MEDIATION IN MODERN CIVIL JUSTICE: DOCTRINAL FOUNDATIONS, JUDICIAL DIRECTION AND COMPARATIVE PERSPECTIVES BETWEEN ENGLAND AND WALES AND MALAYSIA*

by

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ABSTRACT

Mediation has evolved from a voluntary adjunct to litigation into an increasingly embedded component of modern civil justice systems. This article examines the doctrinal foundations and practical operation of mediation, with particular focus on its integration within the procedural frameworks of England and Wales and Malaysia. It analyses the distinction between mediation and adjudication, the respective roles of mediators and parties, and the growing expectation that parties engage in mediation as part of responsible litigation conduct.

The article considers the development of judicial approaches to mediation, including the emergence of court-directed alternative dispute resolution in England and Wales following *Churchill v. Merthyr Tydfil County Borough Council*, and contrasts this with the procedurally structured but non-coercive framework established in Malaysia under *Arahan Amalan Ketua Hakim Negara Bilangan 2 Tahun 2022* (the 2022 Practice Direction). It further evaluates the cost implications, structural advantages, and limitations of mediation, and examines its strategic significance in contemporary legal practice.

The article concludes that while both jurisdictions recognise the value of mediation, they differ in the degree of judicial intervention employed to promote engagement. The English model reflects qualified compulsion supported by cost consequences, whereas the Malaysian model emphasises structured facilitation while preserving party autonomy.

Keywords: Mediation; Civil procedure; Alternative dispute resolution; Costs; Case management; England and Wales; Malaysia.

1. INTRODUCTION

Mediation has evolved from a peripheral adjunct to litigation into an increasingly integral component of modern civil justice systems. Courts in both England and Wales and Malaysia now recognise mediation as a legitimate and often desirable means of resolving disputes efficiently and proportionately. This development reflects a broader shift in civil justice away from a purely adjudicative model towards one grounded in case management, proportionality, and the effective allocation of resources.

The modern civil justice system no longer operates on the assumption that adjudication is the default or preferred mode of dispute resolution. Instead, mediation and other forms of alternative dispute resolution are increasingly integrated into the procedural architecture of litigation. This shift reflects both pragmatic and normative considerations: the cost and delay associated with litigation, the need to manage judicial resources effectively, and the recognition that negotiated outcomes may better reflect the commercial realities underlying disputes.

This article examines mediation through a doctrinal and comparative lens. It explores the distinction between mediation and court proceedings, the respective roles of mediators and parties, and the evolving judicial approach in England and Wales and Malaysia. It further considers the cost implications of mediation, the forms it may take, and its strategic significance in practice. The article concludes by evaluating the current position in both jurisdictions and considering whether further development is warranted, particularly within the Malaysian framework.

2. MEDIATION AND COURT PROCEEDINGS: A DOCTRINAL DISTINCTION

Mediation and court proceedings occupy distinct, though increasingly interconnected, positions within the civil justice framework. While both

are directed towards the resolution of disputes, they differ fundamentally in their nature, function, and underlying juridical philosophy.

Court proceedings represent the orthodox mechanism for the determination of legal rights and liabilities. They are conducted within a structured procedural framework governed, in England and Wales, by the Civil Procedure Rules ('CPR') and, in Malaysia, by the Rules of Court 2012. The process is inherently adversarial. Parties advance competing legal arguments supported by evidence, with the objective of securing a favourable determination from the court. The outcome is a binding judgment, enforceable by the coercive power of the State. Litigation is therefore concerned primarily with the adjudication of rights.

Mediation, by contrast, operates outside this adjudicative paradigm. It is a consensual process in which a neutral third party facilitates negotiation between disputing parties with a view to achieving a mutually acceptable resolution. The mediator does not determine rights or impose a decision. The juridical basis of mediation is therefore not adjudication, but agreement.

The distinction between the two processes is conceptual as well as procedural. Litigation seeks to answer the question of who is legally right. Mediation addresses the broader question of what outcome is acceptable in light of the risk, cost, and practical considerations. This distinction has significant practical consequences. A party with a strong legal case may nevertheless elect to settle where the costs and uncertainties of litigation are disproportionate. Conversely, a party with a weaker legal position may resist settlement for strategic or commercial reasons.

Another important point of divergence lies in the degree of control exercised by the parties. In litigation, control over the outcome is ultimately vested in the court. In mediation, however, control remains with the parties throughout. They retain the autonomy to settle on terms of their choosing or to terminate the process without agreement.

Confidentiality further distinguishes mediation from court proceedings. Litigation is conducted in public and contributes to the development of precedent. Mediation, by contrast, is conducted in private and on a without prejudice basis. While this confidentiality promotes candid negotiation, it also means that mediation does not contribute directly to the development of the law.

From a doctrinal perspective, mediation may be understood as operating alongside, rather than in substitution for, litigation. It does not displace the court's role in determining rights, but provides an alternative mechanism through which disputes may be resolved without recourse to adjudication. The modern civil justice system increasingly recognises this complementary relationship. Courts in both England and Wales and Malaysia now actively encourage parties to consider mediation, not as an optional adjunct, but as an integral component of responsible dispute resolution.

The significance of this development lies in the gradual reconfiguration of civil justice from a single-track adjudicative model to a multi-door system, in which mediation occupies a central and increasingly prominent position. The practitioner must therefore be able to navigate both processes effectively, recognising not only their doctrinal distinctions, but also their strategic interplay.

3. THE ROLE AND FUNCTION OF THE MEDIATOR

The mediator occupies a central, yet carefully circumscribed, role within the mediation process. Unlike a judge or arbitrator, the mediator does not exercise adjudicative authority. The legitimacy of mediation depends precisely upon this absence of determinative power.

The mediator's primary function is facilitative. This includes structuring discussions, identifying issues, and assisting parties in exploring potential avenues of settlement. In practice, the role extends to testing the strengths and weaknesses of each party's case and assisting in the assessment of litigation risk.

In complex commercial disputes, particularly those involving allegations of dishonesty, regulatory exposure, or parallel proceedings across jurisdictions, the mediator's task becomes correspondingly more sophisticated. In such contexts, parties often require assistance not merely in communication, but in understanding how their dispute may evolve within a broader legal and commercial landscape. This has given rise, in practice, to what is sometimes described as an evaluative dimension within mediation. Here, the mediator may draw upon legal or commercial experience to assist parties in assessing the realism of their positions. However, this must remain within the bounds of facilitation. The mediator does not provide binding opinions, nor do they substitute judgment for that of the parties.

Confidentiality is fundamental to the mediator's role. Communications within mediation are generally protected by the without prejudice privilege. The mediator must also preserve the confidentiality of private sessions and may not disclose information obtained therein without express authority.

The mediator operates as both a manager of process and a facilitator of informed decision-making. The effectiveness of mediation depends significantly upon the mediator's ability to balance neutrality with engagement and to guide the parties towards a realistic appreciation of risk.

The role of the mediator is therefore both nuanced and pivotal. It requires not only an understanding of negotiation techniques but also a sensitivity to legal, commercial, and interpersonal dynamics. As mediation continues to assume a more prominent position within civil justice systems, the expectations placed upon mediators are likely to increase correspondingly, reinforcing the importance of both skill and judgment in the conduct of the process.

4. THE ROLE AND FUNCTION OF PARTIES

While the mediator facilitates the process, it is the parties who ultimately determine its outcome. The centrality of party autonomy is one of the

defining features of mediation and distinguishes it fundamentally from adjudicative processes. However, this autonomy is not merely a benefit; it imposes substantive responsibilities upon parties, both in terms of preparation and conduct.

In litigation, parties operate within a structured framework in which decision-making is progressively externalised. Legal representatives assume control over strategy, procedural rules govern the conduct of the case, and the final determination rests with the court. By contrast, mediation re-centres decision-making authority upon the parties themselves. They retain control over whether to settle, on what terms, and at what stage. The mediator does not impose an outcome, and the process may be terminated at any point without agreement.

This restoration of control requires parties to engage with the dispute in a manner that differs materially from litigation. It is not sufficient to rely solely upon the perceived strength of one's legal position. Parties must instead undertake a realistic assessment of risk, including the prospects of success at trial, the costs and duration of proceedings, evidential uncertainties, and the practical consequences of any judgment obtained. This broader evaluative exercise reflects the fundamental distinction between adjudication and negotiated resolution.

A further critical aspect of party participation is the presence of individuals with effective settlement authority. The efficacy of mediation is often contingent upon the ability of parties to make decisions during the course of negotiations. Where authority is absent or subject to external approval, the process may be rendered ineffective or unnecessarily prolonged. Although this requirement is not formally prescribed by procedural rules, it is widely recognised in practice as essential to meaningful participation.

The role of a legal representative within mediation also differs from that in litigation. While legal advisors continue to advise on legal merits, their function extends to assisting clients in evaluating risk, formulating negotiation strategy, and identifying acceptable settlement parameters. Advocacy within mediation is therefore not confined to advancing legal

positions but includes guiding clients through a process of informed and pragmatic decision-making.

In practice, one of the principal challenges in mediation arises from the persistence of positional bargaining. Parties frequently enter mediation with fixed positions framed in legal terms and may initially resist movement away from those positions. Effective participation requires a willingness to move beyond rigid positions and to engage with underlying interests, which may include commercial considerations, reputational concerns, or the avoidance of further cost and uncertainty. The ability of parties to make this transition is often determinative of whether mediation succeeds.

The conduct of parties in relation to mediation is also subject to increasing judicial scrutiny, particularly in England and Wales. The courts have made clear that an unreasonable refusal to engage in alternative dispute resolution may give rise to adverse costs consequences. In *Halsey v. Milton Keynes General NHS Trust Steel v. Joy and another* ('*Halsey*'),[1] the Court of Appeal held that while parties cannot be compelled to mediate, a refusal to do so may be unreasonable depending on the circumstances of the case, including the nature of the dispute, the merits, and the prospects of success of mediation. This principle has been reinforced in subsequent authorities. In *PGF II SA v. OMFS Company 1 Ltd*,[2] the Court of Appeal held that a party's silence in the face of an invitation to mediate constituted, of itself, unreasonable conduct. Similarly, in *Thakkar v. Patel*,[3] the Court emphasised that a failure to engage constructively in ADR may justify adverse costs orders.

These authorities establish that participation in mediation is no longer merely a matter of discretion. Rather, it forms part of responsible litigation conduct. Parties are expected not only to consider mediation, but to engage with it in a meaningful and constructive manner. A purely formal or tactical approach to mediation, undertaken without a genuine intention to explore settlement, may fall short of this standard.

In Malaysia, while the jurisprudence on cost consequences for refusal to mediate is less developed, there is nonetheless an increasing expectation that parties will engage with mediation where appropriate. Order 34 rule 2 of the Rules of Court 2012 empowers the court to direct parties to attempt mediation. These developments reflect a broader recognition that parties bear responsibility for attempting resolution before resorting fully to adjudication.

It is also necessary to recognise the limits of party autonomy. While parties retain control over the outcome, their decisions are shaped by legal advice, commercial realities, and, increasingly, procedural expectations imposed by the court. Effective participation in mediation, therefore, requires not only autonomy but the informed and disciplined exercise of that autonomy in light of these factors.

From a doctrinal perspective, the role of parties in mediation represents a reallocation of responsibility within the dispute resolution process. Where litigation places responsibility for resolution upon the court, mediation places it upon the parties themselves. This shift has significant implications for how disputes are approached, prepared, and ultimately resolved.

5. MEDIATION AS AN EARLY DISPUTE RESOLUTION MECHANISM

The increasing prominence of mediation within civil justice systems is reflected not only in its availability as an alternative to litigation but also in the growing expectation that it should be considered at an early stage of proceedings. This development is driven by considerations of proportionality, cost efficiency, and judicial economy, and is reinforced by procedural rules and evolving case law.

In England and Wales, the CPR provide the principal framework through which this expectation is articulated. The overriding objective under CPR requires the court to deal with cases justly and at proportionate cost. This includes, expressly, saving expense and ensuring that cases are dealt with

expeditiously and fairly. The encouragement of alternative dispute resolution forms part of this broader objective. The court is not merely a passive forum for adjudication, but an active manager of cases, with a responsibility to promote efficient resolution.

The significance of early mediation must be understood within this procedural context. The earlier a dispute is resolved, the greater the potential savings in terms of costs and judicial resources. Prior to disclosure, expert evidence, and trial preparation, the financial and temporal investment in litigation remains relatively limited. Early mediation, therefore, offers an opportunity to resolve disputes before they become entrenched and disproportionately expensive.

Judicial authority has reinforced this position. In *Halsey*, the Court of Appeal identified, among the relevant considerations in assessing the reasonableness of a refusal to mediate, the stage at which mediation is proposed and whether mediation would have had a reasonable prospect of success. While *Halsey* stopped short of endorsing compulsion, it established that parties must give serious consideration to mediation at an appropriate stage.

The subsequent decision in *Churchill v. Merthyr Tydfil County Borough Council*[4] represents a further and significant development. The Court of Appeal clarified that courts possess the jurisdiction to stay proceedings or otherwise direct parties to engage in alternative dispute resolution, provided that such direction is proportionate and does not impair the parties' right to a fair trial. This decision marks a departure from the earlier understanding that mediation must remain purely voluntary. While mediation retains its consensual nature in terms of outcome, participation in the process may now, in appropriate cases, be required.

The practical effect of these developments is that mediation is increasingly integrated into the lifecycle of a dispute. It is no longer confined to a late-stage attempt at settlement, but may be raised at the outset of proceedings, during case management, or at key procedural junctures. Practitioners must

therefore consider, from an early stage, whether mediation is appropriate and how it should be deployed as part of the overall strategy.

However, the effectiveness of early mediation is not absolute. Its suitability depends upon the nature of the dispute and the extent to which the parties are able to assess risk. In some cases, particularly those involving complex factual issues or allegations of dishonesty, parties may require disclosure of documents or clarification of evidence before they can engage meaningfully in settlement discussions. Premature mediation, undertaken before parties have sufficient information, may result in failure and unnecessary cost.

Mediation must therefore be approached not as a reactive adjunct to litigation, but as a strategic tool capable of shaping the trajectory of a dispute from an early stage.

From a doctrinal perspective, the emergence of mediation as an early dispute resolution mechanism reflects a broader shift in civil justice systems towards proactive case management and proportionality. Courts are increasingly concerned not only with the correct determination of disputes, but with the manner in which those disputes are resolved. The efficient use of judicial resources and the reduction of unnecessary costs are now central considerations.

For practitioners, this development carries important implications. Mediation must be considered not as an optional adjunct to litigation, but as a potential first step in the resolution of disputes. This requires early assessment of the suitability of mediation, the availability of sufficient information to support negotiation, and the strategic advantages or disadvantages of engaging at a particular stage. In England and Wales, failure to consider mediation at an early stage may expose parties to adverse costs consequences and result in missed opportunities for efficient resolution.

In practical terms, the integration of mediation into the early stages of dispute resolution requires a shift in approach. Practitioners must engage

with mediation not reactively, but proactively, incorporating it into case strategy from the outset. This reflects the evolving role of mediation within civil justice systems as a mechanism not merely for settlement, but for the efficient management and resolution of disputes.

In Malaysia, the position reflects a similar, though less formalised, recognition of the value of early mediation. Order 34 rule 2 of the Rules of Court 2012 empowers the court to direct parties to attempt mediation. The 2022 Practice Direction[5] provides that mediation may be undertaken at multiple stages of proceedings, including pre-trial case management, interlocutory stages, trial, and appeal.

While the Malaysian framework does not yet exhibit the same degree of coercive force as that seen in England and Wales, the underlying rationale is consistent. Early engagement with mediation serves to reduce the burden on the courts, minimise costs for the parties, and promote efficient resolution of disputes. The emphasis remains on encouragement rather than compulsion, but the expectation that parties will at least consider mediation is becoming more pronounced.

The timing of mediation is therefore a matter of strategic judgment. While early mediation may offer significant advantages, it may be less effective where key facts remain uncertain or where parties lack sufficient information to assess risk.

6. ENGLAND AND WALES: DOCTRINAL AND PROCEDURAL FRAMEWORK

The civil justice framework in England and Wales has progressively integrated mediation into mainstream litigation through both the CPR and judicial authority. The overriding objective under CPR r 1.1, together with the court's duty under CPR r 1.4 to actively manage cases, requires courts to encourage the use of alternative dispute resolution where appropriate. Mediation is therefore no longer peripheral, but forms part of the expected conduct of litigation, reflecting a policy emphasis on proportionality, efficiency, and the effective allocation of judicial resources.

As outlined in Headings 4 and 5 above, the authorities establish that parties are expected not merely to consider mediation but to engage with it constructively, with unreasonable refusal capable of attracting adverse costs consequences. The subsequent development in *Churchill v. Merthyr Tydfil County Borough Council* confirms that participation in alternative dispute resolution may, in appropriate cases, be directed as part of the court's case management powers. While settlement remains voluntary, these developments collectively establish a framework of **qualified compulsion**, supported by both cost consequences and judicial control over the conduct of proceedings.

6.1 Cost Consequences and Litigation Conduct

The principal mechanism through which the courts enforce engagement with mediation remains the law of costs. The general rule that costs follow the event is subject to the court's discretion, and alternative dispute resolution conduct forms an important part of that assessment.

A party who unreasonably refuses to mediate may face a reduction in recoverable costs, an adverse costs order, or, in appropriate cases, an order on the indemnity basis. The courts have made clear that the assessment of reasonableness is fact-specific. A refusal to mediate may be justified where, for example, the dispute raises a point of law requiring judicial determination, there is a clear and strong case with little room for compromise, or mediation would incur disproportionate cost.

However, such cases are increasingly the exception rather than the norm. In most commercial disputes, the courts expect parties to engage with mediation, and the threshold for justifying refusal is correspondingly high.

The emphasis on costs reflects a broader policy objective. Rather than compelling settlement, the courts seek to incentivise responsible behaviour by attaching consequences to unreasonable conduct. This approach preserves the voluntary nature of mediation while ensuring that parties cannot ignore it without risk.

6.2 The Emerging Position

The combined effect of the CPR and the relevant authorities is that mediation has become embedded within the civil justice process in England and Wales. The trajectory of development may be summarised as follows: initial encouragement of alternative dispute resolution as an optional mechanism; introduction of cost sanctions for unreasonable refusal; increasing expectation of active engagement; and recognition of the court's power to direct participation in alternative dispute resolution.

This progression reflects a shift from mediation as a peripheral option to mediation as an integral component of dispute resolution.

For practitioners, the implications are clear. Mediation must be considered at an early stage, incorporated into the case strategy, and engaged with constructively. Failure to do so is no longer merely a tactical decision; it carries procedural and financial risk.

7. MALAYSIA: DOCTRINAL AND PROCEDURAL FRAMEWORK

The development of mediation within the Malaysian civil justice system reflects a growing institutional and judicial recognition of its value as a mechanism for the efficient and proportionate resolution of disputes. While the Malaysian framework does not exhibit the same degree of doctrinal elaboration as that of England and Wales, mediation has nevertheless been incorporated into the procedural landscape through the Rules of Court 2012 and supporting practice directions.

7.1 The Rules of Court 2012

The principal procedural basis for mediation is found in Order 34 rule 2. This provision empowers the court, at the pre-trial case management stage, to give such directions as are necessary for the just, expeditious, and economical disposal of proceedings. In furtherance of this objective, the court may direct parties to consider mediation or facilitate discussions aimed at settlement.

The inclusion of mediation within the case management framework reflects a broader shift towards active judicial management of civil proceedings. The court's role is not confined to adjudication but extends to encouraging parties to resolve disputes without the need for trial, where appropriate.

However, the rule does not impose a mandatory obligation upon parties to settle, nor does it prescribe specific consequences for refusal to engage in mediation. The emphasis remains facilitative rather than coercive, and the ultimate decision to settle continues to rest with the parties.

7.2 *Arahan Amalan Ketua Hakim Negara Bilangan 2 Tahun 2022*[6]

The Malaysian framework governing mediation has undergone significant development with the introduction of *Arahan Amalan Ketua Hakim Negara Bilangan 2 Tahun 2022* ('the 2022 Practice Direction'), which came into force on 1 April 2022 and expressly revoked Practice Direction No. 4 of 2016.[7] This Practice Direction now constitutes the principal procedural instrument regulating mediation in civil proceedings.

The 2022 Practice Direction applies across the High Court, Sessions Court, and Magistrates' Court, thereby embedding mediation throughout the civil justice system. Its scope reflects a clear institutional recognition of mediation as an integral component of dispute resolution rather than a mechanism confined to particular categories of cases.

Notwithstanding its procedural detail, the Malaysian framework remains fundamentally facilitative in nature. The Practice Direction empowers courts to encourage and refer parties to mediation, but does not impose an obligation to settle, nor does it prescribe sanctions for refusal to engage. The distinction between participation in the process and agreement to settlement is preserved.

The Practice Direction confers upon the court an active role in promoting mediation. The court may refer parties to mediation where it considers that the dispute is capable of resolution through such means. Mediation may be undertaken at multiple stages of proceedings, including pre-trial case management, interlocutory stages, prior to trial, during trial, after trial but

before judgment, and at the appellate stage. This wide temporal scope reflects a comprehensive integration of mediation within the lifecycle of litigation.

The Practice Direction formalises three principal forms of mediation: judge-led mediation, institutional mediation, and private mediation. Judge-led mediation is conducted within the court system by a judicial officer acting as mediator. Institutional mediation is conducted under the auspices of recognised bodies, including the Asian International Arbitration Centre and the Malaysian International Mediation Centre. Private mediation is conducted by mediators appointed by agreement between the parties.

Judge-led mediation represents a distinctive feature of the Malaysian framework. It enables mediation to be conducted within the court structure, subject to safeguards designed to preserve fairness and impartiality. Where appropriate, arrangements may be made to ensure that the judge conducting mediation is not the judge determining the case.

The Practice Direction introduces procedural structure in the conduct of mediation. Parties are required to report on the status of mediation, and timelines may be imposed for such reporting. Where mediation is successful, the parties may record the settlement as a consent judgment. Where mediation fails, proceedings continue in accordance with the court's directions.

In relation to costs, the Practice Direction distinguishes between different forms of mediation. Judge-led mediation is provided without charge, whereas institutional and private mediation are subject to fees. However, unlike the position in England and Wales, there is no developed doctrine imposing adverse costs consequences for refusal to mediate.

The Practice Direction also contains express provisions safeguarding confidentiality. Mediation proceedings are private, communications are without prejudice, and the mediator is not compellable to give evidence. These provisions reinforce the integrity of the mediation process.

The Malaysian framework may therefore be characterised as **procedurally structured but non-coercive**. It reflects a deliberate balance between institutional support for mediation and the preservation of party autonomy.

8. COURT-DIRECTED MEDIATION: A COMPARATIVE ANALYSIS

The increasing integration of mediation within civil justice systems raises a central doctrinal question: to what extent may courts direct parties to engage in mediation without undermining its consensual nature?

In England and Wales, the answer lies in the development of a system of qualified compulsion. While parties cannot be compelled to settle, they may be required to engage in alternative dispute resolution as part of the court's case management powers. The decision in *Churchill* confirms that such direction is permissible where proportionate. This operates alongside a well-developed body of costs jurisprudence, which incentivises engagement with mediation.

In Malaysia, the position reflects a different calibration. The 2022 Practice Direction introduces a structured framework for mediation and integrates it within case management. However, it does not impose compulsion in the sense recognised in England and Wales, nor does it attach cost consequences to refusal to mediate. Participation remains voluntary in substance.

The divergence between the two jurisdictions lies, therefore, not in the recognition of mediation's value, but in the mechanisms used to promote engagement. England and Wales employ judicial direction and cost sanctions; Malaysia relies upon structured facilitation and judicial encouragement.

This difference reflects a broader doctrinal tension between judicial control and party autonomy. The English approach prioritises efficiency and the effective use of resources, while preserving voluntariness in outcome. The Malaysian approach places greater emphasis on preserving the consensual nature of mediation, even at the expense of weaker enforcement.

For practitioners, these differences have practical implications. In England and Wales, mediation must be treated as an integral component of litigation strategy. In Malaysia, it remains an important but less coercively enforced mechanism.

9. ADVANTAGES AND DISADVANTAGES OF MEDIATION

The increasing prominence of mediation within civil justice systems is underpinned by a range of perceived advantages. However, mediation is not without limitations. A balanced assessment requires consideration of both its strengths and its constraints, particularly when viewed in comparison with adjudicative processes.

9.1 Advantages of Mediation

One of the principal advantages of mediation lies in its cost efficiency. Litigation, particularly in complex commercial disputes, is often associated with substantial expenditure arising from disclosure, expert evidence, and trial preparation. Mediation, by contrast, typically involves more limited procedural steps and may be concluded within a significantly shorter timeframe. Even where mediation does not result in a settlement, it may serve to narrow the issues in dispute, thereby reducing the scope and cost of subsequent proceedings.

Closely related to cost is the advantage of speed. Court proceedings may extend over months or years, particularly where cases are factually complex or subject to interlocutory applications. Mediation offers a more expeditious route to resolution, often capable of being arranged and concluded within a matter of days. This reduction in duration is of particular importance in commercial contexts, where prolonged uncertainty may adversely affect business operations.

A further advantage lies in the confidential nature of the process. Unlike court proceedings, which are generally conducted in public, mediation takes place in private and on a without prejudice basis. This enables parties to engage candidly in discussions without concern that concessions or admissions will be used against them in subsequent litigation.

Confidentiality is especially significant in disputes involving reputational considerations, sensitive commercial information, or ongoing business relationships.

Mediation also offers a degree of flexibility that is not available in litigation. The process is not constrained by formal rules of procedure or evidence, allowing parties to explore a wider range of potential solutions. Settlements may incorporate terms that extend beyond the remedies available through the court, including structured payments, commercial arrangements, or agreed future conduct. This flexibility enables outcomes that are tailored to the specific needs of the parties.

Another important advantage is the potential for preserving relationships. The adversarial nature of litigation often exacerbates conflict and may result in the breakdown of commercial or personal relationships. Mediation, by contrast, provides a framework within which parties may resolve disputes while maintaining a degree of cooperation. This is particularly relevant in long-term commercial relationships, shareholder disputes, and family businesses.

From a doctrinal perspective, mediation also promotes the principle of party autonomy. Parties retain control over both the process and the outcome, enabling them to reach agreements that reflect their own assessment of risk and commercial priorities. This stands in contrast to litigation, where the outcome is determined by the court and may not fully align with the parties' broader interests.

Notwithstanding these advantages, mediation has inherent limitations that must be recognised.

9.2 Disadvantages and Limitations of Mediation

The most fundamental limitation is the absence of a guaranteed outcome. Unlike litigation, which culminates in a binding judgment, mediation may conclude without agreement. In such cases, parties incur the time and cost of the mediation process without achieving a resolution. While this risk is often justified by the potential benefits, it remains a material consideration.

A related limitation is the potential for tactical misuse. Parties may engage in mediation not with a genuine intention to settle, but as a means of delaying proceedings, testing the strength of the opposing party's case, or obtaining strategic information. While the without prejudice nature of mediation provides some protection, the possibility of such conduct cannot be entirely eliminated.

Mediation may also be affected by imbalances in bargaining power. Where there is a significant disparity in resources, legal sophistication, or access to information, one party may be at a disadvantage in negotiations. Although the mediator plays a role in managing such imbalances, the absence of formal procedural safeguards means that the process relies heavily on the parties' ability to negotiate effectively.

Another limitation lies in the absence of authoritative determination and precedent. Mediation does not produce a binding judgment that clarifies legal rights or contributes to the development of the law. In cases involving novel legal issues, questions of public importance, or the need for authoritative interpretation, litigation may be preferable. The private and confidential nature of mediation, while advantageous in many respects, means that it does not fulfil the public function of law development.

The issue of limited disclosure also warrants consideration. Unlike litigation, where parties are subject to obligations of disclosure, mediation does not impose a formal requirement to disclose documents. While this may expedite the process, it may also impede settlement where one party lacks sufficient information to assess the merits of the case. The strategic decision as to what information to disclose can therefore influence the effectiveness of the mediation.

Finally, there is a risk that mediation may be perceived as an additional procedural step rather than a genuine opportunity for resolution. This is particularly relevant in jurisdictions where courts strongly encourage or direct mediation. If parties participate solely to comply with procedural expectations, without meaningful engagement, the process may become ineffective.

9.3 A Balanced Assessment

The advantages and disadvantages of mediation must be considered in context. Mediation is not a substitute for litigation in all cases, nor is it intended to be. Rather, it operates as a complementary mechanism within a broader dispute resolution framework.

Its effectiveness depends upon a number of factors, including the nature of the dispute, the stage at which mediation is undertaken, the willingness of parties to engage constructively, and the skill of the mediator in managing the process.

In disputes where the issues are capable of compromise, where costs are a significant concern, or where relationships are to be preserved, mediation offers clear advantages. Conversely, where authoritative determination is required, or where parties are unwilling to engage in meaningful negotiation, litigation may remain the more appropriate forum.

From a doctrinal standpoint, mediation reflects a shift towards a more flexible and pragmatic approach to dispute resolution. Its advantages lie in its ability to address not only legal rights, but also the broader commercial and practical considerations that often underlie disputes. Its limitations, however, underscore the continued importance of adjudicative processes within the civil justice system.

10. COST IMPLICATIONS AND TYPES OF MEDIATION

The cost implications of mediation are central to its increasing use. Mediation is generally less expensive than litigation, particularly in complex disputes where the costs of disclosure, expert evidence, and trial preparation may be substantial.

In England and Wales, cost consequences play a significant role in promoting mediation. The courts may penalise parties who unreasonably refuse to engage in alternative dispute resolution, thereby creating a financial incentive to participate.

In Malaysia, the cost implications are structured differently. Judge-led mediation is provided without charge, whereas institutional and private mediation are fee-based. However, there is no equivalent system of cost sanctions for refusal to mediate.

Mediation in both jurisdictions takes a variety of forms. In England and Wales, this includes private commercial mediation, court-encouraged and, in appropriate cases, court-directed alternative dispute resolution processes, small claims mediation, and online mediation. In Malaysia, the 2022 Practice Direction formalises three principal forms: judge-led mediation, institutional mediation, and private mediation.

The Practice Direction also recognises the use of technology, including video conferencing, in the conduct of mediation. This reflects the increasing use of online mediation in modern practice.

Therefore, the choice of mediation type and the decision whether to engage in mediation at all are matters of strategy. Practitioners must consider the nature of the dispute, the availability of information, and the potential benefits of early resolution.

11. PRACTICAL IMPLICATIONS AND STRATEGIC GUIDANCE FOR PRACTITIONERS

The increasing integration of mediation within civil justice systems carries significant implications for legal practitioners. The doctrinal developments outlined in the preceding chapters are not merely of academic interest; they directly affect how disputes must be approached, managed, and resolved in practice. Effective representation now requires not only the ability to litigate, but also the ability to assess, deploy, and engage with mediation as part of an overall dispute resolution strategy.

11.1 Early Case Assessment

A central implication of the modern framework is the need for early and realistic case assessment. Practitioners must, at an early stage, evaluate not only the legal merits of a case but also the broader risks associated with

litigation. This includes consideration of evidential uncertainties, the likely duration and cost of proceedings, and the practical consequences of any judgment obtained.

Such assessment is essential in determining whether mediation is appropriate and, if so, when it should be pursued. In England and Wales, the potential for adverse cost consequences in the event of unreasonable refusal to mediate reinforces the importance of this exercise. In Malaysia, while the procedural incentives are less pronounced, early assessment remains critical in identifying opportunities for efficient resolution.

11.2 Timing of Mediation

The timing of mediation is a matter of strategic importance. As discussed in earlier headings above, mediation may be effective at different stages of a dispute, depending upon the availability of information and the nature of the issues involved.

Early mediation may offer significant advantages in terms of cost and efficiency, particularly where the dispute is primarily commercial and the issues are sufficiently defined. However, where key facts remain uncertain or expert evidence is required, mediation at a later stage may be more productive.

Practitioners must therefore exercise judgment in determining when mediation is likely to be most effective. This involves balancing the potential benefits of early resolution against the need for sufficient information to enable meaningful negotiation.

11.3 Preparation for Mediation

Effective participation in mediation requires careful preparation. This extends beyond the preparation typically associated with litigation and includes a realistic assessment of the strengths and weaknesses of the case, identification of the client's commercial objectives, and determination of acceptable settlement parameters.

Preparation also involves consideration of the opposing party's position and the potential areas of compromise. The formulation of a coherent negotiation strategy is essential. Without such preparation, mediation risks becoming unfocused and ineffective.

Legal advisers play a central role in this process. Their function is not limited to advising on legal rights but includes assisting clients in understanding risk and making informed decisions.

11.4 Engagement with the Mediation Process

Constructive engagement with the mediation process is essential. In England and Wales, the authorities make clear that parties are expected to engage meaningfully with alternative dispute resolution, and failure to do so may have adverse consequences in costs. Even in Malaysia, where such consequences are less clearly defined, a lack of genuine engagement may undermine the effectiveness of the process.

Constructive engagement involves a willingness to consider alternative perspectives, openness to compromise, and responsiveness to proposals made during the course of the mediation. A purely positional approach, in which parties adhere rigidly to their initial positions, is unlikely to result in resolution. The mediation process requires a degree of flexibility and a willingness to reassess assumptions in light of evolving discussions.

11.5 Managing Client Expectations

A further important aspect of mediation is the management of client expectations. Clients may approach mediation with a perception that it is a sign of weakness or with unrealistic expectations of outcome. Practitioners must address these perceptions and provide clear guidance on the purpose and potential benefits of mediation.

This includes explaining that mediation does not require concession of legal rights but offers an opportunity to achieve a commercially sensible outcome. It also involves preparing clients for the possibility that compromise will be necessary.

Effective expectation management is essential to ensuring that clients engage constructively with the process and are able to make informed decisions.

11.6 Cross-Border Considerations

In cross-border disputes, additional complexities arise. Differences in legal culture, procedural frameworks, and expectations regarding mediation may influence the parties' approach.

As noted in earlier headings above, the position in England and Wales places greater emphasis on engagement with mediation, supported by cost consequences and, following *Churchill*, the possibility of court-directed alternative dispute resolution. In Malaysia, the framework remains more facilitative. Practitioners must therefore be mindful of these differences and manage expectations accordingly.

Cross-border mediation also requires consideration of enforcement, confidentiality, and the selection of a mediator with appropriate expertise. Institutional mediation may be particularly advantageous in such cases.

11.7 Strategic Use of Mediation

Ultimately, mediation should be understood as a strategic tool within the broader dispute resolution process. It is not merely an alternative to litigation, but a mechanism through which litigation risk may be managed.

Practitioners must consider whether mediation may achieve a more favourable outcome than litigation, whether it may reduce costs and uncertainty, and how it fits within the overall strategy of the case. In some cases, mediation may lead to a full settlement. In others, it may result in partial resolution or clarification of issues. Even where a settlement is not achieved, the process may provide valuable insight into the opposing party's position.

11.8 The Role of the Mediator in Practice

Private sessions are a central feature of mediation. Communications made during such sessions are confidential and may not be disclosed without the consent of the party providing them. This enables candid discussion and facilitates effective negotiation.

This confidentiality operates alongside the without prejudice nature of mediation, which protects communications from being relied upon in subsequent proceedings. In Malaysia, the position is reinforced by the 2022 Practice Direction, which expressly provides that mediation proceedings are private, that communications are without prejudice, and that the mediator is not compellable to give evidence.

These principles ensure that mediation can be conducted in a manner that promotes openness and trust.

12. CONCLUSION AND REFORM CONSIDERATIONS

Mediation has become a central component of modern civil justice systems. England and Wales have developed a system of qualified compulsion, supported by cost consequences and judicial direction. Malaysia has developed a structured but non-coercive framework, emphasising facilitation and party autonomy.

The difference between the two systems reflects a matter of calibration rather than principle. Both seek to promote efficient and proportionate resolution of disputes while preserving the consensual nature of mediation.

There is scope for measured development within the Malaysian framework, particularly in relation to the consequences of refusal to engage in mediation.

Consideration may also be given to enhancing access to mediation at an early stage of disputes, including through structured mechanisms enabling parties to access mediation outside the court process and, where

appropriate, the provision of subsidised or cost-free mediation for lower-value claims.

Ultimately, mediation should be understood not as a substitute for litigation, but as a complementary mechanism within a broader dispute resolution framework. Its value lies in its ability to address not only legal rights, but also the commercial and practical realities that underpin disputes.

For practitioners, the implications are clear. The effective conduct of modern litigation requires an ability to engage with mediation as a central component of dispute resolution strategy. This involves not only an understanding of the doctrinal framework, but also the exercise of judgment in determining when and how mediation should be deployed.

As civil justice systems continue to evolve, mediation is likely to assume an increasingly prominent role. The challenge for both jurisdictions is to ensure that its development remains aligned with the principles of fairness, efficiency, and party autonomy.

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Endnotes:

[1] [2004] EWCA Civ 576 [16]–[34].

[2] [2013] EWCA Civ 1288 [34]–[56]

[3] [2017] EWCA Civ 117 [27]–[31]

[4] [2023] EWCA Civ 1416 [18]–[21], [50]–[58], [65]–[66], and [74].

[5] *Arahan Amalan Ketua Hakim Negara Bilangan 2 Tahun 2022* (Practice Direction on Mediation).

[6] *Arahan Amalan Ketua Hakim Negara Bilangan 2 Tahun 2022* is issued in the Malay language, with no official English translation presently available.

[7] Practice Direction No. 4 of 2016 (issued in English).