6-2022

Empowering the courts to order the use of amicable dispute resolution: The Singapore Rules of Court 2021

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This is a pre-copyedited, author-produced version of an article accepted for publication in Civil Justice Quarterly following peer review. The definitive published version (2022) 41(3) Civil Justice Quarterly 191 – 202 *is available online on Westlaw UK or from Thomson Reuters DocDel service.*

Empowering the Courts to Order the Use of Amicable Dispute Resolution: The Singapore Rules of Court 2021

Dorcas Quek Anderson

Abstract

The civil justice regime in Singapore entered a new phase of radical reforms with effect from 1 April 2022. The reforms have substantially expanded the role of amicable dispute resolution (ADR). Parties have a duty to consider ADR prior to and during civil proceedings. More significantly, the courts have been empowered to order parties to attempt ADR, taking into account the ideals of the Rules of Court and all relevant circumstances. This note analyses the key reforms relating to the use of ADR with reference to comparable English developments. It discusses the broad yet ambivalent scope of ADR that could give rise to considerable uncertainty concerning whether the parties have fulfilled their duty to consider ADR. It is also argued that the courts are likely to be guided principally by the ideals of the Rules of Court rather than the factors set out in Halsey v Keynes when deciding whether to order the use of ADR. However, this will be a complex consideration given the tension between the principles of proportionality and matching the appropriate process to meet the parties' needs. This likely tension has to be acknowledged by the courts and a considered decision made on where the balance should lie.

I. Introduction

The civil justice regime in Singapore entered a new phase of extensive and radical reforms with effect from 1 April 2022.[1] The Civil Justice Commission was tasked by the Chief Justice in 2015 to consider ways to transform the litigation process by enhancing efficiency and speed of adjudication, maintaining costs at reasonable levels, simplifying rules and allowing greater judicial control of the litigation process.[2] The Commission's recommendations include the introduction of the filing of a single interlocutory application, reduced scope of documents subject to discovery and empowering the court to direct the filing and exchange of affidavits of evidence-in-chief before or concurrently with discovery so as to streamline the key issues.[3]

One of the key civil justice reforms entails the considerable expansion of the role of amicable dispute resolution (ADR). The Rules of Court 2021 (ROC) have imposed on parties a duty to consider ADR prior to and during civil proceedings. More significantly, the courts have been empowered to order parties to attempt ADR, taking into account the overarching ideals of the ROC and all relevant circumstances.[4] Similar to England and Wales, the Singapore courts have retained their power to make post-trial costs orders to account for a party's unreasonable refusal to attempt ADR. ADR has assumed an unprecedented importance within the reformed civil justice regime's focus on efficiency and active case management. Notably, these developments have occurred in parallel with England and Wales' recent consideration of the role of ADR within civil justice and the legality of mandatory ADR orders.

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[1] Rules of Court 2021 (S 914/2021) Order 1 rule 1; Courts (Civil and Criminal Justice) Reform Bill s 71.

[2] Civil Justice Commission, *Civil Justice Commission Report* (29 December 2017), *https://www.mlaw.gov.sg/files/Annex_C_Civil_Justice_Commission_Report.pdf/,* foreword; Ministry of Law, "Public Consultation on Civil Justice Reforms: Recommendations of the Civil Justice Review Committee and Civil Justice Commission" (26 October 2018), p. 9, *https://www.supremecourt.gov.sg/news/media-releases/public-consultation-on-proposed-reforms-to-the-civil-justice-system*

[3] Singapore Courts, "New Rules of Court 2021: General Overview of the New Rules of Court – What is New?" *https://www.judiciary.gov.sg/new-rules-of-court-2021/digest-1*

[4] Rules of Court 2021 (S 914/2021) Order 5 rule 3.

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This note examines the Singapore ROC reforms relating to the use of ADR with reference to comparable English developments. Section II discusses the role of ADR in connection with the five ideals within the ROC. It is argued that proportionality concerns appear most prominent but could potentially clash with the ideal of providing fair results suited to the parties' needs. This tension is likely to be manifested when the courts decide whether to order the use of ADR. Section III discusses the broad yet ambiguous scope of ADR within the ROC, which could give rise to considerable uncertainty in determining whether the parties have fulfilled their duty to consider ADR. Section IV discusses the multiple ways that parties are encouraged through the ROC to use ADR. Focusing on the empowerment of the courts to order parties to attempt ADR, the final section argues that the court is likely to be guided principally by the ideals of the ROC rather than the factors set out in *Halsey v Keynes* when deciding whether to order ADR. However, this will be a complex consideration given the tension between the ROC ideals of proportionality and matching the appropriate process to meet the parties' needs. This likely tension has to be acknowledged by the courts and a considered decision made on where the balance should lie.

II. The relationship between ADR and civil justice

The enlarged role of ADR within Singapore's reformed civil justice regime is closely connected with the ideals of the ROC. The court is obliged to "have regard to the ideals" when deciding whether to order the use of ADR.[5] The overarching ideals of civil justice include:

(a) fair access to justice;
(b) expeditious proceedings;
(c) cost-effective work;
(d) effective use of court resources; and
(e) fair and practical results suited to the parties' needs.[6]

While these principles were not articulated in earlier legislation, they have been alluded to in extra-judicial pronouncements of the Supreme Court bench.[7] The strong emphasis of four out of the five ideals on cost-effectiveness and efficiency is strikingly similar to the overriding objective in the Civil Procedure Rules (CPR) to deal with cases "justly and at proportionate cost".[8] Elaborating on the concept of proportionality, the ROC have explained that cost-effective work must be proportionate to the nature and importance of the action; the complexity and novelty of issues raised; and the amount of the claim.[9] These factors are also largely similar

[5] Rules of Court 2021 (S 914/2021) Order 5 rule 3(2).
[6] Rules of Court 2021 (S 914/2021) Order 3 rule 1.
[7] See for example Chief Justice Sundaresh Menon, "Mediation and the Rule of Law" (10 March 2017), p. 18 *https://www.supremecourt.gov.sg/Data/Editor/Documents/Keynote%20Address%20-%20Mediation%20and%20the%20Rule%20of%20Law%20(Final%20edition%20after%20delivery%20-%20090317).pdf*
[8] CPR r.1.1(2).
[9] Rules of Court 2021 (S 914/2021) Order 3 rule 1(c).

to the CPR's conceptualisation of proportionality in relation to the amount of the case, the complexity of the issues and the importance of the case.

Apart from cost-effectiveness, another prominent theme underlying the five ideals relates to fairness and just results. The dual motifs of fairness and proportionality have at times been perceived as competing priorities by the English judiciary. A just and fair outcome has at times been implicitly equated with access to the courts. In this respect, Lord Justice Briggs has depicted the civil courts as existing primarily to provide a "justice service" entailing "expert, experienced and impartial court for the obtaining of a just and enforceable remedy".[10] From this perspective, ADR may fail to deliver a just outcome because of the absence of the court's declaration on the law. On the other hand, it has been asserted that there is "never a need to choose between justice and proportionate cost" because "[j]ustice requires proportionality"[11] and that costs and time considerations are integral to the definition of procedural justice. [12]

The alleged tension between fairness and proportionality in relation to ADR has not surfaced as prominently in the judicial and extra-judicial discourse within Singapore. Chief Justice Sundaresh Menon has in several speeches articulated a user-centric vision of the Rule of Law that includes access to justice as an essential ingredient and focuses on the disputant's needs, rights and interests. He contended that the Rule of Law should not be rooted exclusively in an adjudicative setting. Instead, developing a diversified suite of dispute resolution options within a legal system would enhance its ability to deliver justice that is most appropriate for the parties' needs.[13] The Singapore courts have also repeatedly underscored the integration of fair and just procedure with substantive justice.[14] Hence, there has been judicial conceptualisation of fair outcomes in terms of both consensual and adjudicative processes. Furthermore, justice has not been equated with merely the correct application of the law to the facts.[15]

Notwithstanding the ostensible absence of tension between justice (in terms of court adjudication) and ADR, there is palpable conflict between the user-centric concept of appropriate dispute resolution and the proportionality principle. Concerning the former principle, CJ Menon has elaborated extensively on customising the dispute resolution options to the particularities of each case and the parties' needs. The ROC has articulated this principle in the ideal of fair results suited to the parties' needs. Taken on its own, this principle will result in fitting the dispute resolution option to the litigants' interests, which may not necessarily

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[10] Lord Justice Briggs, *Civil Courts Structure Review Interim Report* (December 2015), pp. 28-29.

[11] A. Higgins, "Keep Calm and Keep Litigating", in A. Higgins (ed.), *The Civil Procedure Rules at 20* (Oxford: Oxford University Press, 2021), p. 54.

[12] R. Assy, "Brigg's Online Court and the Need for a Paradigm Shift" (2017) 36 C.J.Q. 70, 84.

[13] Chief Justice Sundaresh Menon, "Mediation and the Rule of Law" (10 March 2017), p.18 *https://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), p. 9 *https://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/cj's-speech-mass-call-2021.pdf*

[14] *United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd* [2005] 2 SLR(R) 425 at [10]-[11].

[15] J.Pinsler, "The Ideals in the Proposed Rules of Court" (2019) 31 Singapore Academy of Law Journal 987, 992.

entail cost-effectiveness. By contrast, proportionate justice places greater emphasis on efficiency concerns, which could override the parties' views and interests on the most appropriate mode of dispute resolution. In this regard, CJ Menon opined that proportionate justice is about "fairly, equitably and responsibly distributing scarce judicial resources, so as to promote the interests of all who require justice".[16] There has therefore been implicit acknowledgement that the court users' subjective preferences concerning fair and appropriate outcomes will not be the overriding consideration when the courts decide on the suitability of ADR. The courts will also consider the need to preserve public resources and promote cost-effectiveness for future court users.

In sum, while the Singapore discourse has not pitted proportionality against substantive fairness when discussing the role of ADR, there is a palpable tension between a user-centric perspective to access the most appropriate form of justice and the important need to preserve scarce public resources. Notably, the ideal of "fair and practical results suited to the parties' needs" reflects this dissonance. The insertion of the notion of practicality suggests that the results must be cost-effective and that it is the court's opinion that takes precedence over the parties' views on how their needs are met.[17] At the same time, this ideal seems to connote the primacy of the parties' needs when deciding on the mode of dispute resolution. As will be discussed below, this tension has significant implications on the Singapore courts' future determination of when to order the use of ADR.

III. The scope of amicable dispute resolution

Turning to the substantive ROC provisions on ADR, it is noteworthy that the term ADR has been very broadly construed. Notably, the previous references to "alternative" dispute resolution in the Rules have been substituted by the word "amicable". This nomenclature change is consistent with the growing global sentiment that consensual processes including mediation should be deemed integral instead of alternatives to litigation. Indeed, Master of Rolls Sir Geoffrey Vos commented that the "alternative" aspect should be taken out of the term ADR, so that dispute resolution is holistically construed as "an integrated process…to help [parties] find the best way to reach a satisfactory solution".[18] Former Master of Rolls Sir Anthony Clarke also remarked in a similar vein,

> "ADR must become an integral part of our litigation culture…that when considering the proper management of litigation it forms [an] intrinsic and…instinctive…part of our lexicon".[19]

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[16] Chief Justice Sundaresh Menon, "Technology and the Changing Face of Justice" (14 November 2019), p. 38 *https://beta.judiciary.gov.sg/docs/default-source/news-docs/ncmg---keynote-lecture.pdf*

[17] J.Pinsler, "The Ideals in the Proposed Rules of Court" (2019) 31 Singapore Academy of Law Journal 987, 1001.

[18] The Rt Hon Sir Geoffrey Vos, "The Relationship between Formal and Informal Justice*"* (26 March 2021), pp.7-8, *https://www.judiciary.uk/wp-content/uploads/2021/03/MoR-Hull-Uni-260321.pdf*

[19] Sir Anthony Clarke Master of Rolls, "The Future of Civil Mediation" (2008) 74(4) Arbitration: The International Journal of Arbitration, Mediation and Dispute Resolution 419, 421.

While the elimination of the "alternative" aspect of ADR is a positive development, there is ambivalence on the types of processes that are regarded as amicable dispute resolution. Amicable dispute resolution often connotes the use of consensual methods and has in certain contexts included negotiation and mediation but excluded more evaluative methods such as arbitration and early neutral evaluation. A case in point is clauses in investment treaties requiring disputing parties to attempt amicable dispute resolution before commencing arbitration. For instance, the EU-Singapore Investment Protection Agreement urges parties to attempt amicable settlement through negotiation as far as possible,[20] while the Netherlands Model Bilateral Investment Treaty provides that investment disputes "should, as far as possible, be settled amicably through negotiations, conciliation or mediation".[21] By comparison, ADR for domestic civil disputes has commonly encompassed any consensual and evaluative process apart from litigation. The International Chamber of Commerce used to administer the Amicable Dispute Resolution Rules for commercial disputes that allowed parties to choose mediation, conciliation or early neutral evaluation.[22]

Although the Singapore ROC do not expressly define ADR, Order 5 rule 1(3) has effectively delineated its scope very broadly by stating that an offer of amicable resolution means an offer to resolve the dispute "other than by litigation, whether in whole or in part". The Supreme Court Practice Directions have further specified the processes of mediation, neutral evaluation, expert determination and conciliation,[23] while the State Courts' Practice Directions have also included a specific arbitration programme as a form of ADR.[24] Negotiation, though often deemed to be a form of ADR in other settings, is not referred to in the ROC and practice directions.

This broad conceptualisation of ADR is remarkably similar to the CPR's reference to mediation, arbitration, early neutral evaluation and ombudsmen schemes.[25] However, negotiation between the disputing parties, while not formally classified as a form of ADR, is also accepted within the CPR as a way to explore settlement.[26] It is apposite that the Civil Justice Council (CJC) in its interim report on ADR adopted a narrower view of ADR. It excluded negotiation because it thought the courts should encourage ADR involving the intervention of a neutral third party when routine negotiations failed. It further excluded the adjudicative process of arbitration because cases decided in arbitration do not usually trouble the courts and arbitration is less readily available for lower value cases.[27]

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[20] EU-Singapore Investment Protection Agreement (2018) art.3.2.
[21] Netherlands Model Bilateral Investment Treaty art.17.1.
[22] Dyala Jimenex Figures, "Amicable Means to Resolve Disputes: How the ICC ADR Rules Work" (2004) 21(1) Journal of International Arbitration 91, 95.
[23] Supreme Court Practice Directions 2021, para.53(3) and Appendix D.
[24] State Courts Practice Directions 2021, Form 6 (Court ADR Form).
[25] CPR Practice Direction – Pre-Action Conduct and Protocols para.10.
[26] CPR Practice Direction – Pre-Action Conduct and Protocols para.10, stating that parties "may negotiate to settle a dispute or may use a form of ADR".
[27] Civil Justice Council ADR Working Group, *ADR and Civil Justice: Interim Report* (October 2017) paras. 3.16-3.23.

Although the exact ambit of the ADR label may seem an innocuous issue, the current ambiguity in the scope of ADR within the ROC could give rise to significant difficulties. First, if negotiation, being a method "other than litigation" under the ROC, were accepted as an ADR option, litigants could assert that their duty to consider ADR has been amply fulfilled even if other ADR processes involving third party neutrals have not been attempted. The uncertainty about whether the duty to attempt ADR is satisfied through negotiation will in turn exert an impact on the court's consideration of whether to order a specific form of ADR. As noted by the English CJC, a question arises as to how far a court should intervene in the choice of ADR process and whether it should insist, for instance, that mediation, as a distinct process from simple negotiation, be undertaken.[28] A second and related difficulty concerns whether the court should order the use of mediation when parties have earlier attempted evaluative methods such as arbitration and early neutral evaluation. Could the courts legitimately take the view that the parties must attempt mediation because their earlier attempts at ADR did not include consensual processes and hence did not sufficiently fulfil their duty to consider ADR? Hence, the broad scope of ADR is likely to result in considerable ambivalence in how the parties and the courts will exercise their choice of ADR mode to fulfil the parties' duty to consider ADR and the court's determination whether to order ADR respectively.

IV. Consideration of amicable dispute resolution before and during civil proceedings

The English CPR have adopted a multi-pronged approach to encouraging the use of ADR in civil proceedings. Prior to the commencement of proceedings, pre-action protocols encourage the exchange of sufficient information and the use of ADR. During legal proceedings, parties are prompted through court guides and allocation questionnaires to indicate their view on the suitability of ADR, while the courts draw upon their case management powers to encourage the use of ADR. Before or during proceedings, parties may also make Part 36 offers. The third prong – the courts being empowered under CPR 44 to order cost sanctions on parties who unreasonably failed to engage in ADR – is meant to incentivise parties to adhere to the first two aspects of the ADR strategy.[29]

Singapore's former civil justice regime largely resembles the above multi-pronged approach, save for the use of ADR in pre-action conduct. There are comparatively fewer pre-action protocols for a smaller number of case types, including claims falling below the Magistrate's Court jurisdiction, personal injury claims, motor accident matters and medical negligence claims.[30] Apart from this difference, the offer-to-settle mechanism, the frequent prompts through court forms to consider ADR and the court's power to make post-trial cost sanctions have been present in the Singapore Rules of Court.

[28] Civil Justice Council ADR Working Group, *ADR and Civil Justice: Final Report* (November 2018) para.8.32.
[29] Civil Justice Council ADR Working Group, *ADR and Civil Justice: Interim Report* (October 2017) para.5.41.
[30] Rules of Court 2021 (S 914/2021) Order 65; State Courts Practice Directions 2021 paras.36, 38-41.

The current ROC have addressed the lacuna in the first prong. Apart from specific categories of claims in existing pre-action protocols, parties in *all civil claims* now have the "duty consider amicable resolution of the…dispute *before the commencement* and during the course of any action or appeal": Order 5 rule 1(1). The duty to consider ADR before the commencement of proceedings is discharged by the parties' obligation to "make an offer of amicable resolution" and the provision that a party "must not reject an offer of amicable resolution" without reasonable grounds. Elaborating on the details of the ADR offer, Order 5 rule 2 stipulates that the offer must be in writing and must be open for at least 14 days. Offers that do not state an expiry date will expire once the court has adjudicated the matter.

The next notable addition to the multi-pronged ADR strategy is the empowering of the courts to order the parties to resolve the dispute through ADR. This change addresses the limitations in the earlier regime that permit the courts to only make cost sanctions taking into account unreasonable refusals to attempt ADR. As observed by the CJC in relation to the similar regime in England and Wales, this results in the court's criticism of the parties' lack of use of ADR being left until after judgment and the court's assessment being "inevitably overshadowed by the judgment".[31] The council thus recommended more direct and immediate court intervention in the parties' decision-making on ADR.[32] The Singapore ROC have remedied this lacuna by permitting the court to order the use of ADR having regard to the ideals of the ROC and all the relevant circumstances, including whether the parties have earlier refused to attempt ADR.[33] This power appears to be exercisable at any stage of the proceedings. It is further provided that the Court "may suggest solutions for the amicable resolution of the dispute the parties at any time as the Court thinks fit".[34]

The court has retained the power to make adverse costs orders if a party is deemed to have failed to discharge the duty to consider amicable resolution or failed to make an offer of amicable resolution: Order 21 rule 4(c). The terms of offer that have not been accepted may only be disclosed to the court after the court has determined the merits of the matter.[35] Litigants may decline to make or accept an ADR offer if they have reasonable grounds to do so. Where a party has informed the court that it does not wish to attempt ADR based on reasons that are privileged, the court "may order the party to submit a sealed document setting out the party's reasons for such refusal" that "will only be opened by the Court after the determination of the merits of the action".[36] Notably, these provisions have replaced the previous offer-to-settle regime, presumably because the focus has shifted to attempting ADR processes rather than merely making offers.

In summary, these provisions facilitate the pro-active intervention of the courts to order the immediate use of ADR in pending actions. In the event that courts declines to order the use of

[31] Civil Justice Council ADR Working Group, *ADR and Civil Justice: Interim Report* (October 2017) para.5.53.
[32] Civil Justice Council ADR Working Group, *ADR and Civil Justice: Final Report* (November 2018) para.8.33.
[33] Rules of Court 2021 (S 914/2021) Order 65.
[34] Rules of Court 2021 (S 914/2021) Order 5 rule 3(5).
[35] Rules of Court 2021 (S 914/2021) Order 5 rule 2(3).
[36] Rules of Court 2021 (S 914/2021) Order 5 rule 3(3).

ADR, it will defer its consideration of the reasonableness of the parties' conduct concerning ADR – both prior to and during the proceedings – to after the matter has been adjudicated. Suitable cost sanctions will then be made.

V. The courts' power to order the use of ADR

The empowerment of the courts to order ADR in the Singapore ROC has been undoubtedly the most controversial reform. In earlier consultations with the legal profession, practitioners contended that this recommended reform imposed a condition precedent to commencement of actions and ignored the reality that ADR was not suitable for some disputes.[37] Mandatory ADR, in its many forms, has indeed faced great resistance in many jurisdictions for similar reasons. Nevertheless, it is necessary to consider the exact form of compulsory ADR in order to effectively evaluate its effectiveness. The CJC has classified the types of compulsion into three categories: attempting ADR as a pre-condition of access to courts (type 1); a requirement that parties have attempted ADR in all cases at a later stage (type 2); and the court's power to require unwilling parties to engage in ADR in the course of case management (type 3).[38] It helpfully highlighted that type 1 compulsion imposes a financial burden on litigants, while a blanket compulsion under type 2 would be insensitive to cases in which ADR is not suitable.[39] Type 3 compulsion used to be eschewed primarily because it was deemed a breach of the right to access the courts under the European Convention of Human Rights according to *Halsey v Keynes*. This objection has been increasingly doubted, culminating in the CJC report suggesting that parties may be lawfully compelled to participate in ADR where a return to the normal adjudicative process is available.[40]

The ROC's provision of the power to order ADR is clearly a type 3 compulsion. While there have been no objections analogous to the *Halsey* ruling raised within Singapore, there have been doubts expressed concerning how the courts would exercise their power. This indeed is a significant concern arising from Type 3 compulsion.[41] Type 3 compulsion corresponds with another type of mandatory ADR known as discretionary – as opposed to categorical – referral of cases to ADR. The discretionary approach refers to the courts given the authority to refer any case they deem appropriate to ADR, whereas categorical referral applies when certain classes of cases are mandated to undergo ADR.[42] As the term discretionary referral suggests, the court bears the heavy responsibility of exercising their discretion accurately when

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[37] Civil Justice Commission and Civil Justice Review Committee, *Response to Feedback from Public Consultation on the Civil Justice Reforms* (11 June 2021) para.28.
[38] Civil Justice Council ADR Working Group, *ADR and Civil Justice: Interim Report* (October 2017) para.8.3.
[39] Civil Justice Council ADR Working Group, *ADR and Civil Justice: Interim Report* (October 2017) paras.8.10-8.12.
[40] Civil Justice Council, *Compulsory ADR* (June 2021) para. 7.
[41] Civil Justice Council ADR Working Group, *ADR and Civil Justice: Interim Report* (October 2017) para.8.14.
[42] Frank E. A. Sander, H. William Allen & Debra Hensler, "Judicial (Mis)use of ADR? A Debate" (1996) 27 University of Illinois Law Review 885, 886; Frank E. A. Sander, "Another View of Mandatory Mediation", (2007) Dispute Resolution Magazine 16. See also D. Quek, "Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program" (2010) 11 Cardozo Journal of Conflict Resolution 479, 488.

determining the suitability of a case for ADR. Such a burden is evidently absent in categorical referral ADR programmes that deem certain types of claims particularly suitable for ADR.

The court's exercise of its discretion in ordering ADR: consideration of the relevant circumstances

The introduction of the courts' power to order ADR begs the question of the salient factors to be considered by the courts as "relevant circumstances" together with the overarching ideals of the ROC when exercising its discretion. Order 5 rule 3 has specified only one factor – any party's refusal to attempt ADR – which mirrors one factor set out in *Halsey v Keynes:* the extent to which other settlement methods have been attempted.[43] The other *Halsey* factors may also be instructive, including the merits of the case; whether ADR has a reasonable prospect of success; whether costs of ADR would be disproportionately high; and whether any delay in setting up the ADR would be prejudicial.[44] *Halsey* and related cases have yet to be discussed within existing Singapore caselaw, and are likely to provide guidance for the Singapore courts. Nevertheless, as evident from the post-*Halsey* jurisprudence, the balancing of the relevant factors is inherently complex and has resulted in differing emphases across court decisions. As underscored by Ahmed, the merits of the case factor has been applied both generously and strictly by the courts;[45] Ramsey J in *Northrop* and *Leicester Circuits Ltd v Coates Brothers Plc* reasoned that a reasonable belief in a strong case would provide limited justification for a refusal to mediate[46] while decisions including *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.[47] Moreover, although the Court of Appeal in *PGF v OFMS* held that ignoring an invitation to mediate could justify costs sanctions,[48] the same court with a different coram in *Gore v Naheed* decided that a failure to engage in mediation, "even if unreasonable, does not automatically result in a cost penalty", but was merely a factor to be taken into account.[49]

Furthermore, several *Halsey* factors will be applied differently when the court is making an order for parties to attempt ADR instead of retrospectively evaluating the reasonableness of the parties' conduct after the trial. The court will not have the benefit of hindsight in assessing considerations such as the parties' belief in the merits of the case and the prospect of success of ADR. It is therefore arguable that these factors, unless strongly substantiated by the parties, will not be attributed great weight. It is apposite that the Singapore Supreme Court's Practice Directions, in its guidelines to lawyers on advising their clients on ADR, have stressed that

[43] [2004] 1 WLR 3002 at [20].
[44] [2004] 1 WLR 3002 at [17] to [23].
[45] M. Ahmed, 'Bridging the Gap Between Alternative Dispute Resolution and Robust Adverse Costs Orders' 66(1) *Northern Ireland Legal Quarterly* (2015) 71, 73.
[46] [2014] EWHC 3148 (TCC); [2015] 3 All ER 782, at [72].
[47] [2004] EWCA Civ 887; [2004] 1 WLR 3026.
[48] [2013] EWCA Civ 1288; [2014] WLR 1386.
[49] [2017] EWCA Civ 369; see also M. Ahmed, "Mediation: the Need for a United, Clear and Consistent Judicial Voice: *Thakkar v* Patel [2017] EWCA Civ 117*; Gore v Naheed* [2017] EWCA Civ 369" (2018) C.J.Q. 13.

mediation that does not result in settlement has often led to other benefits such as the refinement and reduction of disputed issues. Regarding merits of the case, the same practice directions have cast doubt on the popular reason for litigation – "a matter of principle" – commenting that principles are most expensive at law and are unlikely to lead to permanent resolution of underlying issues.[50] The only factors that the practice directions appear to favour as justifying a refusal to attempt ADR are the need to set a judicial precedent and the presence of fraud. However, even the latter factor is qualified by the comment that fraud may be dealt with in mediation. Accordingly, it is highly unlikely for any *Halsey* factor, including a belief in the merits of the case, to be readily given substantial weight.

The court's exercise of its discretion in ordering ADR: the ideals of the Rules of Court

It thus appears that the Singapore courts are likely to be guided principally by the ideals of the ROC when deciding whether to order ADR. As argued above, the ideals are underpinned predominantly by the concept of proportionate justice. The courts will probably evaluate the cost-effectiveness for both the litigants and the judicial system in attempting ADR compared to proceeding to litigation. However, this cost-benefit analysis is also not without challenges. ADR is not evidently the least costly choice in the reformed Singapore civil justice regime. The reformed ROC have greatly streamlined the litigation process with a shorter discovery process, limited interlocutory applications and greater judicial control, which is likely to substantially reduce the time involved in court. Once the litigation process is made markedly more efficient, there will invariably be less incentive to reap time and costs savings by attempting ADR. In light of the uncertainty about the substantial costs savings arising from using ADR, the courts will need to carefully consider other factors closely related to the proportionality principle such as the cost of ADR and the stage of proceedings when ADR is being considered.

However, proportionality is not the sole ideal articulated in the ROC. The court is also obliged to consider the need to reach fair and practical results suited to the parties' needs. It has been highlighted earlier that there is a palpable tension between the ROC overarching goals of appropriate dispute resolution suited to the parties' needs and proportionate justice. The disputants' needs may well include areas other than costs concerns. Accordingly, the court, when taking into account the ideals in deciding whether to order ADR, should consider costs and efficiency concerns in tandem with the other needs of the disputants. The parties may well form a reasonable view that their primary needs such as publicity may be better achieved through a trial rather than ADR. Their concerns and needs may thus readily clash with cost concerns of the overall justice system. This likely tension has to be acknowledged by the courts and a considered decision made on where the balance should lie.

[50] Supreme Court Practice Directions 2021, Appendix D para.3.5.

Australian jurisprudence is apposite in reflecting how different factors may be holistically balanced. Legislation empowering the courts to order the use of mediation have been present in many states since 2000.[51] In the New South Wales Supreme Court decision of *Browning v Crowley*, mediation was ordered in a property dispute involving an alleged de facto 27-year relationship between the parties. The value of the property exceeded A$30 million. The case was at a mature stage, with affidavits and expert reports filed and there was a large difference between the parties' positions. However, the court balanced these factors against the complexity of the issues, the large amount of costs to be incurred by the parties from the hearing, the amount of time spent in a 3-week long hearing (at the public's expense) and the suitability of mediation for cases with long-standing personal relationships. The expense of mediation was deemed relatively small in relation to what the parties would incur if they litigated the matter.[52] The court's reasoning here reflects a considered cost-benefit analysis between the options of ADR and litigation amidst uncertainty about the likely litigation and mediation outcomes. Apart from cost concerns, the court also took into account the parties' needs, notably the need to preserve a long-standing relationship.

Dealing with privileged information

The ROC provide that "if a party informs the Court that the party does not wish to attempt to resolve the dispute by amicable resolution, the Court may order the party to submit a sealed document setting out the party's reasons for such refusal".[53] This provision was introduced in response to feedback given that the parties would be required to reveal privileged legal advice when explaining to the court their decision concerning ADR.[54] Although this mechanism averts the breach of privilege, it poses no small difficulty to the court in deciding whether to order ADR based on *all* the relevant circumstances A party could conceivably refuse to make or accept an ADR offer prior to and during legal proceedings. The court during case management proceedings would then have to evaluate the reasonableness of such conduct. The party could ostensibly maintain the refusal but decline to fully reveal the reasons on account of legal professional privilege. In such circumstances, the court runs the risk of ordering the use of ADR without being informed of all the relevant circumstances.[55] This is a substantial risk given the potential of parties' appealing against the court's order and the possibility that the undisclosed information provides strong reasons militating against the use of ADR. However, if the court does not assume such a risk, it would effectively defer the consideration of the parties' conduct to the costs order made after the merits are determined, which is a reversion to the earlier civil justice regime.

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[51] Supreme Court Amendment (Referral of Proceedings) Act 2000 (New South Wales); Court Legislation Amendment Act 2000 (Western Australia) s 22; Supreme Court Rules 2000 (Tasmania) r 518.
[52] *Browning v Crowley* [2004] NSWSC 128.
[53] Rules of Court 2021 (S 914/2021) Order 5 rule 3(3).
[54] Civil Justice Commission and Civil Justice Review Committee, *Response to Feedback from Public Consultation on the Civil Justice Reforms* (11 June 2021) paras.28 and 36.
[55] Order 5 rule 3(3) expressly states that the power to order a sealed document does not affect the court's power to order ADR.

The Australian decisions concerning mandating ADR have shown that the parties' arguments in favour or against ADR may be advanced in general terms without necessarily revealing privileged legal advice. For instance, the prospects of success at ADR and the merits of the case could be readily estimated based on the pleadings and legal issues.[56] Arguably, legal costs may also be estimated based on the projected length of the hearing, even if the exact quantum of solicitor-client costs are not revealed. In addition, the cost of potential ADR providers may be readily obtained by all parties. Hence, the mechanism for the objections to ADR to be filed in a sealed document has been inserted unnecessarily into the ROC and could inadvertently hamper the courts from properly considering all circumstances before deciding on the appropriateness of ADR.

VI. Conclusion

The new ROC in Singapore contain probably the most radical and comprehensive changes made to civil justice since 1996, when the rules of the lower courts and Supreme Court were consolidated. The prominence of ADR as a case management tool is a primary feature of these reforms. The empowerment of the courts to order the use of ADR in appropriate cases has introduced a major tool within the courts' multi-pronged ADR strategy to intervene proactively where ADR advances the goals of proportionality and appropriate dispute resolution suited to the parties' needs.

Both the English and Singapore civil justice systems are evidently converging in endorsing the courts' authority in mandating ADR, subject to certain conditions. This change has imposed on the Singapore courts the responsibility of considering all relevant circumstances in light of the ideals of the ROC, an exercise analogous to the consideration of the parties' conduct regarding ADR when deciding on post-trial cost orders. It has been argued in this note that this responsibility is not easily discharged due to the tension between the ideals of the ROC, the broad and uncertain scope of the accepted modes of ADR, the current uncertainty as to the prominence of any *Halsey* factors and the possibility that some circumstances may not be disclosed to the court due to the alleged protection of legal professional privilege. Nevertheless, the reformed ROC have made a resounding statement about the integral role of ADR in achieving the goals of civil justice. Parties now have the unequivocal duty to consider ADR before and in the course of proceedings. The courts will enforce this duty through either ordering the use of ADR or making post-trial cost sanctions. The future jurisprudence arising from these reforms will certainly be of interest to the English and other common law jurisdictions considering similar changes.

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[56] See *Browning v Crowley* [2004] NSWSC 128; *Re Anne Lewis Pty Ltd* [2014] NSWSC 418.