Mandatory mediation in England and Wales? A short note on the Civil Justice Council report, "Compulsory ADR"[1]

Introduction

There have been few more controversial issues within the UK mediation sphere as mandatory mediation. While other jurisdictions, without too much accompanying fuss it seems, have shifted to compelling parties to mediate in different contexts, the British have become bogged down in a heated and polarised debate about both the legality and the appropriateness of dragging recalcitrant parties into the process. From this sea of uncertainty and debate, the recent report published by the Civil Justice Council ('CJC') on Compulsory Alternative Dispute Resolution emerges (*Compulsory ADR* available at Civil-Justice-Council-Compulsory-ADR-report-1.pdf (judiciary.uk)). Undertaken by a range of high-profile lawyers, the report arrives at the conclusion that mandatory mediation is indeed lawful. And while not making concrete proposals for its future use, the report authors are in favour of expanding ADR on a compulsory basis throughout the English civil justice system. This blog post examines these issues, with a primary focus on mediation and points to potential future developments in England and Wales in this area.

In terms of the legal position, the seminal decision bringing forth the notion that compulsory mediation is unlawful was *Halsey v Milton Keynes* [2004] 1 WLR 3002 in which at para Dyson L.J. (at para 9) held that compelling parties to mediate would fall foul of Article 6 of the European Convention on Human Rights: "[i]t seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court." Although technically an *obiter* point in that case, this view had an immediate and longstanding impact upon the field. Ongoing moves by the judiciary to render mediation mandatory were stopped in their tracks. Courts instead settling into cajoling and arm twisting through a costs sanctions regime in which parties could be penalised in terms of costs for refusals to mediate that were deemed unreasonable (the general basis of this regime was also considered in *Halsey*).

The CJC report provides a significant amount of analysis on the issue of compulsion and concludes, not surprisingly, that the *Halsey* point was wrongly determined and that mandatory mediation does not *per se* contravene Article 6, at least in so far as it does not put real barriers in the way of those seeking to access formal justice. This view is in line with a number of judicial pronouncements made off the bench questioning the *Halsey* decision and arguing that it was based on a misapprehension of the Strasbourg jurisprudence (see, for example, the speech by Sir Anthony Clark, MR at the 2nd Civil Mediation Council conference available at Sir Anthony Clarke, Master of the Rolls: A UK Perspective On EU Civil Justice - Impact On Domestic Dispute Resolution (judiciary.uk)). Compelling recourse to mediation has also received support at the European Court of Justice level (see *Rosalba Alassini v Telecom Italia* [2010] 3 C.M.L.R. 17). The recent English Court of Appeal decision in *Lomax v Lomax* ([2019] EWCA Civ) also pushed at the door of mandatory mediation by holding that compulsory judge-led Early Neutral Evaluation was lawful and questioning once more the *Halsey* view. Even Lord Dyson, architect of the *Halsey* opinion, performed a *volte face* of sorts and accepted that his view on Article 6 was not necessarily correct ("A word on Halsey v Milton Keynes", speech by Lord Dyson given at the CIArb's Third Mediation Symposium in October 2010).

[1] Bryan Clark, Professor of Law and Civil Justice, Newcastle University Law School, UK; bryan.clark@newcastle.ac.uk

The desirability of mandatory mediation

Quite apart from the issue of legality, however, the question still remains if mandatory mediation is desirable. As recently as 2018, the Civil Justice Council ADR Working Group reported that the groundswell of opinion in UK mediation circles was against compelling parties into the process (*ADR and Civil Justice*, CJC ADR Working Group Final Report, November 2018, para 8.24). Mandatory mediation is attractive yet troubling. Compulsion seems anathema to its roots as a voluntary process. Mediation, however, is often a hard sell to those in a midst of a dispute and it is well known that when mediation remains an optional process then take-up is often low. It is also known that even when parties do not want to mediate, very often they settle and are glad that they participated in the process. Equally, the current costs sanctions regime for unreasonable refusals to mediate characterised by divergent judicial approaches has been criticised for casting litigants and their lawyers adrift in a sea of inconsistency and unclarity and bringing about compulsion by the back door (for an excellent discussion of this and related issues see (D. De Girolamo "Rhetoric and Civil Justice: A commentary on the promotion of mediation without conviction in England and Wales" (2016) 35(2) Civil Justice Quarterly 162). A formal compulsory system is in my view certainly preferable to this system.

Nonetheless, compulsion into mediation raises questions about the quality of those providing mediation services. As the report authors (at para 100) note, "If we are going to compel participation in an activity, we need to be confident as to who is providing the service and what is involved". Although the Civil Mediation Council has developed a profession-led set of standards, there is a dearth of formal regulation of mediation activity in general civil matters at the moment in England and Wales and according to the report authors, "more systematic regulation is required" (at para 103). Such matters as timing of referral to mediation (discussed in the CJC report at paras 106-111), providing accessible and affordable provision of mediation services (paras 93-98) and how to deal with perfunctory performance (paras 112-113) also need addressing.

Equally, the issue of having access to legal advice and assistance in and around the process becomes more important in environments where mediation is compulsory. This is an especially live issue in lower value disputes involving litigants without lawyers. One of central, although debated, critiques of mediation is that it is not well equipped to resolve power imbalances that exist between the parties. By dint of their neutrality, it has been argued that mediators may be powerless to redress such imbalances and their ability to ensure objectively fair outcomes has been questioned (H. Genn, *Judging Civil Justice: The Hamlyn Lectures* (2009: 116-117)). Providing relevant legal information or advice may serve to remedy some of these difficulties and aid the informed consent of participants within mediation.

Conclusion

It would be misleading to suggest that elements of compulsion into ADR are not already part of the English civil justice system. Pro-settlement mechanisms are a key feature of the current Civil Procedure Rules. More specifically, although falling short of requiring participation in mediation, parties seeking to attend family court are generally required to attend a compulsory Mediation Information and Assessment Meeting (MIAM) (under the Children and Families Act 2014, s10(1)). Similarly, ACAS 'early conciliation' (in short, discussing the option of conciliation) is also a compulsory feature of Employment Tribunals under s.18A(4) of the Employment Tribunals Act 1996. Furthermore, under a new Small Claims Portal for road traffic accidents, litigants are expected to attempt to settle the case prior to instigating the action (see https://www.officialinjuryclaim.org.uk/).

Mandatory mediation is thus a small step from where we already are. On the back of the CJC report, formal compulsion for mediation and other forms of ADR seems likely to expand through amendments to the current Civil Procedure Rules and legislation governing specific dispute areas. This is especially so, given that the new Master of the Rolls, Sir Geoffrey Vos, has signalled a desire to expand the use of settlement-based practices throughout English civil justice for which the CJC report provides a fresh impetus. But the CJC report is not the end of the matter. It rather signals the beginning of a journey of examination into effective implementation. For this, we need to look beyond our shores for guidance from more developed jurisdictions and ensure that all steps taken in pursuance of compulsory mediation and other forms of ADR are properly evaluated.