Bar Council Law Reform Essay Competition Winner 2022

‘Crossing the Constitutional Rubicon: why mediation should be compulsory in all civil disputes’ by Emma Meadows

Mediation is a form of Alternative Dispute Resolution (ADR) which does not have a statutory definition.[1] It ‘involves the use of a neutral third party who seeks to facilitate what is essentially a negotiation process to resolve a dispute’.[2] While ‘mediation has enjoyed a global blossoming’[3] as part of the growth industry of conflict resolution,[4] it ‘has not been accepted by the legal system in the way most would have hoped’.[5] There have been calls for compulsory mediation to be considered in the UK to deal with court backlogs, especially following COVID-19-related delays.[6] In July 2022, the Government released a consultation paper regarding the implementation of compulsory mediation in the small claims court.[7] Steps have therefore already been taken to implement a compulsory mediation system. This essay will argue that these proposals should be extended, and that mediation should be compulsory in all civil disputes.

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1 Daniel Kaufman Schaffer, ‘An Examination of Mandatory Court-Based Mediation’ [2018] 84(3) Arbitration 229, 230.

2 Susan Blake, Julie Browne and Stuart Sime, *The Jackson ADR Handbook* (OUP, 3rd edn, 2021), page 20, para 2.19.

3 Neil Andrews, ‘Mediation: International Experience and Global Trends’ [2017] 4(2) JICL 1, 8.

4 Fisher, Ury & Patton, ‘Getting to Yes: negotiating an agreement without giving in’ (2012, 3rd edn), page xi.

5 Paul Randolph, “Compulsory Mediation?” [2010] New Law Journal 499, 499

6 Jennifer Egsgard, ‘Should mediation be mandatory?’ [2021] NLJ 17, 17.

7 Increasing the use of mediation in the civil justice system – consultation, Ministry of Justice, CP 721, July 2022 <https://www.gov.uk/government/consultations/increasing-the-use-of-mediation-in-the-civil-justice-system> accessed 20 September 2022 20:08.

The Status Quo

In considering why reform is necessary, we must first examine the status quo in the civil justice system. Civil justice is defined as the system which 'deals with non-criminal matters of law that are not family disputes or issues handled by the tribunals'.[8] Civil disputes are governed by the Civil Procedure Rules (CPR), which have been praised for ensuring that 'litigation culture is more civilised'.[9] The overriding objective contained in the CPR states that the Court's duty to manage cases includes encouraging parties to use ADR,[10] and helping parties to settle their dispute.[11] Further, Pre-Action Protocols, introduced in 1999 as part of the civil procedure, strongly encourage settlement.[12]

Commentators have noted that there appears to be two different positions relating to compulsory mediation under the CPR regime, 'the official position which dictates that parties should not be compelled into ADR, and the unofficial but implied position which confirms that the courts have power to compel parties to ADR'.[13] This tension is reflected in the decision[14] in *Halsey v Milton Keynes General NHS Trust*,[15] the leading case on mandatory mediation. Dyson LJ gave the ruling judgment in this case, and

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[8] *Ibid*, page 7.

[9] Civil Justice Council ADR Working Group, ADR and Civil Justice Interim Report, October 2017, page 25.

[10] CPR 1.4(2)(e).

[11] CPR 1.4(2)(f).

[12] Above, no. 9, page 25.

[13] Barbara Billingsley and Masood Ahmed, 'Evolution, Revolution and Culture Shift: A Critical Analysis of Compulsory ADR in England and Canada' (2016) 45 Comm. L. World Rev. 186, 198.

[14] Masood Ahmed, 'A More Principled Approach to Compulsory ADR' [2020] 4 JPIL 277, 279.

[15] [2004] EWCA Civ 576; [2004] 1 WLR 3002.

stated that ‘the court’s role is to encourage, not to compel. The form of encouragement may be robust’.[16] This decision ‘put an end to the movement towards full compulsory schemes [...] significantly reducing the number of cases that were mediated’.[17]

Following *Halsey*, the status quo has been that the judiciary have impliedly mandated mediation[18] through application of the CPR. The overriding objective suggests that settlement ‘is an explicit objective of the judicial system’,[19] and the level of activism used to achieve this aim is being determined by individual judges on a case-by-case basis.[20] Further, Courts have regard to the conduct of parties, including any attempts to settle, when deciding the amount of costs under the CPR regime.[21] The decision in *Halsey* mandated that Courts should consider whether an individual acted unreasonably in refusing to attend ADR when determining whether an adverse costs order should be made, and set out the famous six factors that the Court could consider.[22] Commentators have criticised this approach, and it has been argued that ‘the more vigilant the judiciary becomes in encouraging mediation through the use of costs sanctions, the more it appears that mediation is becoming compulsory’.[23] Further criticism has pointed out that the current approach means that the consideration of any refusal to engage in mediation is necessarily left until after judgment due to its

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[16] *Ibid*, 3008 at para 11, B.

[17] Above, no. 1, 235.

[18] Above, no. 14, 278.

[19] Debbie de Girolamo, “Rhetoric and Civil Justice: A Commentary on the Promotion of Mediation without Conviction in England and Wales” (2016) 35 CJQ 162, 165.

[20] *Ibid*, 176.

[21] CPR 44.4(3)(a).

[22] Above, no. 15, 3009 at para 16, D to E.

[23] Ronán Feehily, ‘Creeping compulsion to mediate, the Constitution and the Convention’ (2018) NILQ 69(2) 127, 132.

consideration as part of costs, which comes too late for unreasonable behaviour to be addressed.[24] The status quo causes confusion for litigants as decisions will depend on whether conduct has been unreasonable,[25] and there is no clear standard which they must meet.[26]

The position becomes even more confused when considering that compulsory or semi-compulsory ADR processes already exist in the civil justice system, requiring litigants to 'take steps directed solely to exploring settlement'.[27] Examples of this include the ACAS Early Conciliation scheme used before a claim is issued to the Employment Tribunal, and Financial Dispute Resolution Appointments used in the Family Courts.[28] In the case of *Lomax v Lomax*,[29] Lord Justice Molyan stated that 'the court's engagement with mediation has progressed significantly since *Halsey* was decided',[30] and held that the Court can compel parties to attend Early Neutral Evaluation, as an additional step in the Court process.[31] This decision equates a compulsory mediation process with another pre-action step, similar to mandating use of the Pre-Action Protocols. The overriding objective was cited in *Lomax* as a reason to compel the use of ADR processes.[32] It has been argued that *Lomax* could be

[24] Above, no. 9, page 35.
[25] Above, no. 19, 173.
[26] *Ibid*, 181.
[27] Above, no. 23, page 7.
[28] Civil Justice Council, Compulsory ADR, June 2021, pages 23 to 26.
[29] [2019] EWCA Civ 1467.
[30] *Ibid*, para 27.
[31] *Ibid*, para 26.
[32] *Ibid*, para 32.

applied to other forms of ADR, and 'may herald the beginning of a new era when compulsory mediation [...] becomes a reality'.[33]

It appears therefore, that the 'constitutional Rubicon' of compulsion appears to have been crossed,[34] despite the official status quo being that compulsion should never be ordered by the Courts. Further, the status quo has resulted in 'a need for clear articulation about the expectations of the civil justice system'.[35]

The Government's Proposed Reforms

In June 2021, the Civil Justice Council (CJC) released a paper considering compulsory ADR, in which it stated that 'a well-functioning civil justice system should offer a choice of dispute resolution methods [...] particularly at a time when the civil justice system in general and the court system as a whole are struggling to cope with its case-load'.[36] They concluded that mandatory mediation could and should be implemented.

The CJC suggested that there are three forms of compulsory mediation.[37] The first, Type 1 compulsion, is that compulsory mediation is a pre-condition of access to the court, that needs to be completed prior to issuing proceedings.[38] The second, Type 2 compulsion, is a requirement that all parties engage in compulsory mediation during

[33] Bryan Clark, 'Lomax v Lomax & the future of compulsory mediation' [2019] NLJ 17, 17.
[34] Above, no. 9, page 46.
[35] Above, no. 19, page 183.
[36] Above, no. 28, page 38.
[37] Above, no. 9, page 45.
[38] *Ibid.*

the course of proceedings, such as at the Case Management stage.[39] The third, Type 3 compulsion, is a power of the Courts to mandate mediation on an ad-hoc basis in suitable cases.[40]

Type 1 compulsion is not suitable because it disregards the fact that many claims may be undisputed, and mediation therefore places unnecessary costs on a potential claimant.[41] Type 3 compulsion is also problematic because it invites 'expensive procedural debate about whether or not to use ADR' as part of the process.[42] The CJC recognised that Type 2 compulsion as 'a blanket requirement would be insensitive to the cases in which ADR is either inappropriate or unhelpful',[43] which could be resolved by implementing an exemption procedure. Type 2 compulsion is the most suitable as this is the stage at which mediation would be most helpful in a dispute.[44]

In July 2022, the Ministry of Justice (MoJ) released a consultation paper containing their proposals for a compulsory mediation system in the Small Claims Court, whereby all litigants in defended claims would be 'required to attend a free mediation appointment with HMCTS before their case can progress to a hearing', unless an exemption is granted.[45] Cases would be automatically stayed for 28 days for this purpose.[46] The move has been described as the 'latest in a long line of policy and rule

[39] *Ibid*.
[40] *Ibid*.
[41] *Ibid*, page 48.
[42] *Ibid*, page 49.
[43] *Ibid*, page 48.
[44] Above, no. 9, page 57.
[45] Above, no. 7, page 5.
[46] *Ibid*, page 14.

changes by the Government in an attempt to clear the lengthy court backlog [...] which has exploded since the pandemic, but was already increasing prior'.[47]

The Small Claims Court has 'a preponderance of litigants without the means to instruct legal representation',[48] and these litigants are the people who could benefit the most from court-mandated mediation schemes. As a result, the MoJ has predicted that another 272,000 people will 'access the opportunity to resolve their dispute consensually and avoid the time and cost of litigation'.[49] This is expected to divert 20,000 cases from the court system, and could free up 7,000 judicial sitting days.[50] The consultation paper states that the aim of the proposal is to support 'the timely, proportionate, and efficient delivery of civil justice'.[51] The Small Claims Court currently deals with 61% of all civil justice cases.[52] In the current system of voluntary access to mediation, the uptake rate is 21%,[53] and the rate of settlement is 55%.[54] The Centre for Effective Dispute Resolution reported that for the year up to 31 March 2020, 93% of mediations resulted in settlement.[55] It is clear that the MoJ are aiming for more

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[47] Abbie Coleman and Michael Woonton, 'Mediatory Mediation Plans for Small Claims Disputes' <https://www.blakemorgan.co.uk/mandatory-mediation-plans-for-small-claims-disputes/> accessed 29 September 2020 09:36

[48] Above, no. 9, page 61.

[49] Above, no. 7, page 18.

[50] *Ibid.*

[51] *Ibid.*

[52] Above, no. 7, page 8.

[53] *Ibid.*

[54] Impact Assessment, Ministry of Justice, CP 721, July 2022, <https://www.gov.uk/government/consultations/increasing-the-use-of-mediation-in-the-civil-justice-system> accessed 20 September 2022 20:08, page 1.

[55] CEDR, The Ninth Mediation Audit, 2021, page 19.

cases to be settled outside of the court room, to try to emulate the 93% success rate in these less complex, litigant-in-person heavy cases, rather than the 55% rate.

Compulsory mediation clearly has the capacity to afford wide-reaching benefits in all forms of civil dispute, further saving judicial sitting days and enabling more litigants to access ADR. With such a high success rate, the court system would be far more effective at resolving disputes. The Civil Mediation Council stated that ADR should no longer be considered '"alternative" or external to civil justice'.[56] This opinion is echoed by the MoJ in the consultation paper, where it was claimed that 'the time has come for mediation to be viewed as an integral part of the civil justice system'.[57] The 'future ambition is to extend the requirement to mediate to all County Court users'.[58] If the same projected benefits apply to other areas of the civil justice system, the Court backlog could be cleared. It could result in a more efficient civil justice system, 'freeing the judiciary to try cases where good faith disagreement renders them incapable of settlement, and ensuring affordable and timely access to justice for all'.[59] Compulsory mediation should not only be introduced in the Small Claims Court as per the government's proposal, but should be extended to all types of civil dispute.

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[56] Above, no. 28, page 5.

[57] Above, no. 7, page 10.

[58] *Ibid*.

[59] Above, no. 9, page 14.

Why Compulsory Mediation is Not a Breach of Human Rights

Despite its benefits, mandatory mediation remains a controversial topic.[60] Arguably the largest and most important concern voiced by critics of compulsory mediation is the fear that compulsion breaches the right of access to the courts enshrined in Article 6.[61] This fear was articulated in ***Halsey***,[62] and has since been echoed by practitioners[63] and academics alike.[64] The argument contends that 'mandatory court-based mediation restrains the right to a fair trial [and] creates barriers preventing people from having their claims heard by courts'.[65] The main objection appears to be that compulsion that 'was disproportionately expensive or took an excessively long time, or was otherwise burdensome would obstruct access',[66] and would therefore be a breach. Other similar considerations include if there is a charge for the service, or if limitation periods are not suspended pending the outcome of mediation.[67] Further, and perhaps more obviously, there would be a breach of Article 6 if the process prevented an individual from pursuing a court action entirely.[68]

[60] Above, no. 33, 17.

[61] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), Article 6.

[62] Above, no. 15, 3007 at para 9, D.

[63] Above, no. 9, page 47.

[64] Shirley Shipman, 'Compulsory Mediation: the Elephant in the Room' [2011] 30(2) CJQ 163, 165.

[65] Above, no. 1, 236.

[66] Above, no. 28, page 29.

[67] Michael Bartlet, 'Mandatory Mediation and the Rule of Law' (2019) Amicus Curiae Series 2, Vol 1, No 1, 50, 72.

[68] Above, no. 23, 138.

However, a distinction has been drawn between compulsion to participate in ADR, and compulsion to settle a dispute.[69] This means that compulsory mediation does not breach Article 6, because the mandatory requirement is to attend mediation, not to settle, so recourse can still be had to the Court if mediation fails.[70] Further, compulsory mediation is particularly helpful ‘where consumers lack adequate resources to initiate litigation [as it provides] access to a form of justice that furthers equality before the law’.[71] Commentators argue that ‘the right of access to justice broadly cast is not identical to the right of access to a court’, which is the process Article 6 is designed to protect.[72] In order to consider compulsory mediation as improving access to justice, we need to rethink the way we define the concept. A broader understanding of the objective behind accessing “justice” includes ADR, compromise and settlement.[73] When we use this broader understanding, access to justice is improved through mediation as more disputes can be resolved in less time.[74]

The contention that compulsory mediation is not contrary to Article 6 is supported by the case of *Alassini v Telecom Italia SPA*.[75] The European Court of Justice in this case held that the right of access to the Courts does not preclude States from implementing settlement procedures prior to access, providing that ‘that procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay

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[69] Mercy Milgo, ‘The case for express compulsory mediation in England and Wales’ [2021] 10(1) UCL JL and J 1, 17.

[70] *Ibid*, 18.

[71] Above, no. 67.

[72] Above, no. 64, 173.

[73] *Ibid*, 182.

[74] *Ibid*.

[75] [2010] 3 CMLR 17.

for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs—or gives rise to very low costs—for the parties'.[76] Italy has continued to use its compulsory system following the judgment.[77] Other European States that use compulsory mediation schemes include Belgium and Greece.[78] These schemes have not prompted any successful Article 6 challenges.[79]

The concept of reframing compulsion as 'an obligation to attend and participate in good faith', not an obligation to settle, has been highlighted as a significant advantage of compulsory processes.[80] This is because 'even if a settlement is not reached, mediation will still benefit both parties as it will likely result in the issues being narrowed down significantly and thus save costs going forward'.[81] Compulsory mediation is simply another formal pre-action step that must be taken by parties.[82] The CJC have stated that they have seen 'no convincing evidence that ADR is less successful when compulsory', and that often unwilling participants do still engage in the process.[83] They argue that compulsory ADR is compatible with Article 6,[84] so it seems that the most significant barrier to compulsory mediation has been overcome.

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[76] *Ibid*, para 67.

[77] Above, no. 28, page 27.

[78] Above, no. 23, 135.

[79] *Ibid*.

[80] Above, no. 9, page 46.

[81] Above, no. 69, 20.

[82] Above, no. 1, 236.

[83] Above, no. 9, page 46.

[84] Above, no. 28, page 4.

The Drawbacks of Compulsion vs the Benefits of Compulsion

Critics have identified a number of further concerns regarding compulsory mediation. One of the main criticisms is that making mediation compulsory is contrary to the 'identity and integrity' of voluntariness,[85] 'endangering the foundation of mediation'.[86] Therefore, the argument continues, compulsion does not work, 'it only increases the costs to be paid by the parties, postpones the final solution and undermines the perceived effectiveness of mediation'.[87] There is concern about the level of safeguards offered by the process,[88] given that mediation is self-regulated by providers, unlike other legal services.[89] Further arguments include that it prevents the development of the law, disadvantages the poor and the weak and leads to coerced settlement.[90]

However, mediation has many 'intrinsic benefits', which include its flexibility in process and in outcomes, its ability to maintain relationships and avoid hostility, its confidentiality, cost-effectiveness and speed.[91] Mediation can achieve outcomes that a Court cannot, such as re-establishing communication between two hostile parties.[92] Compulsory mediation adheres to the concept that litigation is the last resort, by making it the last resort.[93] Not only does it increase efficiency in the litigation process,[94]

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[85] Above, no. 67, 74.

[86] Above, no. 1, 236.

[87] *Ibid*.

[88] Above, no. 64, 173.

[89] Above, no. 7, page 19.

[90] Above, no. 19, 164.

[91] Above, no. 3, pages 8 to 9.

[92] Above, no. 9, page 9.

[93] *Ibid*, page 45.

[94] Above, no. 18, 164.

but it ‘enables numerous disputing parties to become familiar with mediation. This improves awareness, speeds up the education process, setting aside the myth that mediation is a sign of weakness, and may expedite a compromise solution, contributing to the saving of resources’.[95] One of the biggest disadvantages inherent in voluntary mediation is that proposing it can cause worries that the proposing party has a weak position.[96] By having a system of compulsion, the ‘“who blinks first” issue’[97] is removed from mediation. The intrinsic benefits clearly outweigh the drawbacks, enabling civil justice to be more efficient, and encouraging litigants to come to mutually beneficial solutions that a Court might not be able to impose.

Practicalities

I propose that the reasonable point at which compulsory mediation needs to be carried out by parties to a civil dispute is after a defence has been filed, and therefore the claim is contested. There should be a 1 hour case management hearing held at this point (which could be shorter for less complex cases), wherein the Court can hear submissions regarding whether the case is suitable for an exemption. The Court will then order the form of mediation. Often, ‘a one-hour telephone mediation could settle many cases’, even less complex cases above the small claims threshold,[98] but in some cases, a full-day mediation may be necessary. A stay of proceedings will be formally ordered at the hearing, and a time-frame in which to attend mediation set out. Having the Court hear all cases before ordering mediation means that those cases for which

[95] Above, no. 1, 236.

[96] Sue Prince, ‘Mandatory Mediation: The Ontario Experience’ [2007] 26 CJQ 79, 95.

[97] Above, no. 9, page 46.

[98] Above, no. 9, page 61.

mediation is unsuitable can be decided on a case-by-case basis, with all litigants able to argue for an exemption to be applied. This also means it is not necessary to place a blanket ban on compulsory mediation for certain types of claim, when it might not be appropriate in every incidence.

An order for compulsory mediation will, of course, simply be an order to attend mediation, not an order to settle out of court. If mediation fails, 'there must be provision for disputes to be taken to the courts'.[99] The threat of costs sanctions for failing to comply with the court order (i.e. by not attending mediation) will remain 'a vital instrument' to ensure compliance,[100] in the same way any other breach of a court order would be reflected in costs or another sanction. As good faith mediation 'requires no more than that the parties remain open-minded and be willing to put forward or consider options for resolution',[101] the issue of policing and ensuring that parties attend their mediations would not be difficult.

Clearly, the issues of regulation within compulsory mediation will need to be addressed if it is to be introduced.[102] The introduction of a regulatory authority similar to the Bar Standards Board would be a step in the right direction to allay many concerns and standardise training and processes. The MoJ have noted that this may need to happen in their consultation.[103]

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99 Above, no. 3, 33.

100 Above, no. 9, page 60.

101 Vicki Waye, 'Mandatory mediation in Australia's civil justice system' [2016] 45 Comm. L. World Rev. 214, 220.

102 Above, no. 28, page 42.

103 Above, no. 7, page 19.

Conclusion

It is therefore clear that steps are being taken to integrate compulsory mediation into the civil justice system. The benefits of compulsory mediation contribute to the efficient and fair operation of civil justice, and should be introduced to all civil disputes. It is true that 'ADR can no longer be treated as external, separate, or indeed alternative to the court process',[104] given its success rates and its benefits. Compulsory mediation is the future of dispute resolution in civil justice, providing all litigants with access to the means to resolve their disputes in a cheaper, faster and more flexible manner.

104 Above, no. 28, page 30.