sup>46</sup> All parties must file an ADR Form at the pre-trial stage.<sup>47</sup> This form provides information on the different ADR options and requires parties and their lawyers to indicate whether they wish to use any form of ADR. Similar to the Supreme Court procedure, the parties have to provide reasons for any refusal to use ADR.<sup>48</sup> The spectre of adverse cost sanctions due to an unreasonable refusal to use ADR is highlighted in both courts' forms. Furthermore, the registrars in both courts routinely encourage parties to consider ADR during pre-trial conferences and rely on the parties' responses in the forms to determine whether any refusal of ADR is unreasonable.

Unlike the reluctance within the United Kingdom to compel the use of mediation, Singapore's civil justice regime has relied heavily on mandatory mediation. The reliance on costs sanctions to encourage the use of ADR has been complemented by mandating the use of mediation at an early stage for certain civil claims below S\$250,000, including personal injury, motor accidents, medical negligence and defamation.<sup>49</sup> The parties in such disputes are automatically referred for ADR in the State Courts' Centre for Dispute Resolution. In 2014, the scope of mandatory ADR programmes was expanded through the introduction of a simplified regime to deal with civil claims below S\$60,000. In such cases, the court is empowered to order the use of ADR if it is 'of the view that doing so would facilitate the resolution of the dispute between the parties'.<sup>50</sup> This change was followed by radical recommendations made in 2018 by two civil procedure reform committees to reform the civil justice system. Their proposals included the introduction of a duty for parties to consider ADR prior to and during legal proceedings and the empowerment of the courts to order the use of ADR.<sup>51</sup> After extensive consultation, the collective recommendations were accepted with minor

modifications by the Ministry of Law.<sup>52</sup> Legislative amendments were recently approved to grant the courts the power to order parties to attempt ADR, and took effect on 1 April 2022.<sup>53</sup>

The parallel developments in the UK and Singapore civil justice systems seemed to have converged through their current endorsement of mandatory ADR court orders. This major development is likely to result in an unprecedented expansion of ADR's role in the future within both jurisdictions. What are the potential cost implications of ADR's enlarged function within the civil justice regime? The next section considers this pertinent question.

## 4 Counting the Costs of Enlarging ADR's Role

### 4.1 A More Complex Analysis of Cost-Effectiveness

Section II highlighted how ADR has been heavily promoted by the courts because of its instrumental value in alleviating the prohibitive costs and time involved in litigation. The critical question arising from ADR's enlarged role is whether the reliance on mandatory ADR orders will indeed reduce the costs of civil justice, resulting in the delivery of justice at proportionate costs. Cost-effectiveness may be evaluated from several perspectives – the individual party, the judiciary or the broader society – and with varying conclusions. Because the concept of access to justice is essentially a user-centric one, it is critical that the mandatory ADR order is cost effective for the disputants. Nevertheless, the determination of this question is a complex exercise. Some relevant factors the courts have considered to determine the reasonableness of refusals to attempt ADR include the costs of ADR and the time involved in completing ADR. In this regard, Lord Justice Dyson stressed in *Halsey* that the costs of mediation must not be disproportionately high and any delay caused by attempting ADR should not be prejudicial to the parties.<sup>54</sup> Reiterating these concerns, the Civil Justice Council in its 2021 report suggested that the form of ADR should not impose a disproportionate burden on the parties' time and resources. It further stated that mandatory ADR options that are free or low cost or available in shorter format are less likely to be controversial, while privately provided mediation service may cause more difficulty because the fees involved may represent a disproportionate cost in low-value claims.<sup>55</sup>

45 Supreme Court Practice Directions (2010 Revised Edition), Singapore, para. 35C and Forms 28-9.

46 State Courts Practice Directions, Singapore, para. 35(9).

47 *Ibid.*, para. 36(4) and Form 7.

48 *Ibid.*, Form 7.

49 *Ibid.*, paras 36(2). 37, 38, 39A.

50 Rules of Court (Cap 322, R 5, 2014 Ed), Order 108 rule 3(3).

51 Ministry of Law, above n 3.

52 Ministry of Law, Response to Public Feedback on the Civil Justice Reforms (11 June 2021) [www.mlaw.gov.sg/news/press-releases/2021-06-11-response-to-public-feedback-on-the-civil-justice-reforms](http://www.mlaw.gov.sg/news/press-releases/2021-06-11-response-to-public-feedback-on-the-civil-justice-reforms) (last visited 6 October 2021).

53 Courts (Civil and Criminal Justice) Reform Bill s 71; Rules of Court 2021 (S 914/2021), Order 5 rule 3.

54 *Halsey*, above n. 41.

55 Civil Justice Council, above n. 42, at 41, 46. These observations were influenced by the European Court of Justice decisions in *Rosalba Alassini*

[2010] 3 CMLR 17 and *Menini v. Banco Popolare Societa Cooperative* [2018]

CMLR 15 placing importance on ADR giving rise to low costs for the parties and causing no delay to the resolution.

**Table 1** *Litigation Interest and Risk Assessment Framework*

|  |
|--|
| <b>Stage 1: Determine the Expected Value of Court Outcome</b>              |
| (1) Estimate risks or probability regarding liability at trial             |
| (2) Estimate damages   |
| (3) Multiple (1) by (2) to obtain expected value of court outcome          |
| <b>Stage 2: Calculate the Net Expected Value of Court Outcome</b>          |
| (4) Estimate value of tangible and intangible costs of proceeding to trial |
| (5) Deduct (4) from (3) to obtain net expected value of court outcome      |

Apart from the costs and time involved in ADR, the courts have considered other factors, including the merits of the case, the nature of the dispute, the extent to which other settlement methods have been attempted and whether the ADR process has a reasonable prospect of success.<sup>56</sup> Collectively, these *Halsey* guidelines have been applied in contrasting ways. As noted by Ahmed, the merits of the case factor has been applied both generously and strictly. Certain decisions, such as *Northrop* and *Leicester Circuits Ltd v. Coates Brothers Plc*, have not placed great weight on parties' reasonable belief in success at litigation. Justice Ramsey in *Northrop* reasoned that a reasonable belief in a strong case would provide limited justification for a refusal to mediate because mediation would have a positive effect even if the claim had no merit.<sup>57</sup> By contrast, decisions such as *Swain Mason Mills v. Reeves (A Firm)* and *Reed Executive Plc v. Reed Business Information Ltd* have readily deemed a party's reasonable belief in a watertight case as sufficient justification for a refusal to mediate.<sup>58</sup> The diversity of the UK courts' weighing of the *Halsey* factors attests to the complexity of determining the overall cost-effectiveness of attempting ADR. The inherent complexity of this task is likely to be also present in the courts' decision to mandate ADR or not.

It is paramount that the court's discretion on mandatory ADR orders be exercised accurately in order to effectively enhance access to justice through proportionate costs. To illustrate the nuanced nature of the comparison of litigation and ADR, it is beneficial to refer to decision analysis, a common tool used by lawyers to identify a range of possible litigation outcomes on the basis of key factors and estimated probabilities.<sup>59</sup> Drawing from this method, Keet et al. formulated a litigation interest and risk assessment framework to guide lawyers

in making a systematic analysis of the risk of litigation. It comprises the following two stages (see Table 1).<sup>60</sup>

The same framework can be readily applied to assess the interest in and risk of attempting ADR. As illustrated in Table 2, the net expected values of ADR and litigation may be juxtaposed to ascertain which is the more cost-effective dispute resolution option from the disputant's perspective.

The aforementioned decision analysis framework underscores several salient principles underlying the analysis of ADR and litigation's relative cost-effectiveness. First, each factor cannot be considered in isolation in relation to ADR without giving regard to the equivalent factor in litigation. It would, for instance, be erroneous to give substantial weight to the cost of ADR alone without considering how these costs compare with the likely litigation costs. Such an approach fails to appraise ADR using litigation as a reference point. Second, the multiple factors interact with one another such that it is rare for one factor to be determinative. As such, when estimating the cost-effectiveness of litigation, the court cannot ascribe undue weight to probability of success at trial alone without also considering the legal costs and intangible costs (such as monetary value of lost time). In the same vein, it is not holistic to focus on the cost of ADR without also considering the likelihood of a successful outcome with ADR. Third, the accuracy of the overall analysis hinges on the parties' and the court's accurate estimation of each factor. It has been shown that many lawyers and parties make decision errors in estimating the likelihood of success at trial.<sup>61</sup> The error rates in some studies were as high as 65% for plaintiffs and 29% for defendants. These errors stem from common cognitive biases that plague the parties, including optimism bias, self-serving bias, confirmation bias and

56 *Halsey*, above n. 41.

57 [2014] EWHC 3148 (TCC); [2015] 3 All ER 782, at [72].

58 *Swain Mason Mills v. Reeves (A Firm)* [2012] EWCA Civ 498 [2012] STC 1760; *Reed Executive Plc v. Reed Business Information Ltd* [2004] EWCA Civ 887; [2004] 1 WLR 3026.59 J. Lande, *Lawyering with Planned Early Negotiation* (2015), at 28.60 M. Keet, H. Heavin and J. Lande, *Litigation Interest and Risk Assessment: Help Your Clients Make Good Litigation Decisions* (2020), at 1531-1800.61 R.L. Kiser, M.A. Asher and B.B. McShane, 'Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations', 5(3) *Journal of Empirical Legal Studies* 551, 556 (2008); Keet et al., above n. 60, at 431.

Table 2 Litigation Interest and Risk Assessment Framework Applied to Assess Benefit of Attempting ADR

| ADR  | Litigation   |
|--|--|
| <b>Stage 1: Determine the Expected Value of ADR Outcome</b>                                      | <b>Stage 1: Determine the Expected Value of Court Outcome</b>              |
| (1) Estimate probability of obtaining desired settlement sum with ADR                            | (1) Estimate risks or probability regarding liability with trial           |
| (2) Estimate settlement sum  | (2) Estimate damages   |
| (3) Multiple (1) by (2) to obtain expected value of ADR outcome                                  | (3) Multiple (1) by (2) to obtain expected value of court outcome          |
| <b>Stage 2: Calculate the Net Expected Value of ADR Outcome</b>                                  | <b>Stage 2: Calculate the Net Expected Value of Court Outcome</b>          |
| (4) Estimate value of tangible and intangible costs of proceeding to ADR                         | (4) Estimate value of tangible and intangible costs of proceeding to trial |
| (5) Deduct (4) from (3) to obtain net expected value of ADR outcome                              | (5) Deduct (4) from (3) to obtain net expected value of court outcome      |
| <b>Compare net expected values to determine whether ADR or litigation is more cost effective</b> |  |

focus on sunk costs. The chances of arriving at flawed analyses of the cost-effectiveness of ADR vis-à-vis litigation are, thus, very high.

#### 4.2 Potential Pitfalls in Comparing the Use of ADR and Litigation

It is evident that the *Halsey* factors are readily mapped to the variables in the aforementioned framework. Drawing from the aforementioned three principles, there are multiple ways in which the courts may weigh the *Halsey* factors inaccurately when deciding whether to order the use of ADR. One such error could occur in the consideration of the costs and time of ADR, which the courts have noted should not be disproportionate or prejudicial to the parties. The Civil Justice Council suggested that the form of ADR ordered should preferably be free or offered at a low cost. However, if the costs and time of ADR are compared with the resources to be spent at litigation, ADR need not necessarily be free in order to justify a mandatory ADR order; ADR costs merely need to be lower than the costs and time occasioned by a trial. Alluding to this argument, the UK Civil Mediation Council pointed out that the suggestion that compulsory mediation ought to be free or low cost could prove to be a false economy as it failed to take into account the consequent savings in time and costs to the individual.<sup>62</sup> As such, when ADR costs are being evaluated in terms of proportionality, the absolute value of ADR costs is not as significant as the value relative to litigation costs. Admittedly, the absolute costs of ADR should not be disproportionately higher than the value of the disputed claim. However, that is a distinct issue from the proportionality of ADR costs with reference to litigation, which is the primary remit of the court's analysis when deciding whether to mandate ADR.

Furthermore, the court may also neglect the interaction of multiple factors and, consequently, give undue weight to a few factors in its analysis. Notably, there may be excessive significance placed on a party's reasonable be-

lief in the merits of the case. Lord Justice Dyson's view that a reasonable belief in a watertight case may constitute sufficient justification to refuse mediation seemed to excessively elevate this factor over others.<sup>63</sup> Subsequent decisions have relied heavily on Lord Justice Dyson's statement, resulting in the diminution of other equally important factors. Lord Justice Davis in *Swain Mason*, quoting Lord Justice Dyson, found that the principle had obvious resonance where the defendant's assessment of the strength of its case was largely vindicated by the trial outcome. At the same time, Lord Justice Davis disagreed with the trial judge's consideration of other factors: the likelihood of settlement at mediation, the benefit of mediation in understanding the weaknesses of the case and the collateral reputational damage to the defendant that could be avoided through a settlement. It is most plausible that these factors were diminished by the merits factor because the latter was assumed to be most determinative.<sup>64</sup>

A more holistic assessment of the interaction of multiple factors has been done in recent UK High Court decisions. In *DSN v. Blackpool Football Club Ltd*, the claimant was successful in the sexual assault claim and sought an indemnity costs order on the basis of the defendant's refusal to engage in ADR. Addressing the defendant's belief in its strong defence, Justice Griffith stated that no defence, however strong, justified a failure to engage in ADR. Justice Griffith considered other factors, including the significant financial costs and expenditure of time at a trial, in comparison with the possibility of reaching flexible, timely and ingenious solutions through mediation that satisfied all parties.<sup>65</sup> The High Court in *Richard Wales v. CBRE Managed Services Ltd* adopted a similar approach. The unsuccessful claimant argued that he should not pay the first defendant's costs because it had rejected his invitations to attempt mediation before and during the legal proceedings. When assessing the merits

63 *Halsey*, above n. 41.

64 *Swain Mason*, above n. 58.

65 [2020] EWHC 670 (QB), at [28]-[30].

62 Civil Justice Council, above n. 42, at 7.



factor, Justice Halliwell noted that *Halsey's* emphasis on this factor was motivated by the danger of public bodies being vulnerable to pressure from claimants with weak cases and sought to use mediation as a tactical ploy. Having found no such tactical ploy in the circumstances, Justice Halliwell considered the opportunity provided by mediation to address wider considerations not justiciable by the courts, the reasonable prospect of success of mediation given the historic relationship between the parties and the nature of the issues in the litigation and the costs of mediation not being disproportionately high in relation to the sums at stake in the litigation.<sup>66</sup> The court, therefore, disallowed 20% of the first defendant's costs. These recent cases are a more positive reflection of a cost-benefit analysis that considers the interaction of multiple factors.

Finally, the threshold question of whether ADR is cost effective assumes greater complexity because the courts have to make this assessment *before* instead of after the trial. When deciding whether a party has unreasonably refused to attempt ADR, the court is able to consider the eventual litigation outcome to determine whether the party had a reasonable belief in the merits of its claim or defence. However, in deciding whether to make a mandatory ADR order, the court has to prospectively appraise the party's assessment of the merits. As suggested earlier, the influence of multiple cognitive biases readily results in inaccurate appraisal of the prospects of success by litigants and lawyers. It is, therefore, likely that the court would have to carefully review the parties' views on the merits to determine whether they are reasonable. Nevertheless, the court's preliminary assessment of the merits at an early stage of the proceedings cannot realistically be a precise evaluation. Because of the inherent uncertainty in making a prospective assessment of the success at trial, the merits factor could arguably play a less influential role in the court's decision to mandate ADR.

In summary, ADR's role has expanded considerably through the UK and Singapore courts' power to make compulsory ADR orders, supplementing their existing practice of imposing adverse costs orders to take into account unreasonable refusals to attempt ADR. This has brought greater complexity to courts' assessment of the cost-effectiveness of ADR. Both the parties and the courts have to engage in detailed risk analyses to determine whether any refusal to attempt ADR or order to use ADR is justified. The expanded role of ADR in the civil justice system will have a positive impact on access to justice only when the court engages in a holistic and accurate assessment of the relevant factors with an accurate comparison of the respective implications of ADR and litigation. As evident from the potential pitfalls discussed, it is exceedingly challenging to attain such accuracy.

### 4.3 Civil Justice Reforms in Singapore: The Complexity of Comparing the Cost-Effectiveness of ADR and Litigation

Singapore implemented extensive changes to its civil justice regime that took effect on 1 April 2022. The Civil Justice Commission was tasked by the Chief Justice in 2015 to consider ways to transform the litigation process by enhancing the efficiency and speed of adjudication, maintaining costs at reasonable levels, simplifying rules, eliminating cost-wasting procedural steps and allowing greater judicial control of the litigation process.<sup>67</sup> Another committee was concurrently set up by the Ministry of Law to also make recommendations on enhancing judicial control over litigation.<sup>68</sup> Collectively, both groups have proposed the streamlining of the litigation process by empowering the court to limit the number of interlocutory applications and order the filing of a single application as far as possible. They also recommended narrowing the scope of the default discovery process to oblige the parties to produce documents that support their respective cases and known adverse documents in their possession or control. Furthermore, the court may order the filing and exchange of affidavits of evidence-in-chief before or simultaneously with discovery, in order to shift the focus of witness evidence to the earlier case put forward in the pleadings. As briefly explained, ADR's role has also been expanded through the imposition of a duty to consider amicable resolution of the dispute, the more robust use of cost sanctions to take into account unreasonable refusals to consider ADR and the empowerment of the courts to order parties to participate in ADR.<sup>69</sup> These proposals were effected in legislation taking effect from 1 April 2022.<sup>70</sup> Will the use of ADR be readily deemed as cost effective in this future civil justice system? Paradoxically, ADR will not evidently be the least costly choice in this radically transformed justice process. In a conventional litigation process, the costs and time involved in mediation are usually lower than the costs and time occasioned by litigation; ADR has, thus, emerged as a natural alternative to court adjudication in many countries. However, a streamlined litigation process with a shorter discovery process, limited interlocutory applications and greater judicial control is likely to substantially reduce the time for court adjudication. Once the litigation process is more efficient, there is less incentive to reap time savings by attempting ADR. Moreover the cost-effectiveness of using ADR instead of litigation may also not be evident because the modified litigation process could front-load discovery and other legal work. As such, several members of the Singapore Bar pointed out that the front loading of legal costs, caused by the exchange of witnesses' AEICS before discovery, would have an adverse impact on the likelihood of parties reaching an

67 Civil Justice Commission Report (29 December 2017).

68 Report of the Civil Justice Review Committee (2017). [https://www.mlaw.gov.sg/files/Annex\\_B\\_CJRC\\_Report.pdf/](https://www.mlaw.gov.sg/files/Annex_B_CJRC_Report.pdf/)

69 Ministry of Law, above n. 3, at 5-6.

70 Courts (Civil and Criminal Justice) Reform Bill s 71; Rules of Court 2021 (S 914/2021), Order 5 rule 3.

66 [2020] EWHC 1050 (Comm), at 27-32.

amicable settlement.<sup>71</sup> Indeed, the potential for mediation to save substantial costs is great where a large proportion of legal costs has yet to be spent in preparation for a trial. Conversely, the incentive to attempt ADR in order to save legal costs is considerably reduced where most of the trial preparation work has been done at an early stage of the proceedings. Hence, ADR becomes less of a desirable alternative to litigation when the litigation process is substantially shortened and the legal work brought forward to the early stage of proceedings. Where the time and cost differences across mediation and litigation are minimal, the court may then have to ascribe greater weight to other *Halsey* factors to decide whether mediation is the most cost-effective option. For instance, the likelihood of resolution at ADR may assume greater importance because a low settlement probability will result in additional costs and time spent without the parties' reaping future savings. In this regard, compulsion to attempt mediation potentially impacts the probability of a successful settlement. The concept of mandatory mediation has attracted criticism from mediation practitioners, who have highlighted the danger of the court's coercion into mediation being translated into coercion within mediation.<sup>72</sup> Litigants may be advised by their lawyers to go through the motion of mediation in order to avoid the possibility of adverse costs orders and to move on to litigation. The coercive nature of an order to mediate could, thus, diminish the highly consensual nature of the mediation process within the parties' perception, leading to their reluctant and suboptimal participation in the mediation.<sup>73</sup> Admittedly, there have been mixed views and studies on whether the lack of voluntary participation in mediation affects the likelihood of resolution, for instance, the Civil Justice Council noted that a surprisingly large number of litigants are drawn into the mediation and become engaged in it.<sup>74</sup> Nevertheless, it is prudent for the courts to take into consideration any particularly strong objections any party has against mediation.

Alternatively, where there are negligible cost differences between mediation and litigation, the intangible benefits and costs of ADR and litigation will have to be carefully weighed to discern whether ADR could offer valuable benefits such as creative solutions. In short, mandatory ADR orders have to be made with circumspection when the litigation process is simplified with reduced costs. The greater use of ADR will not necessarily result in greater access to justice for the litigant. Singapore's civil justice reforms, thus, aptly illustrate the

complexity of undertaking sound risk analyses of ADR and litigation, taking into account all the circumstances.

#### 4.4 Proportionality of Costs for the Overall Justice System

The preceding sections have discussed the proportionality of costs from the individual litigant's perspective. However, the overarching question of proportionality is much wider than the party's resources, with both the UK and Singapore courts acknowledging the need to ensure scarce public resources are allocated appropriately to ensure availability of resources for other litigants.<sup>75</sup>

When public resources, apart from individual resources, are considered in counting the cost of mandatory ADR, the overall cost-benefit calculus is rendered more ambivalent. The use of ADR may save costs and time for the parties, but may not be cost efficient for the courts or the state. Proportionality of costs for the individual does not invariably result in overall proportionality of costs, and a choice has to be made in the event of a conflict. Consider, for instance, the management of low-value civil claims. The Singapore State Courts, which have jurisdiction over claims below S\$250,000, provide ADR services through their centre for dispute resolution staffed by full-time district judges and staff. Parties with civil suits are able to participate in mediation or early neutral evaluation at no cost or a nominal fee. These ADR sessions are scheduled as half-day sessions.<sup>76</sup> In the event that parties are ordered to attempt ADR, they clearly reap substantial cost savings from the potentially shorter resolution time at ADR than a trial, lower legal costs due to the shortened duration of legal work and not having to pay court fees for a trial. From the court's standpoint, the short-term savings may be of a lower extent as the cost of ADR through judge mediators is funded by the judiciary; the savings are reaped primarily from the shorter time spent by the courts to resolve the matter. However, long-term benefits may be reaped through the appropriate referral of resource-intensive claims to ADR, thus freeing judicial resources to adjudicate other claims.<sup>77</sup> Proportionality of costs from the courts' standpoint may, therefore, vary from proportionality from the party's perspective.

When the court assesses the relevant factors concerning a mandatory ADR order, there could conceivably be a tension between the parties' cost concerns and the cost concerns of the overall justice system. A disputant could form a reasonable view that their desired outcome, such as a public decision, may be achieved through a trial instead of ADR. While legal costs may ostensibly be saved through attempting ADR, this disputant will rate the overall cost-effectiveness of ADR poorly because of its

71 Ministry of Law, above n. 52, at 22.

72 See for instance T. Hedeem, 'Coercion and Self-Determination in Court-Connected Mediation: All Mediations are Voluntary, but Some are More Voluntary than Others', 26 *Justice Systems Journal* 273, 278 (2005); F.E. A. Sander, H. William Allen & D. Hensler, 'Judicial (Mis)use of ADR? A Debate', 27 *University of Toledo Law Review* 885, 886 (1996); D. Quek, 'Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program' 11 *Cardozo Journal of Conflict Resolution* 485-86, at 479 (2010).

73 Quek, above n. 72, at 508.

74 Civil Justice Council, above n. 42, at 37.

75 Section II.

76 Thian Yee Sze and Low Lih Jeng, 'An Overview of the Court Dispute Resolution Process and Judicial Mediation in the State Courts', in D. McFadden and G. Lim (eds.), *Mediation in Singapore: A Practical Guide 2021* 219, 229-34; State Courts, *An Overview of Mediation* <https://www.judiciary.gov.sg/alternatives-to-trial/mediation/going-for-mediation-state-courts> (last visited 22 June 2022).

77 Section II.

constraint in achieving their desired outcome. By contrast, it will seem proportionate from the judiciary's perspective for the claim to be referred to ADR, particularly if the trial will take substantial time and involve complex issues. This will be an even more compelling factor where there are acute constraints in judicial resources.<sup>78</sup> A third perspective may be added – that of the society. The UK Civil Justice Council reasoned in this regard that ADR 'should reduce the ultimate burden in terms of cost and time imposed by disputes on individuals, businesses and the community'.<sup>79</sup> The society's viewpoint would be aligned with the courts' perspective, as it is desirable for costs to be saved for the broader community. As such, it matters whose perspective – that of the community and the court or that of the individual party – is adopted when considering the proportionality of costs for the purpose of determining whether to mandate the use of ADR. The pertinent question arising from such circumstances is whether the court's perspective of proportionate costs should generally prevail. If so, it would effectively imply that the judiciary is ascribing greater significance to its resource constraints than the party's primary concerns underlying the pursuit or defending of their claim. This stance would not be objectionable if cost-effectiveness of the overall justice system is the overarching factor in deciding whether ADR should be attempted. However, should proportionality of costs always be the overriding consideration? The next section discusses other factors that are also vital to the concept of access to justice.

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## 5 Counting the Costs in More Intangible Ways

Section II earlier argued that ADR has been promoted in many legal systems not merely because of its instrumental value in alleviating prohibitive costs and time but also for its inherent value in many other aspects. The extent of intangible benefits derived from ADR is substantially influenced by the system's legal tradition and culture. The role played by ADR in advancing access to justice is particularly multifaceted within the Singapore civil justice regime. Apart from cost-effectiveness, the judiciary has promoted ADR because of its value in creating a broader justice system with diverse modes of dispute resolution, adding a consensual dimension to the quality of justice and tailoring the appropriate process to suit the parties' needs.<sup>80</sup> It will be argued next that the court's future decisions on mandating ADR must also take these aspects into account, in addition to efficiency factors. A neglect of these factors will risk a failure of the civil justice regime to properly use ADR to further the multiple dimensions of access to justice.

78 Civil Justice Council, above n. 42, at 38.

79 *Ibid.*, at 41.

80 See Section II.

## 5.1 The Other Dimensions of Access to Justice: Appropriate Dispute Resolution and Transforming the Quality of Justice

Despite ADR's multidimensional relationship with access to civil justice within Singapore, the recently recommended reforms for ADR have not referred to its multiple purposes. This is largely due to the overarching focus of the two reform committees on cost-effectiveness. For instance, the Singapore Civil Justice Commission was tasked to recommend reforms that enhance efficiency and maintain costs at reasonable levels.<sup>81</sup> Notably, four out of five ideals in the draft procedural rules – fair access to justice, cost-effective and proportionate work, expeditious proceedings and efficient use of resources – cumulatively stress efficiency concerns.<sup>82</sup> Nevertheless, a close reading of the proposals and related speeches reveals brief references to other goals of civil justice. The ideals in the amended procedural rules include achieving 'fair and practical results suited to the needs of the parties'.<sup>83</sup> This goal alludes to the concept of appropriate dispute resolution. One reform committee also identified appropriate dispute resolution as a reason for the proposed empowerment of the courts to order the use of ADR.<sup>84</sup> Elaborating on this aim, a member of the Civil Justice Commission stated that this provides assurance of the process addressing the litigant's needs and providing a fair result.<sup>85</sup> Notwithstanding the great emphasis on proportionality and cost-effectiveness of the overall reforms, it is submitted that the court's future decision on mandating ADR should be applied consonant with the goal of appropriate dispute resolution. As underscored by Chief Justice Menon, access to justice should entail a user-centric focus on the disputant's needs, rights and interests. He also highlighted how the legal system was meant to deliver justice that was customised to the features of each case and most appropriate to the parties' needs.<sup>86</sup> To fulfil this goal of access to justice, the court is obliged to match perceived needs with the most appropriate dispute resolution process. Although ADR may generally be encouraged as a first resort due to the cost savings it brings, it should not be the automatic option ordered by the court, without giving regard to the contours of the dispute.

81 Ministry of Law, n. 3, at 3.

82 Ministry of Law, n. 3, Annex D Draft Rules of Court, Ch 1 r 3 3(2).

83 *Ibid.*, Ch 1 r 3(2)(e).

84 Civil Justice Review Committee, above n. 68, at 27-8.

85 J. Pinsler, 'The Ideals in the Proposed Rules of Court', 31 *Singapore Academy of Law Journal* 987, 1001 (2019).

86 CJ Menon, above n. 27 and n. 28.

Significantly, the notion of appropriate dispute resolution is closely related to the vision of creating a broad justice system with a diverse suite of dispute resolution modes. These concepts were prominent in the ‘multi-door courthouse’ metaphor coined by Frank Sander in the 1990s that precipitated the early growth of court-connected ADR. As Sander put it, the forum has to be fitted to the fuss.<sup>87</sup> The availability of ADR in the courts is ultimately meant to serve the needs of the parties and the unique features of each dispute. The disputants’ needs may well include areas other than cost concerns. Cost concerns should, therefore, not be the sole consideration when deciding whether ADR should be ordered. Notably, the Ministry of Law has acknowledged that the duty to consider ADR does not ignore the fact that there may be reasonable grounds in some situations not to use ADR.<sup>88</sup> It has also explained that the courts would take into account all the facts, including why the parties did not use ADR earlier, before deciding whether to order the use of ADR. Hence, costs and efficiency concerns should be considered in tandem with other needs of the disputants, as part of the overarching goal of referring parties to the most appropriate dispute resolution option. As argued earlier, this approach may at times require the court to consider whether the justice system’s cost concerns or the parties’ needs in the particular dispute should take precedence in deciding whether to order the use of ADR. This likely tension has to be acknowledged, and a considered decision made on where the balance should lie.

Another significant aspect of ADR’s contribution to access to justice is its focus on consensual, instead of adversarial, resolution of disputes. This idea has been summed up in the term ‘peacebuilding’ and was also integral to the early introduction of mediation to the Singapore judiciary. The minister of law, when explaining the legislative amendment to empower the courts to mandate ADR, also highlighted that the long-standing assumption that dispute resolution must be adversarial should be replaced by the understanding that justice is about the maintenance of peace and the promotion of conciliation between parties. Significantly, the amendment has been explicitly connected with the goal of hastening a mindset shift of achieving justice ‘by focusing on the common interests of the litigants and reaching common ground through mutual agreement’.<sup>89</sup> The enlarged role of ADR is, therefore, inextricably connected with the goal of transforming the quality and nature of justice. It, thus, follows that the court should consider this implicit benefit of ADR when deciding whether to mandate the use of ADR. ADR will be most suitable in

situations where parties have not explored negotiation and where it is important to preserve the parties’ relationship.

## 5.2 Counting the Cost of ADR Using Important Dimensions of Access to Justice

There are profound implications of these ADR dimensions on the issue of counting the cost of expanding ADR in the justice system. First, an excessive association of ADR with cost savings alone potentially diminishes the significance of other dimensions of access to justice. The courts’ exercise of their power to make cost sanctions because of a refusal to attempt ADR or to order participation in ADR could be conceivably justified primarily in terms of efficiency reasons. Furthermore, the courts, when determining the suitability of ADR, have probably focused on cost-effectiveness because it is an objective factor that can be more accurately ascertained than intangible considerations. When assessing factors such as the appropriateness of the dispute for mediation, the courts have to consider the parties’ subjective views. The weight to be ascribed to these factors will also be highly uncertain. Notwithstanding the pragmatic utility of the cost-effectiveness factor, there needs to be a nexus between the factors considered and the dimensions of access to justice that ADR is intended to advance in the relevant jurisdiction. An overemphasis on efficiency and a resulting neglect of other attributes of ADR could severely undermine the overall value of ADR in advancing access to justice. It is for this reason that the concept of mandatory mediation has attracted criticism from mediation practitioners, who have highlighted the danger of mandatory mediation orders diminishing the consensual nature of the mediation process.<sup>90</sup> Put another way, the parties could misconstrue the court’s order as motivated principally by public needs rather than their individual needs. The average court user’s overall understanding of ADR could, thus, be associated more with compulsion and efficiency needs than with the potential of mediation to enhance party autonomy and meet deeper individual needs. ADR would predominantly be perceived as a court diversion tool. The intangible cost of enlarging ADR’s role primarily on the basis of efficiency concerns should, therefore, not be underestimated as it will severely diminish ADR’s peacebuilding aspect, particularly where the jurisdiction purports to promote ADR because of its financial and wider benefits.

Second, the successful expansion of ADR within the justice system must be complemented by measures to ensure the consistent and high quality of ADR. If ADR is promoted because of its consensual nature and its ability to meet individual needs, a court order to attempt ADR would have to direct parties to ADR services that would fulfil these qualities. It will be remiss for parties to be diverted from the adjudication process and to then receive no guidance on the choice of ADR or to be referred to an ADR process with no assurance of quality.

87 Frank E.A. Sander, *Address Before the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice: Varieties of Dispute Processing* (7-9 April 1976), 70 F.R.D. 79, 111-16 (1976).

88 Ministry of Law, above n. 52, para. 31.

89 Second Minister for Law Mr Edwin Tong, *Second Reading Speech on the Courts (Civil and Criminal Justice) Reform Bill* (13 September 2021), at 29-32. [www.mlaw.gov.sg/news/parliamentary-speeches/2021-09-13-second-reading-speech-by-2m-edwin-tong-on-courts-civil-and-criminal-justice-reform-bill](http://www.mlaw.gov.sg/news/parliamentary-speeches/2021-09-13-second-reading-speech-by-2m-edwin-tong-on-courts-civil-and-criminal-justice-reform-bill) (last visited 6 October 2021).

90 See references above n. 72.

The UK Civil Justice Commission, therefore, highlighted the need for the courts and the parties to have sufficient confidence in the ADR provider. It noted that this could be implemented through court rosters of approved mediators or the provision of court-sponsored ADR neutrals. It further stressed the importance of systematic regulation of the mediation industry if mediation were to be made compulsory.<sup>91</sup> In sum, ADR's multifaceted role in enhancing access to justice is not fulfilled merely through procedural means such as cost sanctions but has to be supplemented by concurrent efforts to ensure consistent quality of ADR; otherwise, cost concerns may be met, but not the other essential aspects of ADR's connection with access to justice. The cost of civil justice must be counted not only in financial terms but also in other intangible ways, including the quality of dispute resolution.

## 6 Conclusion: Adopting a Holistic Approach in Counting the Cost of Enlarging ADR

ADR has grown in prominence as a counterpoint to the traditional litigation process due to procedural obstacles to access to justice, such as time and cost constraints. However, its role in enhancing access to justice has expanded from ameliorating procedural obstacles to creating a broader justice system, bringing in a consensual element to the quality of justice and being one of the options that could be appropriate for the disputants' needs. It has been argued that a court's analysis in deciding whether to order the use of ADR is a highly complex one. When considering cost-effectiveness alone, it has to consider an array of factors, including the chances of success at ADR and at litigation, and both tangible and intangible costs of each option. Moreover, it is critical to have clarity on whose perspective is primary in evaluating cost-effectiveness. There could conceivably be a tension between the parties' cost concerns and the cost concerns of the overall justice system that has to be resolved. A risk analysis framework is instructive in elucidating the proper interaction of multiple factors and the potential pitfalls in the court's analysis of the relevant variables. Some of these errors have arguably been made in *Halsey* deciding on disputants' reasonableness in rejecting the use of ADR. Furthermore, mistakes could be exacerbated by cognitive biases that readily affect litigants embroiled in disputes and potentially the courts. In addition, the more intangible aspects of ADR are susceptible to being neglected when cost and efficiency concerns are emphasised in the civil justice system. The courts' power to order the use of ADR could then be motivated principally by proportionality considerations, to

the detriment of the other significant aspects of ADR's contribution to access to justice, such as appropriate dispute resolution.

In light of the complexity in expanding the use of ADR in the courts, how could ADR be appropriately utilised in the future civil justice system? First and foremost, the exact role played by ADR within the civil justice system has to be clearly defined and even reconceptualised. As elaborated in Section II, ADR, within many jurisdictions, has evolved from being a mere alternative to litigation to playing a complementary role to adjudicatory processes. Both facilitative and adjudicatory processes could be characterised as co-equal options within civil justice. A continuing conceptualisation of ADR as an alternative process presumes that court litigation is the primary route to attain justice. Procedural rules to encourage the use of mediation will then be perceived by court users as efforts to divert cases to an external process that is inferior to adjudication. In such circumstances, mandatory ADR orders could reinforce the perception that the courts are, as Professor Genn put it, 'indiscriminately driving cases away' to preserve resources for more important cases that are to be adjudicated. ADR will then be relegated to playing an instrumental role in advancing civil justice through saving costs. However, as Master of Rolls Sir Geoffrey Vos aptly suggested, the 'alternative' aspect has to be taken out of ADR so that ADR is part and parcel of an integrated dispute resolution system helping parties achieve the best solution.<sup>92</sup> A civil justice system premised on the co-equal role of ADR is likely to manifest this vision in ways going beyond procedural mechanisms encouraging the use of ADR. ADR programmes will probably be integrated into the courts through court-supervised lists of mediators or ADR programmes administered by court staff. This conveys to litigants that ADR services play a critical role in advancing justice, instead of being a poor substitute to adjudication. Retired US magistrate Wayne Brazil rightly stated in this regard that 'the closer and more visible the connection between the court and its ADR programme, the clearer the court's signal that it identifies with that program – and endorses its value and quality'.<sup>93</sup> The court's commitment to administering and monitoring the quality of ADR will, thus, effectively attest to the benefits of ADR beyond saving of court and litigant resources. Mandatory ADR orders will also be less likely misconstrued as being motivated merely by efficiency concerns. In sum, counting the cost of expanding ADR has to start with articulating a clear vision of ADR's multidimensional role in advancing civil justice and introducing judicial policies that consistently evince a conviction in ADR's co-equal role with litigation.

While ADR's role has been greatly shaped by legal developments, the impact of culture in reconceptualising

<sup>92</sup> The Rt Hon Sir Geoffrey Vos, above n. 16.

<sup>93</sup> W.D. Brazil, 'Comparing Structures for the Delivery of ADR Services: Critical Values and Concerns' 14 *Ohio State Journal on Dispute Resolution* 715, at 750 and 753 (1999).

<sup>91</sup> Civil Justice Council, above n. 42, at 42.

ADR's place within the broader justice system and the wider society should not be ignored. As evident from the earlier discussion of ADR's development in the United Kingdom and Singapore, ADR's cultural aspects could influence its characterisation within the judiciary. In the early years of Singapore's mediation movement, the judiciary highlighted that mediation was being introduced to revive the Asian practice of resolving disputes in a conciliatory manner.<sup>94</sup> Notably, ADR's non-confrontational aspect was subsequently reiterated by the current chief justice by emphasising its role in peacebuilding. When introducing the most recent legislative amendments to empower the court to order the use of ADR, the minister of law concurred with the chief justice on the need to challenge the long-standing assumption that disputes are inherently confrontational and, hence, solutions must be adversarial in nature. He pointed out that justice 'must also be about the maintenance of peace and the promotion of compromise, conciliation, and closure between parties'.<sup>95</sup> Master of Rolls Sir Geoffrey Vos similarly alluded to ADR's wider societal functions when he spoke about integrating ADR into the overall dispute resolution system. Evidently, extralegal factors, including culture, permeate society's perception of ADR in advancing justice. Singapore's judiciary drew upon the Asian conciliatory approach towards managing conflicts to shape the ADR narrative within the justice system. Since the judicial system is situated within the wider society, the courts' desired vision of ADR could greatly benefit by drawing upon societal influences that are consonant with access to justice goals. Once there is clarity about ADR's role within civil justice, it is also necessary that the courts' decision analysis framework underlying mandatory ADR orders corresponds with the role envisaged for ADR. For instance, if ADR has been promoted because of user-centric benefits, such as helping to achieve the parties' desired goals, the court should properly evaluate whether ADR would indeed meet or detract from the parties' concerns. The court's decision could be informed by clear guidelines on the benefits and suitability of ADR in comparison with litigation. While this approach will be more nuanced than a consideration of cost-effectiveness alone, it will also ensure congruence between mandatory ADR orders and the justice system's goals in using ADR to advance justice. It will ensure that the courts do not indiscriminately order ADR as a matter of course, but holistically consider the needs of the disputants and the broader society. Such a stance will avoid an excessive association of ADR with cost savings, which may then diminish the other significant dimensions of access to justice. The judicious reliance on mandatory orders should also be complemented by measures to ensure the consistent and high quality of ADR. Cumulatively, these measures will contribute to the enlargement of ADR's role within the justice system, consonant with the multifaceted goals of access to justice.

94 See above Section II and n. 23.

95 Second Minister for Law Mr Edwin Tong, above n. 89, at para. 29-30.